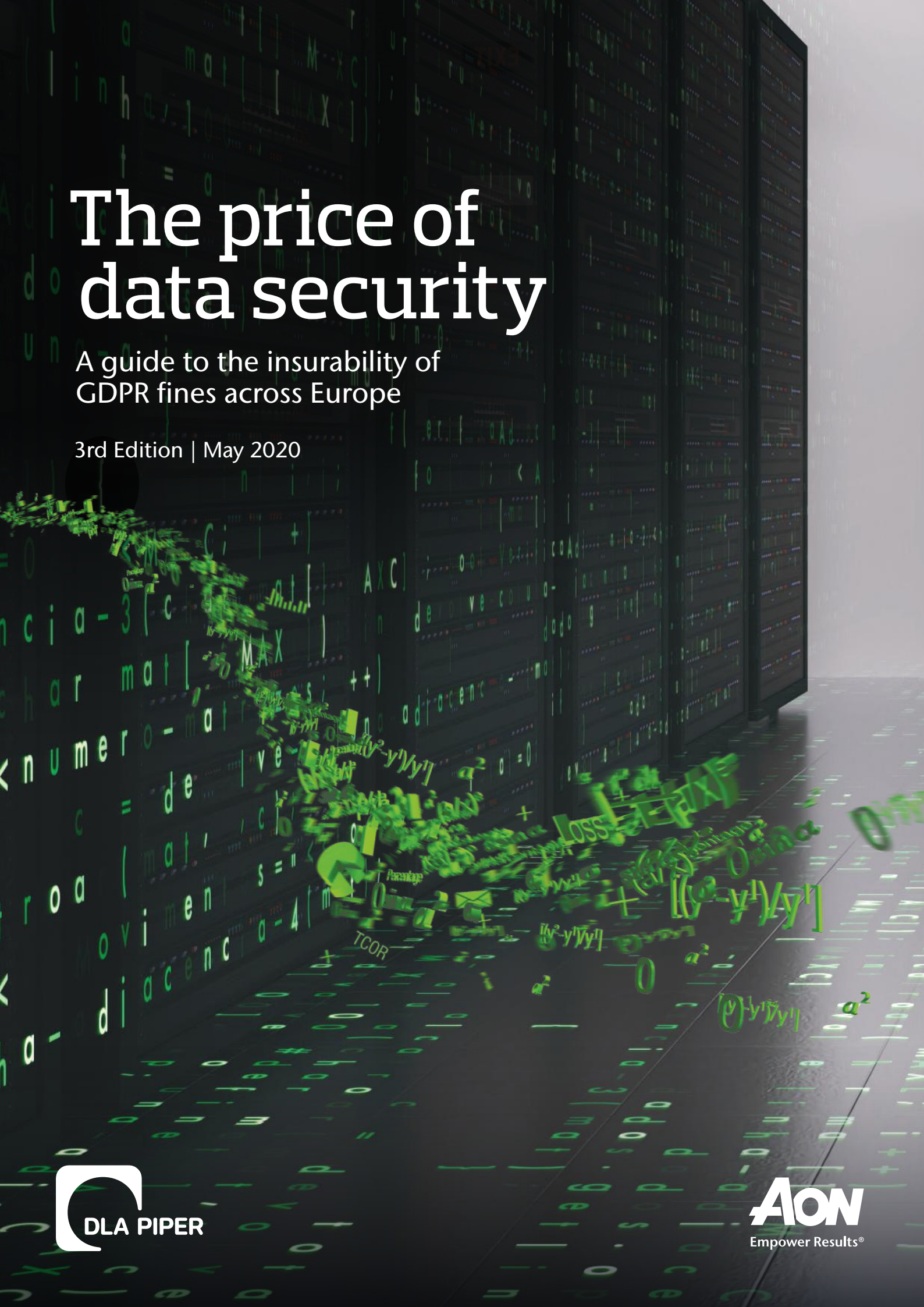

The price of data security

A guide to the insurability of GDPR fines across Europe

3rd Edition | May 2020

DLA PIPER

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Foreword

We are now entering the third year of life under the General Data Protection Regulation (EU) 2016/679 (GDPR), which came into effect on 25 May 2018. It has undeniably revolutionised the data protection regime and significantly affected how organisations worldwide collect, use, manage, protect and share personal data that comes into their possession.

As personal data increasingly represents an important new class of economic asset for organisations, GDPR has significantly increased the enforcement powers available to regulators. GDPR fines can reach up to EUR20 million, or up to 4% of a group's annual global turnover if higher. Two examples from the past year are: an EUR18 million fine against a national postal operator and a EUR14.5 million fine against a real estate company. In the UK, the Information Commissioner's Office (ICO) is still considering its next steps in respect of notices of intent to impose fines of GBP183 million and GBP99 million on an airline company and an international hotel chain, respectively.

The scale of these fines has understandably generated concern in boardrooms. GDPR has replaced a regime under which fines for a data breach were limited and enforcement actions infrequent. The regulatory environment across European Member States is undoubtedly shifting and regulators now have greater powers of enforcement, and significant GDPR fines are expected to be imposed where organisations are subject to investigations.

If anything, concerns about GDPR compliance have been accentuated by the current public health crisis. A sudden imperative for socially distanced interactions means that an increasing number of services are being delivered digitally rather than in the real world, leading to a commensurate increase in data being collected about individuals through those digital interactions. As employers come to terms with many of their personnel working from home, there are obvious concerns about the security of data leaving the office environment. In time, as those employees return to physical sites, technology-based solutions to monitor employee interactions and track and trace the spread of the disease will create significant GDPR compliance questions.

Moreover, the consequences of GDPR non-compliance are not limited to monetary fines. There are also the costs associated with non-compliance. These costs, potentially resulting from a data breach, could include, for example, legal fees and litigation, regulatory investigation, remediation, public relations, and other costs associated with compensation and notification to affected data subjects. Furthermore, the potential damage to an organisation's reputation and market position can be significant.

The magnitude of GDPR fines means organisations are keen to know whether these fines can be insured. Typical cyber insurance policies only insure fines when insurable by law, and stipulate that the insurability of fines or penalties shall be determined by the "laws of any applicable jurisdiction that most favours coverage for such monetary fines or penalties." Organisations also need to consider other costs and liabilities that could result from GDPR non-compliance.

Given the size of the potential financial impact of GDPR non-compliance, it is important for organisations to understand how the insurability of fines, legal and other costs and liabilities following a data breach is approached in different jurisdictions. In this guide we provide an overview of the insurability of fines and resulting costs across Europe (information current at date of publishing) as a resource for all those organisations affected by GDPR.

There are only a few jurisdictions where it is clear that civil fines can be covered by insurance – even then there must be no deliberate wrongdoing or gross negligence on the part of the insured. Criminal penalties are almost never insurable. GDPR administrative fines are civil in nature, but the GDPR also permits European Member States to impose their own penalties for personal data violations. If those penalties are criminal, they almost certainly would not be covered by insurance.

"Over 160,000 data breach notifications have been reported across Europe since GDPR came into force. While few jurisdictions allow the insurance of fines, insurance for legal costs and liabilities incurred as a result of a breach is widely available and can provide invaluable protection. Of course, the impact of a data breach goes far beyond financial implications and how it is managed will be crucial for reputational and market confidence purposes more generally."

Melanie James, Global Co-Chair, Insurance Sector, Partner, Corporate DLA Piper

While the insurability of fines may be limited, insurance forms a key component of an organisation's GDPR risk management strategy to manage costs associated with GDPR non-compliance and resulting business disruption losses.

In addition to insurance, there is significant business advantage to taking privacy and data protection seriously. Properly securing the data you hold is critical, but a robust data retention strategy is essential. Organisations frequently retain too much data for too long, without discernible commercial benefit; thereby increasing their risk exposure. High-profile breaches and revelations regarding the misuse of data shared via social media have made consumers more aware of how their data might be collected, stored, analysed and used.

"GDPR compliance can also strengthen customer relationships. Public opinion on data privacy has changed and customers are increasingly placing importance on how organisations protect their personal information. Organisations can use compliance with regulations as opportunities to show how much they value customers. GDPR provides the chance to reinforce their role as responsible stewards of personal information and to craft innovative privacy and security policies that better reflect the constantly evolving needs of digitisation."

Vanessa Leemans, Chief Broking Officer, Aon Cyber Solutions EMEA

A first edition of the guide was issued before GDPR came into effect in May 2018. As the insurability of GDPR fines is a dynamic and fluid matter, this third edition sets out the latest findings with regard to the following:

1. Insurability of non-GDPR regulatory fines
2. Insurability of GDPR fines
3. Insurability of associated costs incurred by GDPR non-compliance

In this edition, we have included the latest and biggest GDPR cases in Europe, as well as some new practical case studies and lessons learned.

Furthermore, this guide illustrates some common issues experienced by organisations through the use of international claims and data breach scenarios.

We hope that you find this an invaluable guide to understanding and managing the impact of GDPR on your organisation, whilst supporting you and your stakeholders to make informed decisions.

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GDPR enforcement actions

Biggest cases per country in Europe (as of 25 May 2020)

Source: DLA Piper

TOMs =Technical and Organisational Measures

Case studies and lessons learned

Case study

An EUR18 million fine was imposed by the Austrian Data Protection Authority on a national postal operator for various unlawful use of customer data. It had come to light that the company was using customer data to extrapolate the "political affinity" (or presumed voting behaviour) of its customers, and the resulting profiles were then used to offer marketing services to political parties. In some cases, the data itself was even sold to political parties for targeted advertising.

What happened?

On 29 October 2019, it emerged that the Austrian Data Protection Authority (DSB) had imposed a fine of EUR18 million on its country's national postal operator. The fine followed a well-publicised affair in Austria concerning the company's use of customer data for unauthorised purposes.

In addition to controversial attempts to analyse customer data in order predict political affinity (and then sell this intelligence to companies and political parties), the postal operator was also criticised in relation to its decision to collect certain information, such as the frequency of packages delivered to a specific address, and the frequency of customers moving to a new address, without a legal justification for doing so.

Lack of lawful basis for data uses

All activities which use personal data must be supported by a lawful basis, that is, one of a number of grounds prescribed by the GDPR (such as the data subject's consent; or the performance of a contract entered into with the data subject) that justifies the collection and/or use of personal data in a particular context. Central to the DSB's findings was the conclusion that many of the postal operator's activities were not supported by a lawful basis. In the eyes of the DSB, there was no legally justifiable reason why, for example, the postal operator should collect data about the frequency of packages being delivered to a specific customer's address.

Profiling

The GDPR contains a number of references to the concept of profiling, which is understood to be any form of automated processing of personal data undertaken in order to evaluate personal aspects relating to an individual. In analysing customer data in order to evaluate presumed political affiliation, it seems clear that the Austrian postal operator was carrying out a form of profiling.

Profiling is viewed by data protection authorities as an area of heightened risk, where there is a greater imperative to be clear and transparent with data subjects about how and why their data is being used.

The fine

The fine – which is the largest ever data protection fine in Austria to date - became public knowledge when it was included as an accrual in the DSB's outlook for the coming year, published in October 2019. It was concluded that a fine was appropriate in part in order to prevent other similar violations. As the postal operator has announced an appeal to the Austrian Federal Administrative Court, the fine is not yet legally binding.

What are the lessons?

In our data-rich world, many companies are looking for ways to mine their existing datasets in order to gain new commercial insights, or develop marketable products or services. However, this fine demonstrates the risks associated with such activities when not properly considered from a GDPR compliance perspective. While the profiles created by the postal operator from existing customer data led to monetizable services for the company, they were ultimately unfair on the operator's customers and an unlawful interference in a sensitive domain such as an individual's personal political preferences.

Second, in sanctioning the postal operator for its collection of irrelevant categories of information about its customers, the fine also emphasises the importance of the principle of data minimisation – of collecting the minimum amount of personal data needed for a given activity – and, in parallel, ensuring that each activity does use personal data is supported by a clear lawful basis.

Case study

A German real estate company was fined EUR14.5 million after failing to demonstrate compliance with the requirement under the GDPR to retain personal data for no longer than necessary to satisfy a given purpose. In the eyes of the Berlin Data Protection Authority, the company was operating a "data cemetery" which constituted a material risk for data subjects, as well a clear contravention of data protection law.

What happened?

On 30 October 2019, the Data Protection Authority for Berlin (Berlin DPA) imposed a fine of EUR14.5 million on a large German real estate company for serious data retention failings. The company was accused of having used an archiving system for the storage of personal data of tenants which did not allow for the erasure of data that was no longer necessary. According to the Berlin DPA, the affected data included information about the personal and financial circumstances of tenants, such as payslips, self-disclosure forms, extracts from employment and training contracts, tax data, social security and health insurance data and bank statements.

Why was the company not compliant with GDPR?

The company contravened the GDPR in two key ways. First, the company had retained tenant data for longer than was necessary in relation to the purposes for which that data had been collected. This represented a breach of one of the fundamental principles of the GDPR – the storage limitation principle.

Second, the implementation of an archiving system that did not allow for the erasure of tenant data breached the 'data protection by design' requirement under the GDPR, which mandates that data controllers implement appropriate technical and organisational measures into their systems and processes to ensure that, by design, those systems and processes reflect the principles of the GDPR, including the storage limitation principle. By using a system that contradicted with the storage limitation principle, the company was in breach of that requirement.

The fine

In this case, as the Berlin DPA relied on an infringement of Article 25 GDPR (the data protection by design requirement) as the basis for the fine, the maximum possible fine was 2% of annual revenues (rather than the 4% maximum available for infringements of other provisions of the GDPR).

The Berlin DPA considered that there were both aggravating and mitigating factors:

- On the one hand, the fact that the company had deliberately set up the archiving system in a non-compliant manner, and that the affected data had been processed in this way over a long period of time, were considered as aggravating factors.
- On the other hand, it was taken into account that the company had taken initial measures to remedy the situation and had cooperated well with the supervisory authority. With a view to the fact that the company could not be proven to have improperly accessed the inadmissibly stored data, a fine in the middle range of possible fines was regarded appropriate.

What are the lessons?

Good hygiene in relation to data retention is a notoriously difficult practice to implement consistently, particularly in a large organisation. The increasing availability and decreasing cost of digital storage makes it tempting to hold on to data indefinitely, in the belief that it may one day prove useful.

However, this fine demonstrates the importance of ensuring that the lifespan of personal data is always finite, and that its retention period is justified in relation to the purpose for which it was collected and used by the company.

The fine also highlights the importance of ensuring that data protection compliance is considered at the very outset of designing or procuring a new corporate system that will process personal data. Unless data protection requirements – such as the ability to erase personal data after a specific period of time – are taken into account, a system risks being non-compliant from the moment of its inception.

Case study

A EUR50 million fine was imposed by the CNIL (the French supervisory authority for data protection) on a multinational technology company. The CNIL's investigation was prompted by two nonprofit organisations making use of the mechanism under Article 80 of the GDPR to lodge a complaint on behalf of data subjects (in this case, approximately 10,000 users). The fine was justified on the basis of non-compliance with a number of aspects of GDPR relating primarily to transparency and consent.

What happened?

In January 2019, the French Data Protection Supervisory Authority (CNIL) fined a multinational technology company EUR50 million for breaching GDPR requirements on transparency and consent in relation to personalised advertising.

Why was the technology company not compliant with GDPR?

Under the GDPR, controllers are required to provide data subjects with detailed information about the use of their personal data, while also presenting that information in a manner which is clear and easily accessible. The CNIL determined that the company's information practices did not comply with GDPR requirements due to a lack of transparency. In particular, the CNIL noted the following:

- lack of accessibility to information;
- lack of clear and understandable information;
- lack of precise information regarding legal basis for processing and retention periods; and
- the tools made available for transparency and information were not sufficient.

Lack of legal basis for customised advertising

All activities which use personal data must be justified by a lawful basis. The company argued that its use of personal data for behavioural targeting purposes was justified by consent. However, the GDPR sets very high standards for consent, and the CNIL considered that their consent was not validly obtained as the wording used was ambiguous and unspecific. Further, it relied on an opt-out mechanism in the account settings, which was contrary to the express consent requirement under GDPR. If the user wanted to change their preferences, it was made more difficult by the options being hidden through a "more options" link. Finally, the company required the user to consent to the privacy policy, the terms of use and to select "create an account" as a whole, and thus the condition of specific consent was not met.

The fine

The CNIL applied the highest threshold available in the GDPR, (i.e. EUR20 million or 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher) and provided the following reasons for doing so:

- two of the key data protection principles were violated;
- the violations were continued;
- the violations were severe taking into account the purpose, the scope and the number of data subjects; and
- the company occupied an important position in the operating system market.

Was the CNIL the competent supervisory authority?

The company attempted to argue that the CNIL was not the competent supervisory authority. They argued that it should have been handed over to a local Data Protection Commission which was the lead supervisory authority in the EU (under the one-stop-shop principle). However, the CNIL did not agree. The controller for the relevant processing jurisdiction did not have any real and effective decision-making over the relevant processing activities.

What are the lessons?

The fine indicates important lessons about the high standards expected in relation to the quality of both privacy notices and mechanisms for collecting consent. It reinforces the point that fines can stem from simple non-compliance with key data protection principles, and not just from data security breaches. Further, it makes it clear that companies who want to be able to take advantage of the one-stop-shop system must be able to demonstrate the involvement of the EU main establishment in the relevant processing.

Case study

A Portuguese hospital was fined EUR400,000 by their data protection authority for breach of data security and data minimisation principles.

What happened?

A hospital in Portugal was fined EUR400,000 by the Portuguese data protection authority *(Comissão Nacional de Protecção de Dados, CNPD)* for breach of data security and data minimisation principles.

Why was the hospital not compliant with GDPR?

Under the GDPR, controllers are required to ensure an appropriate level of security for personal data. The hospital failed in this regard in a number of ways, but principally in terms of how it controlled access to systems containing patient data. It did not have rules for creating users of the IT system holding the data, and there was a large discrepancy between users of the system who had the profile of a "doctor," and the number of actual doctors at the hospital. This suggests that significant numbers of users had access to sensitive patient data to which they didn't need to access to perform their roles.

Controllers are also required by the GDPR to ensure that they minimise their processing of personal data, limiting it to what is necessary to achieve the desired purpose. The hospital breached this principle by creating access credentials which allowed any doctor, regardless of their speciality, to access any patient data.

The fine

The CNPD found that there were both aggravating and mitigating factors. On the one hand, the data involved was highly sensitive, and when the hospital learned of the inappropriate access rights, it did not alert the CNPD. However, on the other hand the hospital was then cooperative with the CNPD, and it took steps to remedy the infringement and mitigate its effects. Consequently, the fine could have been significantly higher if the hospital had not behaved in such a positive fashion following the CNPD's involvement.

What are the lessons?

This is a salutary lesson in the importance of controlling access to information within an organisation. It is rarely appropriate for all employees of a business to have access to all the data processed by that business – access should always be granted on a "need to know" basis. Failing to do so is in and of itself a breach of the GDPR, regardless of the consequences which flow from the inappropriate access controls.

GDPR at a glance

The EU General Data Protection Regulation (GDPR), came into effect on 25 of May 2018. It has brought new legal rights for data subjects, while extending the scope of the responsibilities of controllers and processors. It also enhanced enforcement rights for regulators, to include fines of up to EUR20 million or, if higher, 4% of an organisation's annual global turnover.

Applicability

GDPR not only applies to organisations located within the EU, but also to organisations that offer goods or services to, or monitor the behaviour of, European data subjects, even where those organisations are located outside the EU.

GDPR applies to the processing of personal data, meaning any information relating to an identifiable person who can be directly or indirectly identified, in particular by reference to an identifier. This can include any information that can be used to identify an individual; a name, an email address or a phone number, but it could also include IP addresses, job roles, employee IDs or depersonalised claims data, survey information or pension details. This definition provides for a wide range of personal identifiers to constitute personal data, including name, identification number, location data or online identifier, reflecting changes in technology and the way organisations collect information about individuals.

Requirements

Some of the GDPR requirements for organisations are:

Governance and accountability – GDPR is concerned with the principle of accountability, which requires organisations to be able to demonstrate compliance with GDPR. The effect of this is that all organisations need to implement a formal data protection programme to demonstrate that data protection is taken seriously and their processing activities are performed in accordance with GDPR.

More rights for data subjects – Data subjects (identified or identifiable natural person) are entitled to a range of rights, including a right to erasure, a right to data portability, a right to challenge certain forms of non-essential processing, and a right not to be subject to an automated decision in certain circumstances. Data subjects have more control over the processing of their personal data.

Privacy by design and by default – Organisations must take privacy risks into account throughout the process of designing a new product or service, and adopt mechanisms to ensure that, by default, minimal personal data is collected, used and retained.

Privacy risk impact assessment – Privacy risk impact assessments are required before processing personal data for operations which are likely to present higher privacy risks to data subjects due to the nature or scope of the processing operation.

Appointment of a data protection officer – Appointment of a data protection officer with expert knowledge is mandatory for public authorities and for organisations whose core activities involve the regular and systematic monitoring of data subjects on a large scale (for example, data-driven marketing activities or location tracking), or which process large amounts of special categories of personal data, such as insurers, banks and healthcare companies.

Personal data breach – Requirement to notify personal data breaches causing risk to individuals to the supervisory authorities within 72 hours. If the incident is likely to pose a high risk to the affected individuals' rights and freedom, there is also a duty to notify those individuals of the breach. A few typical examples of a personal data breach include: sending personal data to an incorrect recipient or access by an unauthorised third party, computing devices containing personal data being lost or stolen, or alteration of personal data without permission.

Processors – The processing of personal data by a processor (the entity which processes personal data on behalf of the controller) must be governed by a contract between the processor and the controller (the entity which determines the purposes and means of processing of personal data). Furthermore, unlike its predecessor, GDPR imposes direct statutory obligations on processors, which means they are subject to direct enforcement by supervisory authorities, fines, and compensation claims by data subjects. In practice processors may, therefore, strongly resist the imposition of any contractual indemnity on the basis that they are subject to their own direct liability under GDPR, and argue that a more balanced apportionment of risk is appropriate (for example, a cross-indemnity), or else the replacement of an indemnity with capped liability. Alternatively, the parties may agree to allocate liability in such a way as to completely exclude GDPR indemnities and accept sole responsibility, with respect to GDPR fines, penalties and assessments, while allocating responsibility for all other non-GDPR fines related liability.

Enforcement

Higher sanctions for non-compliance – In the case of non-compliance with GDPR, the regulator may impose fines up to EUR20 million or, if higher, 4% of an organisation's annual global turnover. Where a data breach would involve a subsidiary of a global company, the sanction and the calculation may apply at group level. This means that the turnover of the group may be taken into account and that the parent company may be sanctioned.

Broad investigative and corrective powers – Supervisory authorities have wide investigative and corrective powers, including the power to undertake on-site data protection audits and issue public warnings, reprimands and orders to carry out specific remediation activities.

Right to claim compensation – GDPR makes it considerably easier for data subjects who have suffered "material or non-material damage" as a result of a GDPR breach to claim compensation against controllers and processors. The inclusion of "non-material" damage means that individuals are able to claim compensation for emotional distress even where they are not able to prove financial loss.

Data subjects have the right to mandate a consumer protection body to exercise rights and bring claims on their behalf. Although this falls someway short of a class action right, it certainly increases the risk of group privacy claims against organisations. Employee group actions are also more likely under GDPR. Data subjects also have the right to lodge a complaint with a supervisory authority, and the right to an effective legal remedy against a controller or processor.

"It is clear that individuals are increasingly concerned about how their personal data is handled by organisations. Getting privacy right is not only about complying with the law; it should also be central to an organisation's reputation management and brand perception."

Prof. Dr. Patrick van Eecke, Partner and Co-Chair, Global Data Protection, Privacy and Security Practice, DLA Piper

Insurance

The scope of GDPR is broader than most insurance policies which are often triggered by privacy or security incidents, whereas GDPR violations can also be triggered by non-compliance separate and apart from a privacy or security incident.

An insurance policy may extend to cover fines imposed for wrongful collection and use of personal data and/or regulatory fines for cyber-related incidents. That policy would treat GDPR fines in the same way. Similarly, a policy which excludes fines imposed for wrongful collection and use of personal data and/or regulatory fines for cyber-related incidents would also exclude such fines imposed under GDPR. The current insurance market does allow for some expansion of cover to specifically address certain instances of non-compliance as it relates to GDPR, but the language must be carefully drafted and reviewed.

Where a policy is intended to cover such fines, a key issue is the extent to which those fines are insurable. That issue is considered in the following section of this guide.

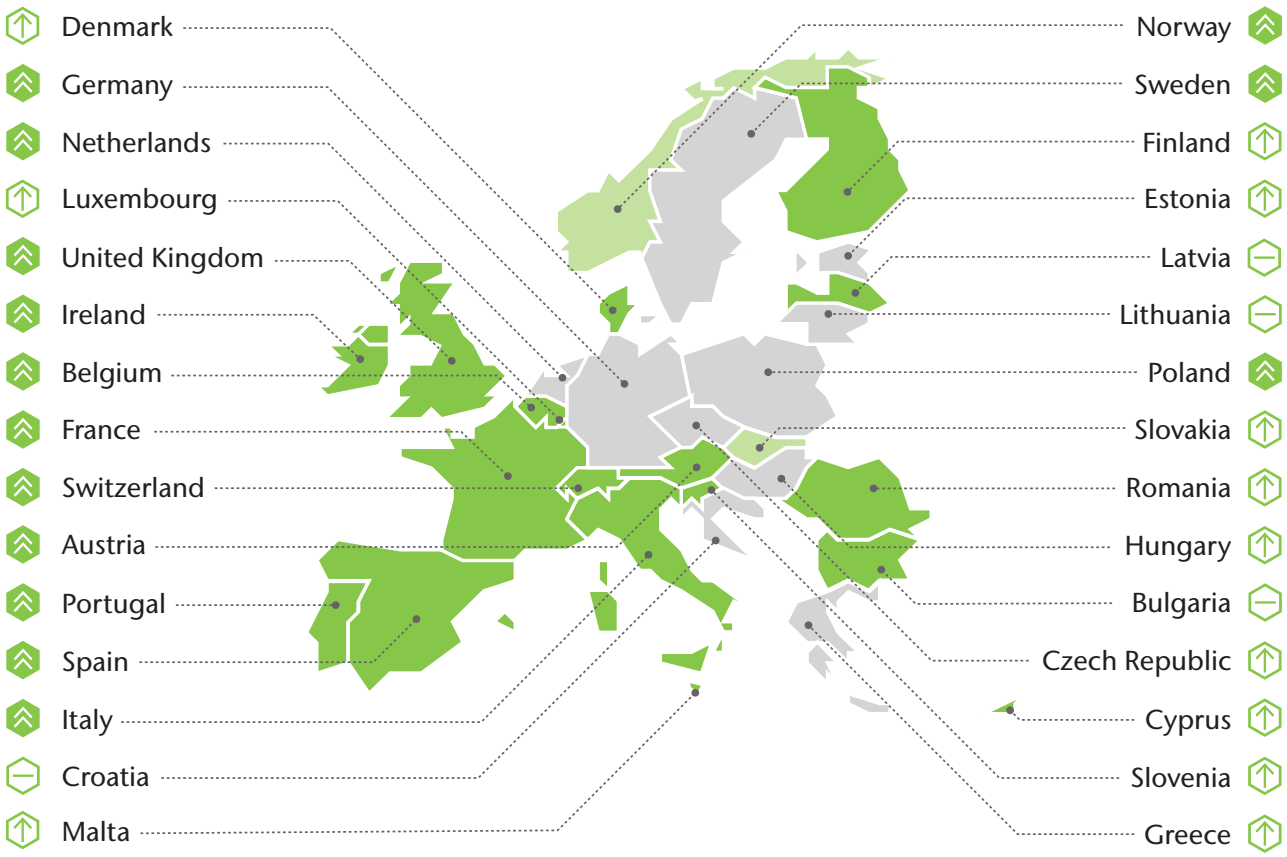
Insurability by country

DLA Piper has carried out a review of whether regulatory fines, GDPR fines in particular, and legal and other costs and liabilities following a data breach, are insurable in each EU country, Norway, Switzerland and the UK.

The findings assume that local law is applied in each country. Often it will be possible for the parties to agree that another system of law applies to an insurance contract. However, legal rules governing insurability are often derived from public policy principles which can override the parties' choice of law, meaning it cannot be assumed that such choice will prevail.

The findings also set out whether fines and other costs and liabilities are insurable "in principle" – DLA Piper has not considered whether insurance cover is available for particular risks. The issue of insurability is dynamic and fluid. Where GDPR fines are "not insurable" in a particular jurisdiction, this position may be a matter of debate in the local insurance sector, and some market participants may nevertheless provide cover for GDPR fines. For example, some local cyber insurance practitioners in France, the Netherlands and Spain view GDPR fines as insurable.

GDPR heat map



Key

Insurability of GDPR fines	Insurable	Unclear	Not insurable[1]
Data regulatory environment[2]	High	Fairly high	Moderate

[1] *DLA Piper has included as "not insurable" countries where in certain limited circumstances a fine might possibly be indemnifiable, but under local laws or public policy fines would generally not be regarded as insurable*

[2] *Data regulatory environment: Presented as a metric to offer a high level guide to the approximate likelihood of exposure to regulatory action from data protection authorities, and the possible strength of that action. It is assessed through a variety of factors, including (i) availability of criminal sanctions under local law; (ii) size and historic activity level of the regulator; and (iii) presence (and complexity) of supplementary privacy and information security laws. The heat rating assigned to a jurisdiction should not be interpreted as an indication of the likelihood of that country's data protection authority commencing enforcement action in respect of any specific scenario. Importantly, GDPR is not yet a live piece of legislation, as date of publishing, and therefore we have no experience of the relative approaches of the data protection authorities to enforcing GDPR in practice.*

Source: DLA Piper

Insurability by country – overview

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach	Data regulatory environment[2]
Austria				High
Belgium				High
Bulgaria				Moderate
Croatia				Moderate
Cyprus				Fairly high
Czech Republic				Fairly high
Denmark				Fairly high
Estonia				Fairly high
Finland				Fairly high
France				High
Germany				High
Greece				Fairly high
Hungary				Fairly high
Ireland				High
Italy				High
Latvia				Moderate
Lithuania				Moderate
Luxembourg				Fairly high
Malta				Fairly high
Netherlands				High
Norway				High
Poland				High
Portugal				High
Romania				Fairly high
Slovakia				Fairly high
Slovenia				Fairly high
Spain				High
Sweden				High
Switzerland				High
United Kingdom				High

Key — Insurability of GDPR fines

- Not insurable[1]
- Unclear
- Insurable

[1] *DLA Piper has included as "not insurable" countries where in certain limited circumstances a fine might possibly be indemnifiable, but under local laws or public policy fines would generally not be regarded as insurable*

[2] *Data regulatory environment: Presented as a metric to offer a high level guide to the approximate likelihood of exposure to regulatory action from data protection authorities, and the possible strength of that action. It is assessed through a variety of factors, including (i) availability of criminal sanctions under local law; (ii) size and historic activity level of the regulator; and (iii) presence (and complexity) of supplementary privacy and information security laws. The heat rating assigned to a jurisdiction should not be interpreted as an indication of the likelihood of that country's data protection authority commencing enforcement action in respect of any specific scenario.*

Insurability by country – detailed findings

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Austria	Regulatory fines are not insurable in Austria. An indemnity agreement between the offender and a third party entered into prior to the violation of regulatory provisions is considered invalid and an immoral contract.	GDPR fines are not insurable in Austria.	It is possible to insure in Austria against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers) for consequences of a breach; and (iv) costs of mitigating a breach including public relations expenses. An insurer can exclude liability where there is a finding of guilt, knowledge or intent.
Belgium	Regulatory fines are generally not insurable in Belgium. It is not possible to insure against criminal fines as a matter of law and public policy. Insuring administrative fines is not expressly prohibited but such fines are likely to be found uninsurable as a matter of public policy.	GDPR fines are unlikely to be insurable in Belgium. GDPR breaches are subject to administrative and criminal fines – criminal fines are prohibited from being insured and must be borne by the liable party personally.	It is possible to insure in Belgium against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. An insurer can exclude its contractual liability under a policy where the insured intentionally caused the covered losses.
Bulgaria	Regulatory fines would not be insurable in Bulgaria. A claim for indemnity is likely to be unenforceable as a matter of public policy because criminal liability is personal in Bulgaria. The Bulgarian Financial Supervision Commission (FSC) would be likely to impose a fine on an insurance company which offered insurance against administrative penalties.	GDPR fines would not be insurable in Bulgaria. GDPR breaches are subject to administrative and criminal fines.	In Bulgaria, a claim under a policy for an insured's investigation and defence costs is not enforceable, it is the role of the court to rule which party will pay the costs. It may be possible to insure against: claims by third parties (customers/suppliers/data subjects) for consequences of breach, and costs of mitigating a breach, including public relations expenses.

Key | Insurability of GDPR fines

Not insurable[1]

Unclear

Insurable

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Croatia	It is unclear whether regulatory fines would be insurable in Croatia as legally permissible risks, or whether a policy insuring regulatory fine would be null and void as contrary to the constitution, law and morality. Fines for intentional, fraudulent or criminal acts would not be insurable.	It is unclear whether GDPR fines would be insurable in Croatia as legally permissible risks, or whether a policy insuring GDPR fines would be null and void as contrary to the constitution, law and morality. Fines for intentional, fraudulent or criminal acts would not be insurable.	It is possible to insure in Croatia against: (I) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties/ (customers/suppliers/data subjects) for consequences of a breach); and (iv) costs of mitigating a breach, including public relations expenses. However, such costs are unlikely to be insurable if the action giving rise to the liability for the fine is intentional or a consequence of gross negligence.
Cyprus	Regulatory fines are not likely to be insurable in Cyprus. There is no express general prohibition in statutes and rules regulating the insurability of regulatory/ administrative fines. However, such fines are likely to be found uninsurable as a matter of public policy.	GDPR fines are not likely to be insurable in Cyprus. Administrative fines under GDPR are not likely to be insurable as a matter of public policy. (Cyprus courts follow English law as persuasive). The same applies to criminal fines adopted under national law in relation to GDPR.	It is possible to insure in Cyprus against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses.
Czech Republic	Regulatory fines may be insurable in the Czech Republic. Insurance against regulatory fines is not expressly prohibited, but there is a risk that such contracts will be unenforceable as a matter of public policy.	GDPR fines may be insurable in the Czech Republic. Insurance against GDPR fines is not expressly prohibited, but there is a risk that such contracts will be unenforceable as a matter of public policy.	It is possible to insure in the Czech Republic against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses.

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Denmark	Regulatory fines are not likely to be insurable in Denmark. It is not possible to insure against criminal sanctions as a matter of public policy. This rule also applies to insurance covering regulatory fines, based on the principle that a fine must be borne by the party committing the criminal act.	GDPR fines are not insurable in Denmark. GDPR breaches will result in criminal fines. The general rule that a party cannot insure against such fines, nor claim indemnity for them.	It is possible to insure in Denmark against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Unless it is otherwise clearly stated, a policy will not cover costs that are due to a willful act or gross negligence.
Estonia	Regulatory fines may be insurable in Estonia. Insurance contracts covering administrative or criminal fines are not expressly prohibited, but there is a risk such contracts will be declared contrary to overriding rules of law/public order/morality. A policy may be unenforceable if it is considered that the parties' intention was to avoid administrative or criminal sanctions. It is a condition of insurability that the loss was caused by circumstances beyond the control of the insured.	GDPR fines may be insurable in Estonia. Breaches of GDPR are sanctioned by administrative and criminal fines. There is a risk that contracts insuring against those fines will be unenforceable.	It is possible to insure in Estonia against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. However, one of the conditions of insurability in Estonia is that the loss was caused by circumstances beyond the control of the insured.

Key | Insurability of GDPR fines — Not insurable[1] — Unclear — Insurable

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Finland	There is no statutory prohibition. However, in 2018 the Finnish Financial Supervisory Authority (FIN-FSA) provided an interpretation of the statutory requirement on Finnish insurance companies to comply with good insurance practice. The FIN-FSA interpreted that the provision of insurance against fines and penalty payments is contrary to that requirement because such insurance might encourage indifference to regulatory compliance and compromise obligations to comply with the relevant regulations. FIN-FSA's interpretation applies to all fines and penalty payments, whether they are imposed on the basis of a deliberate act, omission or negligence. Finnish legislation does not expressly ban insurance for fines; but the FIN-FSA's interpretation means that it might take action against an insurer who provided such cover for a breach of good insurance practice. Therefore, there is a risk that regulatory fines are not insurable.	There is no statutory prohibition. However, in 2018 the Finnish Financial Supervisory Authority (FIN-FSA) provided an interpretation of the statutory requirement on Finnish insurance companies to comply with good insurance practice. The FIN-FSA interpreted that the provision of insurance against fines and penalty payments is contrary to that requirement because such insurance might encourage indifference to regulatory compliance and compromise obligations to comply with the relevant regulations. FIN-FSA's interpretation applies to all fines and penalty payments, whether they are imposed on the basis of a deliberate act, omission or negligence. Finnish legislation does not expressly ban insurance for fines; but the FIN-FSA's interpretation means that it might take action against an insurer who provided such cover for a breach of good insurance practice. Therefore, there is a risk that GDPR fines are not insurable.	It is possible to insure in Finland against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Such sums are insurable even if the insured has been found guilty – gross negligence or intentional actions prevent or decrease payable compensation.
France	Regulatory fines are generally not insurable in France. Insurance against fines is contrary to public policy as such coverage would tend to diminish their deterrent effect.	GDPR fines are not insurable in France. Such fines are considered to be quasi-criminal and insurance against them is against public policy as they are intended to be borne by the party personally.	It is possible to insure in France against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Insurance would not respond if there is a finding of knowledge, recklessness or intent. There would be no underlying aleatory event (i.e. no risk) and therefore no possibility of insuring it.

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Germany	Regulatory fines are likely to be uninsurable in Germany. There is no express bar but generally civil law does not allow the purpose of a fine as a personal sanction to be circumvented.	GDPR fines are likely to be uninsurable in Germany.	It is possible to insure in Germany against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Insurance is not available where there is a finding of intent and/or recklessness.
Greece	Regulatory fines are generally considered to be not insurable as a matter of public policy. However, regulatory fines could be insurable to the extent the fine is not attributed to malice and the acts or omissions which resulted in the fine do not constitute a criminal offence which has resulted in criminal sanctions.	GDPR fines are generally considered to be not insurable as a matter of public policy. However, they could be insurable to the extent that the fine is related to a data security breach, is not attributed to malice and the acts or omissions which resulted in the fine do not constitute a criminal offense which has resulted in criminal sanctions.	It is possible to insure in Greece against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Such costs can be insured against provided conduct giving rise to them was not a result of malice.

Key | Insurability of GDPR fines

Not insurable[1]

Unclear

Insurable

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Hungary	Regulatory fines are not generally insurable in Hungary. Insurance policies against such fines could be considered to be against the law and therefore null and void.	GDPR breaches in Hungary will be subject to administrative and criminal fines. Such fines are not likely to be insurable in Hungary.	It is possible to insure in Hungary against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Claims under policies for such costs are enforceable – at least until it is demonstrated (e.g. by an admission or judgment) that the conduct giving rise to liability for a fine was deliberate or reckless.
Ireland	Regulatory fines are not generally insurable in Ireland. A claim for indemnity is likely to be unenforceable as a matter of public policy. A party is not allowed to claim an indemnity for criminal or quasi-criminal fines which the law has provided should be borne by the party personally.	Breaches of GDPR and Data Protection Act 2018, respectively, will be subject to administrative fines and criminal fines. Such fines are not likely to be insurable in Ireland as a matter of public policy.	It is possible to insure in Ireland against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. A claim under a policy will be enforceable until it is demonstrated (e.g. by an admission or judgment) that the insured's conduct was deliberate or reckless.

DLA Piper are grateful to A&L Goodbody who provided the content in relation to insurability of fines in Ireland.

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Italy	Regulatory fines are not insurable in Italy. Administrative fines are not insurable because the deterrent effect of fines would be lost if the offender could shift its economic burden to the insurer.	GDPR fines are not insurable in Italy.	It is possible to insure in Italy against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. An insurer will not be liable for payment of indemnity if loss was intentionally caused by the insured.
Latvia	Latvian Insurance Contract Law explicitly states that civil liability insurance cannot provide cover in respect of monetary fines, late payment interest and other types of sanctions. In addition, contracts insuring regulatory fines may be declared contrary to overriding rules of law, public order or morality, or objectionable because they are intended to avoid legal sanctions. Theoretically there might be very limited cases where administrative fines would be insurable, but in practice this is unlikely. The criminal fines are uninsurable. We are aware of contracts which seek to qualify indemnification of fines as other types of payments; however, such contracts may not be enforceable.	Latvian Insurance Contract Law explicitly states that civil liability insurance cannot provide cover in respect of monetary fines, late payment interest and other types of sanctions. Breaches of GDPR are sanctioned by administrative and criminal fines. Contracts insuring GDPR fines may be declared contrary to overriding rules of law, public order or morality, or objectionable because they are intended to avoid legal sanctions. Theoretically there might be very limited cases where administrative fines would be insurable, but in practice this is unlikely. The criminal fines are uninsurable. We are aware of contracts which seek to qualify indemnification of fines as other types of payments; however, such contracts may not be enforceable.	It is possible to insure in Latvia against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. However, one of the conditions of insurability in Latvia is that the loss was caused by circumstances beyond the control of the insured.

Key | Insurability of GDPR fines — Insurable — Unclear — Not insurable[1]

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Lithuania	Regulatory fines may be insurable in Lithuania. Insurance contracts covering administrative or criminal fines are not expressly prohibited, but there is a risk such contracts will be declared contrary to overriding rules of law/ public order/morality. A policy may be unenforceable if it is considered that the parties' intention was to avoid administrative or criminal sanctions. It is a condition of insurability that the loss was caused by circumstances beyond the control of the insured.	GDPR fines may be insurable in Lithuania. Breaches of GDPR are sanctioned by administrative and criminal fines. There is a risk that contracts insuring against those fines will be unenforceable.	It is possible to insure in Lithuania against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. However, one of the conditions of insurability in Lithuania is that the loss was caused by circumstances beyond the control of the insured.
Luxembourg	Regulatory fines are not insurable in Luxembourg. A claim for indemnity is likely to be unenforceable as a matter of public order. Indemnity is not permitted for criminal or quasi-criminal fines, which the law has provided should be borne by the party personally.	GDPR fines are not insurable in Luxembourg. GDPR breaches are subject to administrative and criminal fines which are intended to be borne by the relevant party.	It is possible to insure in Luxembourg against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses.
Malta	Regulatory fines are unlikely to be insurable in Malta. A claim for non-GDPR regulatory fines is likely to be unenforceable as a matter of public policy.	GDPR fines are unlikely to be insurable in Malta. GDPR breaches are subject to both administrative and criminal fines, and are likely to be uninsurable as a matter of public policy.	It is possible to insure in Malta against: (i) costs of investigating an incident; (ii) defence costs; (iii) civil claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. A claim under a policy for such costs is likely to be enforceable – provided the insured's conduct is not intentional or grossly negligent.

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Netherlands	Regulatory fines may not be insurable in the Netherlands. There is no specific legislation or case law; however, insurance of fines is generally considered acceptable, unless the penalty relates to deliberate acts. A claim for indemnity is unenforceable if it is contrary to public policy or accepted principles of morality. Malicious intentional acts cannot be insured against.	GDPR fines may not be insurable in the Netherlands. There is no specific legislation or case law; however, insurance of GDPR fines is generally considered acceptable, unless the penalty relates to deliberate acts. A claim for indemnity is unenforceable if it is contrary to public policy or accepted principles of morality. Malicious intentional acts cannot be insured against.	It is possible to insure in the Netherlands against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. A finding of guilt, recklessness, knowledge or intent (e.g. by an admission or judgment) is generally excluded from insurance coverage.
Norway	Regulatory fines may not be insurable in Norway. It is not permitted to enter into insurance contracts which are "in breach of the law or decency," and offering insurance cover for fines imposed for criminal sanctions could be in breach of this rule. However, regulatory fines might not be treated as criminal sanctions if the fine has no punitive purpose, in which case insurance cover would be available.	GDPR fines may be insurable in Norway, depending on the nature of the fine. Under Norwegian legislation, GDPR breaches will be met either with regulatory fines for violations or with compulsory fines. As regulatory fines are not defined as criminal sanctions in the GDPR as implemented in Norway, insurance companies can offer insurance cover in accordance with the Norwegian Insurance Operations Act section 7-1. However, compulsory fines (for example, fines imposed by the regulator for not following an order) are intended to have a punitive purpose and will most likely not be insurable.	It is possible to insure in Norway against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. However, the insured's intentional or willful acts insurable according to the Norwegian Insurance Contracts Act, section 4-9. If an insurer has covered costs resulting from intentional acts, it has the right to recover them from the insured.

Key | Insurability of GDPR fines — Insurable — Unclear — Not insurable[1]

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Poland	Regulatory fines may be insurable in Poland. Criminal fines are not insurable. Administrative fines are generally considered to be insurable but the position has not been tested in court, and the court or a regulator could come to a different view. Insurance products are available that cover administrative fines, but it is not known how such insurance will work in individual cases.	GDPR fines may be insurable in Poland. Both administrative and criminal fines will be available as sanctions for breach of GDPR. Criminal fines will not be insurable. Administrative fines would generally be considered to be insurable, but this position has not been tested in court, and the court or a regulator could come to a different view. Insurance products are available that cover administrative fines, but it is not known how such insurance will work in individual cases.	It may be possible to insure in Poland against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. A claim under a policy for such costs and liabilities is enforceable until it is demonstrated (for example, by an admission or judgment) that the conduct giving rise to liability for a fine was deliberate or reckless.
Portugal	Regulatory fines are not insurable in Portugal. Insurance contracts covering risks relating to liability arising from administrative offences and criminal liability are prohibited by law.	GDPR fines are not insurable in Portugal. In accordance with national law implementing the GDPR, the violation of GDPR legal requirements is subject to both administrative and criminal fines. Insurance contracts covering risks resulting from administrative offences and criminal liability are prohibited by law.	In Portugal, it is possible to insure against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses.

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Romania	Regulatory fines are not likely to be insurable in Romania. Insurance for fines is likely to be unenforceable as a matter of public policy. The subject matter of an insurance policy must not be prohibited by law or contrary to public order or good morals.	GDPR fines are not likely to be insurable in Romania. GDPR breaches will be subject to administrative fines, which are likely to be considered uninsurable risks, as a matter of public policy. We are aware of contracts which seek to qualify indemnification of GDPR fines as other types of payments; however, such contracts may not be enforceable. The Financial Supervisory Authority encourages the issuance of cybersecurity insurance policies, but has not issued any opinions or guidelines whether such insurance policies can also cover GDPR fines.	It is possible to insure in Romania litigation and arbitration defence costs. A claim under such a policy is enforceable, provided the insured's conduct was not intended or committed with gross negligence. Costs incurred when appealing against a decision issued by an investigation authority might also be insurable under a Legal expenses policy. In principle it is also likely to be possible to insure against claims by third parties (e.g. customers/ suppliers/data subjects) for consequences of a breach, and mitigation costs.
Slovakia	According to an opinion of the National Bank of Slovakia fines may be insurable.	According to an opinion of the National Bank of Slovakia GDPR fines may be insurable.	Insuring the costs of legal representation for administrative or regulatory investigations is possible in Slovakia. It is also possible to insure against liability to third parties.
Slovenia	Regulatory fines may be insurable in Slovenia, depending on the nature of the fine. In criminal and quasi-criminal (administrative) cases, where the law provides that a fine is borne by the party itself, insurance for such fines would be deemed contrary to public order.	GDPR fines are not insurable in Slovenia. GDPR breaches are subject to both administrative and criminal fines, which are intended to be borne by the relevant party.	It is possible to insure in Slovenia against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Costs incurred in regulatory investigations can be covered by insurance – unless liability arises as a consequence of an intentional or negligent act.

Key | Insurability of GDPR fines — Not insurable[1] — Unclear — Insurable

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
Spain	Regulatory fines are likely to be uninsurable in Spain. Insurance of criminal and regulatory fines is considered to be against public policy by the Spanish insurance regulator. This position is questioned in relation to regulatory fines by some in the Spanish insurance sector, but the Spanish insurance regulator has not changed its official position to date.	GDPR fines are likely to be uninsurable in Spain. In line with other regulatory fines, this position is also questioned by some in the Spanish insurance sector, which appears to be providing some cover for GDPR fines, but the Spanish insurance regulator has not changed its official position to date.	It is possible to insure in Spain against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. However, losses arising from conduct entailing bad faith by the insured or deliberately caused by the insured are excluded.
Sweden	Regulatory fines may be insurable in Sweden. There is no clear statutory prohibition. The general view is that insurability depends on the character of the penalty or fine and in particular whether imposition of a penalty or fine requires intent or only negligence, or neither, from policyholder.	GDPR fines may be insurable in Sweden. The specific nature of the fine imposed and the conduct of the insured would need to be considered.	It is possible to insure in Sweden against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers/data subjects) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses.
Switzerland	Regulatory fines are generally not insurable in Switzerland. According to the Swiss Federal Supreme Court, fines of punitive nature are generally not considered compensable damages and cannot be insured.	GDPR fines are generally not expected to be insurable in Switzerland. If GDPR fines are considered to have punitive nature, claims for indemnity will most likely not be enforceable. However, Swiss law might regard an excessively high GDPR fine as violating Swiss public order. In that case it is possible that the fine, or the part of it considered excessive, could be the indemnified under a policy.	In Switzerland, there are no statutory limitations with regard to the insurability of legal costs and other costs following a data breach. For example, the following costs can be insured in Switzerland: (i) defence costs; (ii) claims and demands of third parties; (iii) costs for consequences of a breach such as data loss, breakdown of operations; and (iv) costs for crisis management and other mitigation costs.

Jurisdiction/ system of law	Insurability of non-GDPR regulatory fines	Insurability of GDPR fines	Insurability of legal costs, other costs and liabilities following a data breach
United Kingdom	Regulatory fines are generally not insurable in the UK. A claim for indemnity is likely to be unenforceable as a matter of public policy. A party is not generally allowed to claim an indemnity for criminal or quasi-criminal fines which the law has provided should be borne by the party personally. FCA rules prohibit attempts to insure against FCA fines.	GDPR fines are unlikely to be insurable in the UK in most cases. Although there have been rare case law exceptions to the public policy rule that fines are not insurable, we do not expect a similar exception to apply as a matter of course to administrative fines imposed under GDPR, if or when the issue is tested in court, The UK data regulator, the Information Commissioner's Office, has said it is unaware whether insurance against GDPR fines is available, but in any event organisations should focus on good data practice. Fines imposed for criminal offences under the Data Protection Act 2018 (which supplements the GDPR in the UK) will not be insurable.	It is possible to insure in the UK against: (i) costs of investigating an incident; (ii) defence costs; (iii) claims by third parties (customers/suppliers) for consequences of a breach; and (iv) costs of mitigating a breach, including public relations expenses. Claims under a policy for such costs would be insurable unless it has been demonstrated (e.g. by an admission or judgment) that the conduct giving rise to liability for a fine was deliberate or reckless.

Common issues in international cyber scenarios

Scenario

"If a hotel group with headquarters in New York had hotels in France and there was a hack into the database in France, which affected Personally Identifiable Information (PII) of people in various countries, under what applicable law would a cyber insurance policy respond to such a breach? Would it be beholden to the regulations in the country where the attack happened or originated, where the data was warehoused, or does it depend on where the original customer is from?"

Different local country laws and regulations may apply to how a cyber policy will respond, depending upon the unique circumstances in each case.

What law will apply to the policy?
Courts in most EU countries will apply the Rome I Regulation (Regulation (EC) 593/2008) to determine what country's law applies to an insurance contract. If the policy covers a "large risk" (applying tests by reference to balance sheet, turnover, and number of employees) the applicable law will generally be that chosen by the parties, or if no law has been chosen, the law of the insurer's country of residence.

If the hotel group's relevant policies do not cover a "large risk," more complex rules apply under Rome I. Broadly, the parties can choose the law of any EU Member State where the risk is situated, or the law of the country of habitual residence of the policyholder, or (if the policyholder pursues commercial or industrial activity and the insurance contract covers multiple risks relating to those activities situated in different Member States), the law of one of the Member States concerned. If there has been no valid choice of law in accordance with Rome I, the policy will be governed by the law of the Member State in which the risk is situated.

Jurisdictions where Rome I does not apply may approach applicable law differently. However, importantly, many countries' courts will reserve to themselves the right not to apply a system of law other than their own, if doing so would result in an outcome contrary to local rules of public policy.

Rome I itself allows provisions of a foreign law to be disapplied if they are manifestly incompatible with local public policy.

As indicated by DLA Piper's review, in many European jurisdictions local laws making fines uninsurable are based on principles of morality and public policy. Drafting a policy so that it is stated to be subject to the laws of a country where fines are, or may be, insurable will not therefore guarantee that the policy responds to such fines.

A variety of different laws might therefore need to be applied to determine policy response. These will include: the applicable laws chosen in the hotel group's primary policy and any local policies; the laws in any jurisdiction where corporate policyholders (group companies) or operations are situated; and laws and public policy rules in any jurisdiction where an insurer might become involved in proceedings, e.g. if it is joined into a liability claim brought by a locally resident claimant.

What laws and regulations apply to a data breach and associated claims?
The following country laws could all be relevant (more than one may apply): laws of the country where the incident occurs (France, in the case described above); laws of every country where an individual, corporate or governmental entity resides if its data is affected (Aon has serviced PII legal issues in over 100 countries in some cases); laws of the country where the insured is headquartered; and/or laws of the principal place of business of the insured.

The changing landscape of international privacy laws and the evolving approach of regulators can create challenges for any organisation operating on a global platform. Compliance with laws and the jurisdictional competence of a regulator can be dictated by: where the organisation is domiciled; the countries/jurisdictions in which the organisation does business (holds/transfers data); and/or the countries/jurisdictions in which the organisation's customers/clients reside.

This is a dynamically changing environment. The *DLA Piper Data Protection Handbook* sets out an overview of the key privacy and data protection laws and regulations across nearly 100 different jurisdictions.

The choice of law and jurisdiction in a cyber insurance policy can make a difference. When claims involve fines and penalties that may be uninsurable in certain jurisdictions, insurability of GDPR fines will depend on applicable national data protection and insurance laws.

Although there may be very limited circumstances where an insured organisation is allowed to be indemnified for GDPR fines, it is clear that a cyber insurance policy can still be very beneficial to an organisation dealing with a violation of the GDPR.

Subject to the terms and conditions of the policy, a cyber insurance policy can generally cover: the costs associated with the regulatory investigation; the costs incurred in complying with the notification requirements in all jurisdictions; the legal costs and compensation claims brought against an insured organisation due to an infringement of the GDPR; and/or the costs incurred to mitigate the impact on an organisation's reputation following an infringement of the GDPR.

Scenario

"A manufacturer with headquarters in Sao Paolo hired a German marketing company to conduct a marketing campaign to launch their products in Europe. The contractual arrangement between both parties does not contain any data protection terms. In order to develop a targeted marketing campaign, the marketing company first conducts some research on the existing European consumer data of the Brazilian manufacturer. It turns out that the marketing company also transferred the consumer data illegally to their Chinese branch to develop a marketing campaign for a Chinese competitor. The German regulator discovers this illegal use of data and fines the Brazilian manufacturer."

GDPR non-compliance by processor: an organisation, domiciled outside the EU, acting as controller may get fined (or incur liability) because one of its processors infringed upon the GDPR.

The processing of European consumers' personal data by the German marketing company should have been governed by a data processing agreement with the Brazilian manufacturer. Under the GDPR, the Brazilian manufacturer which acts as controller can be fined for the illegal data transfer to China and unlawful use of the data by the German marketing company.

The German marketing company will also be liable for the damages caused by the processing as it has not complied with obligations of the GDPR that are specifically directed to processors regarding the lawful international transfers of personal data.

Any European consumer who has suffered material or non-material damage (including emotional distress) as a result of an infringement of the GDPR (the illegal transfer to China and unlawful use of their personal data) shall have the right to receive compensation from the German marketing company and the Brazilian manufacturer for the damage suffered.

Where one of the parties (as either a controller or a processor) has been held fully liable to a data subject for damage which the data subject has suffered, there is a statutory mechanism under the GDPR which allows that party to claim a contribution to the costs of the compensation from another party, where that other party was also involved in the processing and was partly responsible for the damage.

An insurance policy would probably not cover the GDPR fines imposed on the Brazilian manufacturer and/or the German marketing company. Subject to the terms and conditions of the insurance policy wording, it could potentially cover the costs associated with the regulatory investigation of the German regulator, the costs of the notification to the consumers affected, the legal costs and the compensation claims brought against both parties due to the violation.

Scenario

"A company with headquarters in Norway (where GDPR fines are insurable in certain circumstances) hires a service provider (as its processor) with headquarters in Italy to design and administer a biometric access system for the Norwegian company's offices throughout Europe, including hosting of the data collected by the access system on the service provider's servers in Italy. It transpires that the access system collects unnecessary personal data, does not allow for personal data to be restricted or erased, and has weak data security. This is uncovered when a whistleblower working for the service provider reports the deficiencies to the regulator in both countries."

In this scenario, there have likely been violations of at least the following GDPR requirements: the data minimisation principle, the data protection by design and by default requirement and the security of processing requirement.

The first two of these are obligations of the controller and not the processor. Therefore, the Norwegian company, as controller, will be liable to supervisory authorities (in respect of administrative fines) and to data subjects (in respect of civil claims) for these violations, notwithstanding that they were caused by its processor. However, if the contract with the service provider has been well drafted, there may be a contractual recourse for the Norwegian company against the service provider as a result of the service provider doing something to put the company in breach of its obligations under data protection laws.

The security of processing requirement applies to both controllers and processors. Therefore, a supervisory authority would assess the degree of responsibility of the Norwegian company and the Italian service provider, and fine them accordingly. Equally, a data subject could bring a claim directly against the service provider and could also bring a claim against the company, if it had any responsibility for the violations, for the full amount of loss suffered by the data subject, leaving the company to seek a contribution from the processor.

Appropriate supervisory authority to lead on any enforcement action. This is an example of cross-border processing as there are multiple European offices where the access system is collecting data, which is hosted in another Member State, i.e. Italy. For enforcement pursued against the Norwegian company, the company can expect that its lead supervisory authority (almost certainly the Norwegian data protection authority) takes charge, while coordinating with supervisory authorities in other affected Member States.

If a claim for indemnity in respect of a fine is made by the Norwegian company under a Norwegian law governed insurance policy which covers GDPR fines, the Norwegian company should be able to enforce that claim in the Norwegian courts, assuming it has not been grossly negligent or acted deliberately. If a dispute under the Norwegian company's policy is heard in another jurisdiction, it is possible that the court would refuse to enforce the claim on public policy grounds. The Italian company would not be able to enforce a claim for indemnity for the fine imposed on it under an Italian law governed policy in the Italian courts.

In both countries, investigation costs, defence costs, liability for claims brought by data subjects, and costs of mitigating the consequences of a breach (i.e. PR expenses) are potentially insurable under local law. Gross negligence or deliberate conduct by the insured would bar or reduce the amount of a claim under a policy, and in Italy an insurer will not be liable if the loss was intentionally caused by the insured.

Next steps

There is no doubt that GDPR is a continuous challenge for organisations, but there are steps that you can take to help manage the potential impact through risk governance, insurance review and incident response.

- Carry out a security review to check personal data is secure against unauthorised access or processing and to identify where personal data is stored within the organisation.
- Put in place a plan for ensuring continuous monitoring and testing to follow up all data compliance and cyber security efforts.
- Ensure contracts with all third-party processors contain at least the minimum terms stipulated by GDPR.
- Adopt a privacy-by-design methodology when initiating new projects or developing new tools.

- Ensure adequate cyber insurance coverage is in place.
- Review your existing cyber insurance policy with assistance from qualified coverage counsel and your broker regarding coverage for GDPR non-compliance, especially fines, penalties and lawsuits.

- Ensure you have an incident response plan in place, including data security breach notification procedures and access to external experts.
- Review your existing enterprise-wide incident response plan to ensure that it incorporates escalation plans and nominated advisors covering all required stakeholders. This includes business operations, legal, PR, and key third parties such as IT service providers.

"While GDPR has a positive impact on the privacy of EU citizens, there are still concerns about the financial impact on organisations. Continuous effort is required to manage the implications of GDPR. Organisations can protect themselves by taking an enterprise-wide approach to help achieve cyber resilience and meet the expectations of their customers and shareholders. We hope this guide supports your organisation to do just that."

Onno Janssen, Chief Executive Officer, Aon Risk Consulting and Cyber Solutions EMEA

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