# GDPR

The European Union's General Data Protection Regulation is about to turn privacy and compliance on its head throughout the world. Even if your company doesn't deal directly with an EU country, you still might be required to comply. Evan Schuman investigates.

Starting in May 2018, enforcement will kick in on the European Union's General Data Protection Regulation (GDPR), a move that could have a stronger privacy/security standardization effect than any technological effort has to date. A big part of the reason for that: Although GDPR technically applies only to customers based in EU countries, globalization efforts will make GDPR compliance the smart move – and perhaps essential – for global companies wherever they are located.

Even if a company has zero customers and zero employees based in EU countries, any global efforts – such as an outsourced customer support call center in an EU country, using the services of a company for supply chain services that already is compliant, or even purchasing parts from such a company – could force compliance. That is because the company partners you seek likely will be concerned of their GDPR-compliant data commingling with your non-GDPR-compliant systems, potentially making them non-compliant and subject to fines.

"Whether or not an entity is physically located in the EU, the GDPR seeks to address all entities who process personal data on EU residents," says Bart Willemsen, a Netherlands-based Gartner director focusing on privacy issues. "Data residency concerns, adequate protection measures and increased attention for cross-border data transfer requirements are now C-level discussion material. And if they're not, they should be."

For many Fortune 1000 companies, avoiding anything touching any part of Europe is going to be increasingly difficult.

"Somehow you will end up dealing with EU countries," says Jason Remillard, who was a vice president for security architecture and CISO for Deutsche Bank until May. He recently launched a data classification company called Classidocs in Raleigh, N.C. Remillard notes that a U.S. company that engages a shipping company based in Tokyo that does business with partners in Europe will find that the Japanese company will need to be compliant as well.

Want another reason? If your company wants to purchase cyber insurance and you want protection from GDPR penalties, you had better read your policy carefully. You likely will find insurance contract language mimicking GDPR rules. In short, if you violate GDPR rules, the insurance carrier potentially could use that as the reason for denial of GDPR fine protection.

"With these heightened [cyber insurance] fines, think about the due diligence that will come from [making this purchase]," says Aaron Tantleff, a privacy and information security lawyer at Milwaukee-based Foley & Lardner LLP.

Kevin Kalinich, global practice leader, cyber/network risk for the London-based

## OUR EXPERTS

**Bojana Bellamy,** president, Centre for Information Policy Leadership,

**Steve Durbin,** managing director, Information Security Forum

**Francoise Gilbert,** attorney, Greenberg Traurig

**Will Jan,** vice president and practice leader, Outsell

**Kevin Kalinich,** global practice leader, cyber/network risk, Aon

**Paul Lanois,** Paris-based technology attorney

**James Leaton** Gray, lead consultant on privacy, Kemp Little Consulting Associates

**Jason Remillard,** CEO, Classidocs

**Aaron Tantleff,** privacy and information security lawyer, Foley & Lardner LLP

**Bart Willemsen,** research director, Gartner



**73%**

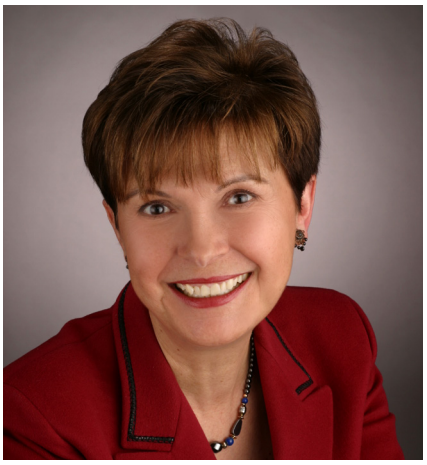
*Percentage of respondents who said GPDR is the most significant change in globally privacy laws in the past 20 years.*

*– TRUSTe*

Aon insurance company, agrees. "This is a big wakeup call for organizations all over the world to analyze whether GDPR applies. What do entities need to do to have a cyber impact analysis and a readiness analysis?" he asks.

Most of the GDPR specific requirements are non-controversial and look more like a privacy best practices white paper from a Fortune 1000 company from five years ago. What makes GDPR compliance much more challenging are stringent codification requirements, along with fines that can be as much as four percent of a company's global revenue or €20 million ($21.3 million), whichever is higher.

Although the list of personally identifiable information (PII) content is extensive – including retention of a customer's IP address – there is an exemption if a company can establish that the prohibited data is needed for a business function and needs to be retained for a specific amount of time. That is where the codification paperwork kicks in, Kalinich explains. Everything needs to be precisely documented. That means both a quantification of how the data is being handled and why. And the European regulators are going to insist on lots of proof behind that "why."



**Francoise Gilbert, attorney, Greenberg Traurig**

This requires companies to try and quantify gap analysis, among many other things, attorney Tantleff says. "These things need to be documented and done correctly," he stresses, whereas most U.S. companies today handle these data privacy issues in an "unofficial and informal way."

"How is data being used?," Tantleff asks. "Detail your predictive algorithms. [EU officials] significantly now have the right to understand them. That means companies may have to disclose their proprietary information, things that they have never had to disclose before. You may have to give a lot more information, without revealing your secret sauce."

Francoise Gilbert, an attorney specializing in data privacy with Miami-based Greenberg Traurig, adds that the intent of the new GDPR pressure is to force company executives to question their colleagues – and then to question them again – about whether retaining this data is truly worth the hassle. The EU is hoping that companies will become compliant simply by choosing to reduce what data they choose to retain.

"The more data you keep, the more exposure you have," Gilbert says. "If you have it, you can lose it. If you have it, someone – a customer, regulator, a litigant – may ask for it and then you have to give it. That's one good reason for not having that stuff."

Gilbert adds that the process is intended to be onerous. "I don't think it's magical. They'll ask: 'OK, show me why this is a business need. Where is the study? Where is the analysis that you made to draw that particular conclusion?' You have that [business need] get out of jail free card, but how did you justify that? And where does it come from? You need to provide all sorts of written documentation."

For those who are wondering if the UK's Brexit vote will provide a GDPR escape for anyone solely doing their European business in the UK, it won't – and for several reasons. First, even if the UK does ultimately exit the European Union – something that is not yet certain – it will not do so until years after GDPR enforcement kicks in. Therefore, the UK will have to comply with GDPR. Second, if the UK does ultimately leave the EU, it will have to write its own rules and UK analysts fully expect those rules to mimic GDPR phrasing to make life simple for UK businesses. Third, even if the UK does leave the EU and chooses

**17**

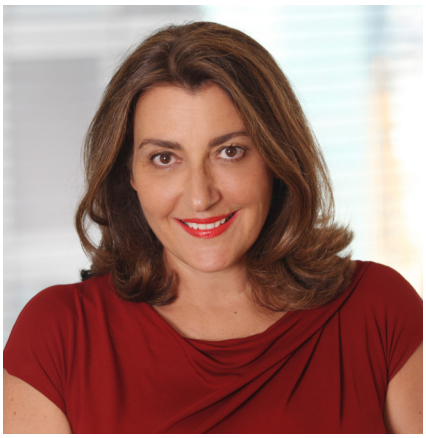
*Article 17 of GDPR includes a person's "Right to be Forgotten," also known as data erasure.*

*– EUGDPR.org*

to write its own data privacy rules that differ from GDPR, UK companies conduct such an overwhelmingly high percentage of business with customers living in other EU countries that GDPR compliance would be essential.

Brexit is an irrelevance in GDPR consideration, says James Leaton Gray, the lead consultant on privacy for London-based Kemp Little Consulting Associates. "That's because it has such massive implications elsewhere."

Some have asked whether EU data rule penalties could even be enforced with companies based outside the EU. Those tracking this space say that even if enforcement might prove difficult, most global U.S. companies will have few practical alternatives to paying up. And with penalties as high as four percent of global revenues, that is going to grab the attention of a lot of CFOs.



**Bojana Bellamy, president, Centre for Information Policy Leadership**

"If a U.S. company has no EU presence, it is not going to be very easy for the regulators to get the money," says Bojana Bellamy, president of the Centre for Information Policy Leadership, a global data security think tank with headquarters in the U.S., Belgium and the UK. But, she adds, because we live in such a globally connected world, the reputational damage and anxiety companies will face end up forcing payment.

Steve Durbin, the managing director of the UK-based Information Security Forum, says compliance will ultimately be the path of least resistance. "Until we've had someone who has tried to do it, it's a 'catch me if you can' situation," he says. "But then there's the impact on brand and reputation. You would not want to be seen as an organization that ignored the legislation and, when caught, refused to comply."

One of the more problematic GDPR requirements is to inform the EU of any data breach impacting privacy within 72 hours of company executives learning of the breach. Even though the "72 hours" reference is precise, it is potentially vague phrasing about when executives learn of a breach. Does that mean the first time the CIO is told, "Boss, something looks wrong here. We're checking to see if we might have been breached?" Or does it mean when the CIO is told: "Our logs indicate no breach, but we're seeing clues that the logs were tampered with." What about when the initial forensics report indicates a problem, given that the initial forensics reports are invariably wrong?

"There's not much clarity about when that 72-hour clock actually starts," says Will Jan, the vice president and practice leader for Outsell, a Boston-based research and advisory service.

Adds Remillard: "The moment of breach is subjective. I guess they could have been more prescriptive."

"It's very difficult to pinpoint the exact point of time that you know of a breach," says Paul Lanois, a technology attorney in Paris who served as associate professor at the University of Cergy-Pontoise in France.

## Process versus procedures

All things considered, it probably does not matter what point in time a company chooses to start the clock as long as it is consistent and can be justified to EU officials. The person who is going to interpret the point of breach recognition is the regulator, says Kemp Little's Gray, referring to an investigative ruling by the European Data Protection Authority (DPA).

But Gray says there are various indicators. Clearly, if law enforcement alerts you that they have discovered your data on a suspect's server or if it starts being found in fraud

**40K**

*Number of phone calls a UK marketing firm made daily in January and February 2016; 25 percent of these calls were made between 1 a.m. and 6 a.m. The firm was fined £70,000.*

*– Econsultancy*

attempts, that would almost certainly signal awareness of a breach for the purposes of alerting the DPA.

Need another scenario? "If you suddenly got a spike on your customer relations website with 15 people all saying that 'you've lost my data,' that would be another indicator that might merit an email to the DPA," Gray says. The European Parliament tried to make it 24 hours instead of 72 hours, he says, because "the Parliament wouldn't accept 'as soon as possible' because that was too loose. Eventually, they agreed that 'you have to start talking with us at 72 hours.'"

Durbin argues that it all comes down to an executive's determination of when it is reasonable to say that they knew of a breach. "Reasonableness is very fluffy," Durbin says.

**James Leaton Gray, lead consultant on privacy, Kemp Little Consulting Associates**

For companies doing a lot of business in Europe, the GDPR offers the promise of one consistent set of data privacy rules across the continent. That might be a promise, however, that GDPR cannot keep. Gilbert points out that different European countries – member states, in the EU vernacular – can add their own interpretation to the rules.

"There is a section, one sentence, that says that member states can add penalties for other things," Gilbert says. "It might be having a data protection officer if you do A, B and C, but member states can add additional circumstances. This might end up being 90 percent uniform with 10 percent the member-state twists. A German judge is not going to see things the same way as a Greek judge."

Bellamy agrees. "Those people who know about it think that Europe will end up with one, harmonious set of rules. That may be wishful thinking," he says, adding that European data policy consistency "is not going to quite be the case" and that "the fragmentation is not helpful if you're rolling out technology."

Another concern with GDPR is whether it will force executives to view data differently and for companies to insist on different kinds of data conversations. "Right now, all of this is happening outside of the purview of the C suite," says Foley & Lardner's Tantless, "Marketing doesn't generally talk with IT or vice versa. How many truly have a data map or data flow? Under Safe Harbor, no one was looking."

Gray says that GDPR compliance efforts will force companies to change their behavior, which might turn out to be the best benefit of all. "There are some things in there that are scaring people, taking things further than in many companies' comfort zone," Gray says. "They will have to ask questions about the data they already have. Who has seen it? Where was it collected from? They don't know where they got half of it from. They don't tag the data."

Making this more complicated: Data rules also have widely varying requirements in the U.S. The rules change from state to state and they change from vertical to vertical. A health care company will have to adhere to strict Health Insurance Portability and Accountability Act (HIPAA) data privacy rules whereas bank or other financial technology company will have a host of other rules, both domestic and global.

"This is likely to be a shock for many countries because of the level of detail that has to be recorded for GDPR," Gray says.

But Gray has a bigger concern. In one very narrow sense, GDPR takes the opposite approach to data management than does the Payment Card Industry Data Security Standards (PCI DSS) rules for retail payments systems. PCI lists a series of processes and procedures that must be followed, but its focus is clearly on results, he notes. That's

**75%**

*Percentage of respondents to a European poll who said they want to be asked permission to use their personal data every time it is collected.*

*– Dataiq and Autograph survey*

why you have many merchants who were PCI compliant and then had that compliance ripped away by Visa after a breach on the rationale that PCI rules are perfect so a breach must be proof of a PCI rule violation, he says. GDPR, on the other hand, is focused on the process. As long as a company is in strict compliance with the rules, a bad result is irrelevant.

"I am slightly nervous because I fear that you end up focusing so much on process that you sometimes forget principle," Gray says. (GDPR) might lose sight of why it's doing what it's doing, he adds. "It becomes a very bureaucratic system."

## Cyberinsurance conundrum

Gray, who served as the BBC's data protection officer for 10 years, says one good thing about GDPR is that it will likely deliver far more transparency. For U.S. firms, this means that "you can't just bury it all in terms and conditions. That won't be accepted by the DPAs. This is a real game-changer for some first movers."

**Steve Durbin, managing director, Information Security Forum**

With penalties of either two or four percent for infractions (depending, in the DPA's opinion, on the severity of the violation), there is likely to be a marked increase in the demand for cyber insurance that will cover GDPR violations, Aon's Kalinich says. He points out that there are three categories of insurance policies: those that offer specific affirmative coverage; those that specifically exclude regulatory costs; and those policies that are "silent with respect to regulatory costs."

Those all come with varying costs. Executives who sometimes like to gamble opt for the policies that are silent on protections, hoping that they can later talk the insurance company into paying, he says.

The four percent exposure, he adds, forces a very serious calculation. "They must do a cost-benefit analysis that will sacrifice the total cost of risk. It's penny wise and dollar foolish. They go for the short-run, narrow, cost-benefit analysis instead of a macro one."

In other words, they are going to weigh the cost of exposure versus the insurance cost of coverage. That number-crunching might convince some to forego insurance and be extra careful to comply with every GDPR provision. Others might worry that they can indeed be completely compliant and they will try and buy the insurance.

But when the company is an $80 billion multinational, that will put the cost of covering a four percent violation at approximately $3.2 billion. Some underwriters are not going to allow that or they will price the premiums so high that the coverage might not make fiscal sense, Kalinich says. "Underwriting scrutiny is going to be in-depth."

How the cyberinsurance conundrum plays out still is unclear. Do you buy cyberinsurance, only to be told later that your violation invalidates the policy and the company will not pay, or do you pay a potentially enormous amount of money to cover a potential threat? This component of the GDPR might well become a major sticking point of its own in years to come. Only time – and a lot of litigation – will tell. ■

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**64%**

*Percentage of digital marketers who use customer profiles. With GDPR, consent to profiling will need to be obtained from consumers.*

*– Dataiq and Autograph survey*