

Tectonic Plates Are Shifting in the EU: What Should US Publishers Be Focused On?

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Agenda

- EU's General Data Protection Law
 - Brief overview
 - Key Provisions Relevant for U.S. publishers

- Other Important Developments
 - EU-U.S. Privacy Shield
 - Review of the ePrivacy Directive
 - Proposal for Digital Content Directive

- Future Trends

GDPR – Brief Overview

- The General Data Protection Regulation (GDPR) will overhaul the data privacy landscape in the EU by May 25, 2018
- Key objectives of the GDPR:
 - High level of protection
 - Modernization & harmonization of data privacy laws across the EU
 - More robust enforcement
- The GDPR is a real “game changer” that significantly increases organizations’ compliance obligations and legal exposure

GDPR - Key Provisions

- Broader **territorial reach** than the current regime
 - GDPR also applies to controllers and processors outside the EU when processing activities relate to either:
 - offering goods or services to data subjects in the EU; or
 - monitoring the behavior of data subjects in the EU
 - For example, U.S. publishers with websites and platforms that target products and services to EU residents may be caught
- More detailed information must be provided in **privacy notices**, including contact details of a data protection officer, data subject rights, legal basis for processing data, and data retention periods

GDPR - Key Provisions

- More detailed rules on the validity of **consent** as a legal basis for processing, for example:
 - consent must be distinguishable from other matters if incorporated in a broader text
 - consent can be withdrawn at any time – data subjects must be informed about this right
 - separate consents must be obtained for each purpose where appropriate
 - consent for non-essential processing cannot be a precondition to entering into a contract
- Mandatory **data breach** notification
 - Controllers to notify the competent DPA “without undue delay” and, where feasible, no later than 72 hours after becoming aware
 - Processors to notify controllers without undue delay
 - Controllers to communicate personal data breach to *data subjects* if likely to result in a high risk for the rights and freedoms of individuals, subject to exceptions

GDPR - Key Provisions

- **Data subjects' rights** under the GDPR are enhanced, for example:
 - Right to access includes additional categories of information, such as anticipated retention periods
 - New “right to be forgotten”, *i.e.*, right to request the erasure of data in certain circumstances
 - New right to data portability, *i.e.*, right to receive personal data in a structured, commonly-used and machine-readable format
- Restrictions on **transfers** to non-adequate countries outside the EU remain
 - U.S. not considered as adequate country
 - Available tools for transatlantic transfers
 - Binding Corporates Rules
 - Commission’s Standard Contractual Clauses remain valid means...for now
 - DPA’s Standard Contractual Clauses
 - Approved codes of conduct and seals
 - Derogations “for specific situations” (*e.g.*, compelling legitimate interest)

GDPR – HR Data



GDPR – Sanctions

- Repercussions for non-compliance will be significant
 - Administrative liability
 - Fines of up to 4% of an undertaking's total annual worldwide turnover in the preceding financial year or €20 million, whichever is higher
 - DPA's powers
 - DPA will have powers to ban processing, issue warnings, reprimands, etc.
 - Civil liability
 - Strengthened rights and remedies for affected individuals, including claims for distress, and -- for the first time in the EU -- class actions for privacy breaches

Other Important Developments

- EU-U.S. Privacy Shield
 - “Replaces” invalidated Safe Harbour framework
 - Based on Safe Harbour but new elements (e.g., onward transfer, arbitration)
 - Commission still negotiating with U.S. Department of Commerce
- Revision of ePrivacy Directive
 - Commission consultation on-going
 - Unlikely radical changes to current cookie rules
- EU’s Digital Content Directive
 - Proposal published in December 2015
 - New law would give consumers new rights of remedy and redress in relation to digital content (e.g., ebooks, streaming music or video)

Future Trends

- Proliferation of data protection and consumer regulations
- Convergence of data protection rules
- GDPR likely to set the basis for laws in other countries
- Data localization

Any Questions?

Thank you!

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