

Legal News

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The new EU data protection law and its importance for Swiss enterprises

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1. Introduction

The European Union (EU) has revised its data protection legislation with ambitious goals. The aim is to enhance protection whilst adapting it to the digital age. The result of this revision is contained in the EU General Data Protection Regulation (GDPR), which will take effect on 25 May 2018 after a two-year transitional period and replace the existing EU Data Protection Directive.

2. Scope of the GDPR

European data protection law is of significance for Swiss enterprises if their data processing falls within the territorial and material scope of the GDPR.

2.1 Territorial scope

The expanded territorial scope is regarded as one of the main amendments within European data protection law. In future, even enterprises that are based outside the EU and do not have an establishment within the EU will be covered by its territorial scope. In this regard it is necessary to examine whether specific data processing falls within the territorial scope of the GDPR on account of the principle of establishment or the principle of market location.

A Swiss enterprise is subject to the GDPR according to the principle of establishment if it processes personal data in relation to the operations of an EU establishment or an EU processor based in the EU, even if the data processing itself occurs outside the EU, e.g. in Switzerland. A processor is a data processor that processes data on behalf of the principal and is not able to decide itself on the purposes and means of processing.

The principle of market location represents an extension of the principle of establishment and covers enterprises that do not have an establishment in the EU, and are thus not covered by the principle of establishment. Under the principle of market location, Swiss enterprises fall under the territorial scope of the GDPR in the following situations:

► Offering goods or services in the EU

If a Swiss enterprise offers goods or services in the EU (including the EEA), the principle of market location applies (for instance if an online shop is directed at customers in the EU). This applies even if the goods or services are offered free of charge.

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► **Monitoring the conduct of persons in the EU**

If a Swiss enterprise monitors the conduct of natural persons within the EU (e.g. localisation of individuals through a mobile app), it falls within the territorial scope of the GDPR.

It should be noted in this regard that Swiss enterprises will fall within the territorial scope of the GDPR on the basis of the two principles mentioned above already if they comply with the criteria mentioned above as processors.

2.2 Material scope

In order for the GDPR to apply, the criteria for both territorial and material scope must be fulfilled. This is the case if, firstly, data are processed and, secondly, these data relate to an individual. Processing means any handling (e.g. saving, deleting etc.) of personal data. Data will be deemed to relate to an individual if they contain information concerning an identified or identifiable living person. Thus, IP addresses for instance are in principle regarded as personal data.

3. Consequences for Swiss enterprises

If data processing falls within the scope of the GDPR, the enterprise concerned is required to adopt organisational and technical measures in order to ensure that the data processing is lawful according to the GDPR. This includes *inter alia* the following duties, some of which are new for Swiss enterprises:

- Keeping a register of all processing activity, stating *inter alia* the type and purpose of data processing as well as the categories of data recipients. In addition, the register must state whether personal data are transmitted to a country outside the EU;
- Carrying out a data protection impact assessment prior to high-risk

data processing (e.g. comprehensive processing of data concerning health). The aim of this is to recognise and minimise data protection risks associated with impending data processing. If no action is taken, the controller must consult the supervisory authority;

- Duty to report breaches of data protection law (e.g. theft of data as a result of a hacking attack) within 72 hours to the competent supervisory authority. A report must contain a description *inter alia* of the data protection breach along with action that has already been taken.

4. Conclusion

Due to of the expanded territorial scope, the GDPR may be relevant for a Swiss enterprise if it offers goods or services within the EU or monitors the conduct of persons within the EU. If the GDPR applies, a question arises for enterprises as to which organisational or other measures can in practice ensure compliance with the comprehensive duties.

If an enterprise is not yet keeping a register of its data processing activities, first of all such a register should be created. Based on the information obtained from the register, it makes sense to carry out a gap analysis in order to establish whether the data processing activities comply with the requirements of the GDPR or if there is scope for improvement. We also recommend that internal data protection policies (including the process applicable to the reporting of data protection breaches, how to deal with data processors, the procedure for data protection impact assessment etc.) and contract templates (e.g. outsourcing contracts) be brought into line with the new requirements.

Our data protection specialists have long-standing experience in the industry and can provide reliable and competent support to you in implementing the measures mentioned above.

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