



**The European General Data Protection Regulation:
A Potential Trap for Unwary U.S. Companies**

Michael G. Trachtman, Esquire and Andrew M. Logan, Esquire
June 2018



Michael G. Trachtman, Esq.
mtrachtman@wispearl.com

The European General Data Protection Regulation (“GDPR”) became effective May 25, 2018. The reach of the GDPR is much broader than many U.S. companies presume, and the risks of noncompliance can be crippling.

Are You At Risk?

The GDPR applies to U.S. companies that actively conduct or pursue business in the EU but, importantly, it can also apply to U.S. companies that offer products or services to EU member states solely through a U.S.-based website.

In assessing whether you are at risk, keep in mind that merely having a website that may be accessed by individuals or businesses in the EU is not by itself enough to trigger GDPR compliance requirements - rather, the enforcement authorities will attempt to determine if, through its website, a U.S. company intends to offer products or services to EU residents. Key risk factors will include, for example, whether the website accepts euros, if it makes website materials or payment gateways available in languages spoken in EU countries, if the website uses any European top-level domains, and if the website touts the utility of its products or services in the EU. In addition, the enforcement authorities will review whether the website monitors EU-based individuals by collecting IP addresses, using cookies, or through other forms of tracking.

What Are You Required To Do?

If the GDPR applies to your company, you must satisfy certain requirements. Most notably:

- You will need to reform your privacy policy and the procedures you utilize to protect personal data. This may require substantial changes to your usual methods of conducting business and maintaining records;
- You will need to appoint a Data Protection Officer who is responsible for implementing and monitoring your GDPR compliance;



Andrew M. Logan, Esq.
alogan@wispearl.com

- You will need to implement protocols to comply with the expanded personal rights provided under the GDPR, including the right to data portability and the right of an individual's data to be removed from a website;
- You will need to implement GDPR-compliant notification requirements in the event of a data breach.

What if a U.S. Company Fails To Comply?

The GDPR provides the EU with the power to conduct investigations and audits, require corrective measures, and impose bans on conducting business. Individuals who may have suffered because of a company's failure to comply with the GDPR requirements may be able to assert claims for damages. And the EU authorities will have the power to levy fines of up to 20 million euros or 4% of annual gross revenues, whichever is greater.

Can they come after you in the U.S.? International law applies and, as a practical matter, given the historical levels of cooperation between U.S. and EU countries, it is very likely that EU assessments will be transferable to and collectible in the U.S.

What Do You Do Now?

Wisler Pearlstine has studied the GDPR and is prepared to assist you.

The first step is to review any activities you may be conducting in the EU through, for example, employees, independent contractors, or other representatives. The second step is to carefully analyze whether, intentionally or unintentionally, your website or personal data collection methods, and related activities, fall within the GDPR enforcement parameters.

Based on that information, we can determine the nature and extent of the risks you may be incurring. We can then discuss, from a cost/benefit perspective, the changes that can be made to minimize GDPR risks (such as modifications to your website), and the practicalities, if necessary, of implementing certain GDPR compliance requirements.

###

About the Authors:

Michael G. Trachtman focuses his practice on the representation of businesses in the myriad of issues that affect their operations, growth, and profitability. The author of three books and numerous articles, Mr. Trachtman is also a frequent lecturer to business and professional groups on topics pertaining to the intersections between law and business.

Andrew M. Logan focuses his practice in the areas of trust and estate planning and administration, taxation, business planning, and the representation of closely held businesses. His clients include individuals with modest to substantial wealth, entrepreneurs, executives, and family business owners.

This article is intended to be used only for informational purposes. Neither this article, nor the contents of this article, are intended to be nor should be construed as legal advice.