

EU General Data Protection Regulation

Applicability to the Middle East



Under certain circumstances, the territorial provisions of the General Data Protection Regulations (GDPR) will 'catch' and apply to organisations in the Middle East even if those organisations do not have any branches or subsidiaries in Europe. When does this occur and what are the implications?

In November 2018 the European Data Protection Board (EDPB) (the EU body that works to ensure that the data protection law is applied consistently across the EU) issued guidance clarifying in what circumstances the GDPR would apply to organisations outside the EU.

Applicability to Middle East companies

Set out below is a non-exhaustive list of factors that can assist Middle East organisations in determining whether the GDPR applies to them. Importantly, although neither the GDPR nor the EDPB guidelines state how these factors should be weighted, they do indicate that all of them should be taken into consideration.

It should be noted however that, even if a Middle East organisation is not subject to the GDPR based on the factors set out below, this will not necessarily mean that it does not need to comply with the GDPR. The GDPR has a truly global reach and requires that Middle East organisations that receive European personal data from organisations in the EU for processing must comply with the GDPR. The practical implication of this is that even if a company in the Middle East is not directly subject to the GDPR, it may nonetheless need to comply with the law if it processes European personal data on behalf of an EU client. The GDPR makes it very clear that all EU organisations working with non-EU organisations (who have access to EU personal data) must impose contractual obligations on the latter to comply with certain GDPR provisions, without which the EU company may be in breach of the GDPR.

Middle East organisations that determine that they are not subject to the GDPR based on the factor below would nonetheless do well to document the rationale for this decision. Should an EU regulator ever come knocking on foot of a complaint from an individual in Europe, the organisation will be able to demonstrate that it recognised the importance of the GDPR but systematically determined why it was not subject to the GDPR.

Do you have an establishment in the EU that is processing personal data on your behalf?

The GDPR extends to Middle East organisations that work with counterparts established in the EU to process EU personal data on their behalf. 'Established' essential means any regular and systematic exercise of commercial activity through a stable arrangement(s) in the EU. Under this factor, Middle East organisation will need to consider whether it partners with any third party to advertise its services, find customers, or perform any other of its operations in Europe. The links (actual and potential) between the Middle East entity and the EU establishment should be analysed.

The GDPR requires a 'stable arrangement' or relationship to exist in order to inextricably link a Middle East entity to an EU establishment. It should be noted that the threshold can be quite low and even having one employee or an agent in the EU may trigger the applicability of the GDPR. However, merely having your Middle East employees visit Europe in order to find investment opportunities or to purchase services/goods from there will be, by itself, unlikely to trigger applicability of the GDPR.

Targeting EU users with advertising campaigns?

Actively directing advertising at customers in the EU may mean that the GDPR will apply to your organisation. Actively advertising can include attending trade shows, running online ads, email campaigns, working with European PR agencies to publish articles, or being part of an affiliate network that targets European audiences.

Marketing campaigns that personalise their content for the specific EU market are more likely attract the application of the GDPR whereas campaigns that do not differentiate content by location and do not specifically target Europe are unlikely to.



Do you personalise your goods or services for EU customers?

Related to personalised marketing is goods or services personalisation. If a Middle East organisation translates its services/goods/website into EU languages; has a EU top-level website domain; delivers goods to Europe; mentions European customers and use cases; allows customers to purchase its goods/services in EU currency; provides EU contact details (e.g. a phone number), the GDPR may apply.

Whilst these above elements, if taken alone, may not amount to a clear indication of the organisation's intention offer goods or services to individuals in Europe, they should each be taken into account in any analysis in order to determine whether organisation's commercial activities can together be considered as an offer of goods or services directed at Europe.

One way some non-EU organisations have sought to get around this is to state clearly in any website privacy notice that your website is not meant for EU users and by not any offerings for EU markets.

Monitoring European users

The notion of monitoring under the GDPR asks whether a Middle East organisation tracks users on the internet in order to create profiles used to take decisions to analyse/predict preferences, behaviours or attitudes (e.g. through the use of website cookies). However, simply because a website is accessible to user in Europe does not alone mean that the GDPR is triggered. Therefore, neither first nor third party cookies that are used for statistical and strictly necessary purposes (i.e. security, load balancing, or authentication) should attract the GDPR.

From a practical perspective, most online marketing tools/agencies that offer profiling services also enable users to specify what geo-locations should see their ads. Therefore, any unintended creation of profiles on users from the EU should be avoided.

Case Studies

Example 1

A software company with head office in Dubai has a fully-owned branch and office located in Portugal overseeing all its EU operations, including marketing and advertising. The Portuguese branch could be considered to be a stable relationship with the Dubai headquarters, which exercises regular and systematic business activities on behalf of the Dubai manufacturing company.

The Portuguese branch could be considered to be an establishment in the EU. Therefore the GDPR would apply to the Portuguese branch and the Dubai headquarters.

Example 2

A cosmetics company based in Ireland moves all its personal data processing activities relating to clinical trial data in its branch based in Abu Dhabi.

According to the company structure, the Abu Dhabi facility is not a legally separate entity and the Irish company decides what, why and how personal data will be collected and used by the Abu Dhabi facility on its behalf.

Even though the data processing activities are taking place in Abu Dhabi, that processing is carried out for and on behalf of the pharmaceutical company in Ireland. The GDPR therefore applies to the Abu Dhabi facility.

Example 3

An Omani company contracts a Finnish company to process personal data on its behalf, which is sent to Finland from Oman. The Omani company offers and directs its services exclusively at the Middle East market and its processing exclusively concerns people located outside in the Middle East. No services are directed at people in the EU, nor it does track people online (via cookies etc.).

The processing by the Omani company is not subject to the GDPR. The Finnish company, being based in the EU, is subject to the GDPR for any data processing carried as part of its business activities.



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