

KIRKLAND ALERT

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EU GDPR — Coming Soon to an M&A Transaction Near You

Beginning **May 25, 2018**, European regulators will be able to enforce the EU General Data Protection Regulation (“GDPR”). The GDPR represents a significant increase in legal obligations owed to individuals located permanently or temporarily in the EU with respect to their personal information. Generally speaking, in addition to applying to any entity “established” in the EU that processes personal data, the GDPR can apply to an entity without a physical presence in the EU if that entity offers goods/services to individuals in the EU or monitors the behaviour of individuals in the EU. It is likely that most organizations will process some personal data, including EU employee information and individual contact details for suppliers and customers.

The possibility of enforcement means the GDPR will now have greater bearing on M&A activity, in the U.S. and elsewhere. The current worst-case exposure for GDPR violations can be financial penalties up to the greater of 4% of total annual worldwide gross revenue or €20 million, depending on the type and severity of the breach. A regulator may also order a non-compliant company to stop processing personal data altogether.

The enforcement appetite of regulators in each of the 28 EU Member States, in particular against entities with no EU presence, is currently unclear. Certain regulators (including UK and Germany) have signalled a willingness to take a pragmatic and proportionate approach to enforcing the GDPR. However, each EU Member State will determine its own enforcement priorities and actions.

M&A transaction considerations

- 1. Outset of Transaction:** Both parties should determine whether the target entity is subject to the GDPR, and whether any personal data will need to be provided by the seller and, if so, at what stage of the deal process. If the GDPR is applicable, the parties will need to ensure that they have a lawful basis for sharing and receiving personal data. Once a bidder receives personal data from the target, the bidder will have compliance obligations under the GDPR with respect to the received personal data. Obtaining consents from impacted individuals is unrealistic given the need for transaction confidentiality. A target and bidder may argue that sharing personal data in a due diligence context is within the legitimate business interests of the target and the bidder. However, given that this legitimate business interest argument may not satisfy regulators, parties may want to consider mitigating risk by providing or receiving no, or only limited, personal data (e.g., by redacting and anonymizing documents), at least until a transaction has advanced (e.g., a bidder obtaining exclusivity). If sharing personal data is necessary, a seller may want to include compliance commitments in NDAs, and ensure that appropriate steps are taken by bidders to protect the security of the data.

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2. **Due Diligence:** Buyers will want to evaluate the target's compliance with the GDPR. The compliance risks are greater if a target's business processes a significant volume of personal data or even more limited amounts of special category personal data (e.g., health, race/ethnicity, religion, political opinions, trade union membership, sex life and sexual orientation, genetic/biometric data, etc.). How to evaluate compliance will depend on the circumstances. In addition to reviewing certain of the target's policies, procedures and documentation regarding the GDPR, a buyer also will want to understand whether these policies are followed in practice, the data protection governance within the organization, IT security measures, and any complaints, disputes or investigations. In some circumstances, it may not be possible to determine GDPR compliance with certainty, given the possibility of interpretative differences and the lack of official regulatory guidance. If any clear gaps in GDPR compliance are identified, the parties will need to understand the cost of achieving compliance and the timeline for doing so.

Failure to consider the GDPR may expose the buyer or seller to significant penalties for non-compliance.

3. Deal Terms:

(i) **Representations and warranties, indemnities and covenants:** GDPR compliance can factor into different provisions of a purchase agreement. While a general "compliance with laws" representation will likely cover the GDPR, in relevant circumstances more specific representations may be appropriate. Situations involving a non-compliant business may trigger negotiations between the parties to allocate responsibility and set a timeline for achieving compliance, such as during any executory period, and to allocate any liabilities arising out of non-compliance.

(ii) **R&W insurance:** Underwriters increasingly seek to exclude coverage for GDPR risk, unless they obtain comfort through due diligence. Typically, known liabilities are also excluded regardless of whether disclosed.

4. **Post-Closing:** Certain transactions may trigger a post-closing obligation on either or both parties to issue new privacy notices to impacted individuals or an obligation to obtain consent from the individuals. This is transaction dependant. Generally speaking, these transactions include some types of asset sales where the assets include personal data, stock sales where the acquiring entity will alter the purpose for which the target's personal data is processed, and transactions that include "special category" personal data such as health, race/ethnicity, religion, political opinions, trade union membership, sex life and sexual orientation, genetic/biometric data, etc.

Conclusion

GDPR compliance may affect all stages of M&A transactions. Failure to consider the GDPR may expose the buyer or seller to significant penalties for non-compliance. Official guidance on the applicability and interpretation of the GDPR can be tracked [here](#) and [here](#). For a high level overview of the key requirements under the GDPR outside of the M&A context, see our [GDPR Alert](#).

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

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