

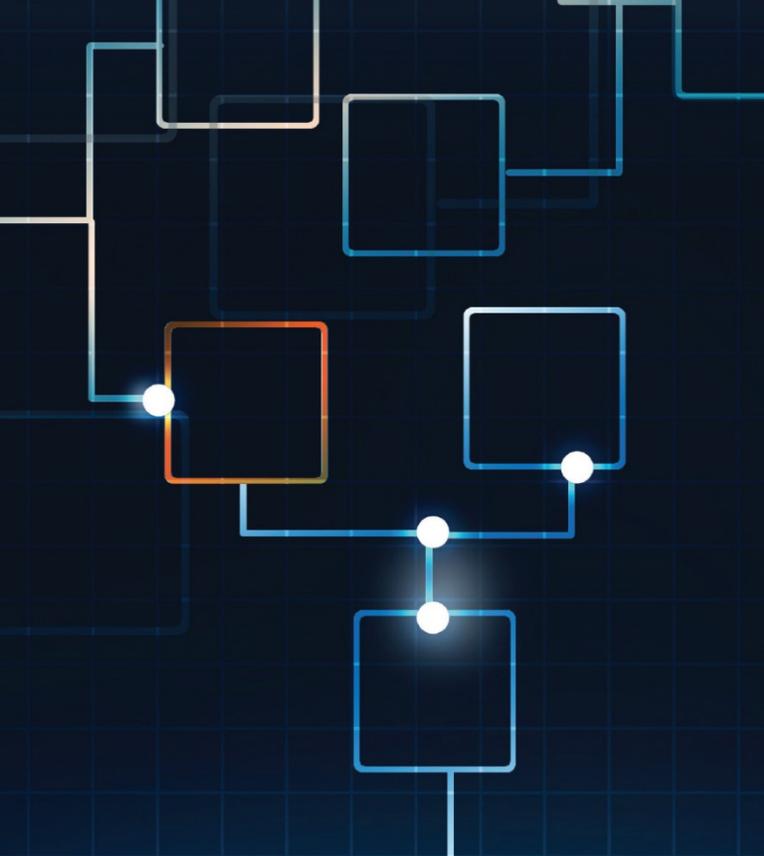
Breakout Session #3

When Was Your Last Reinsurance Contracts Check Up?

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General Data Protection Regulation: *Impact on Reinsurance Contracts*

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GDPR aims and objectives

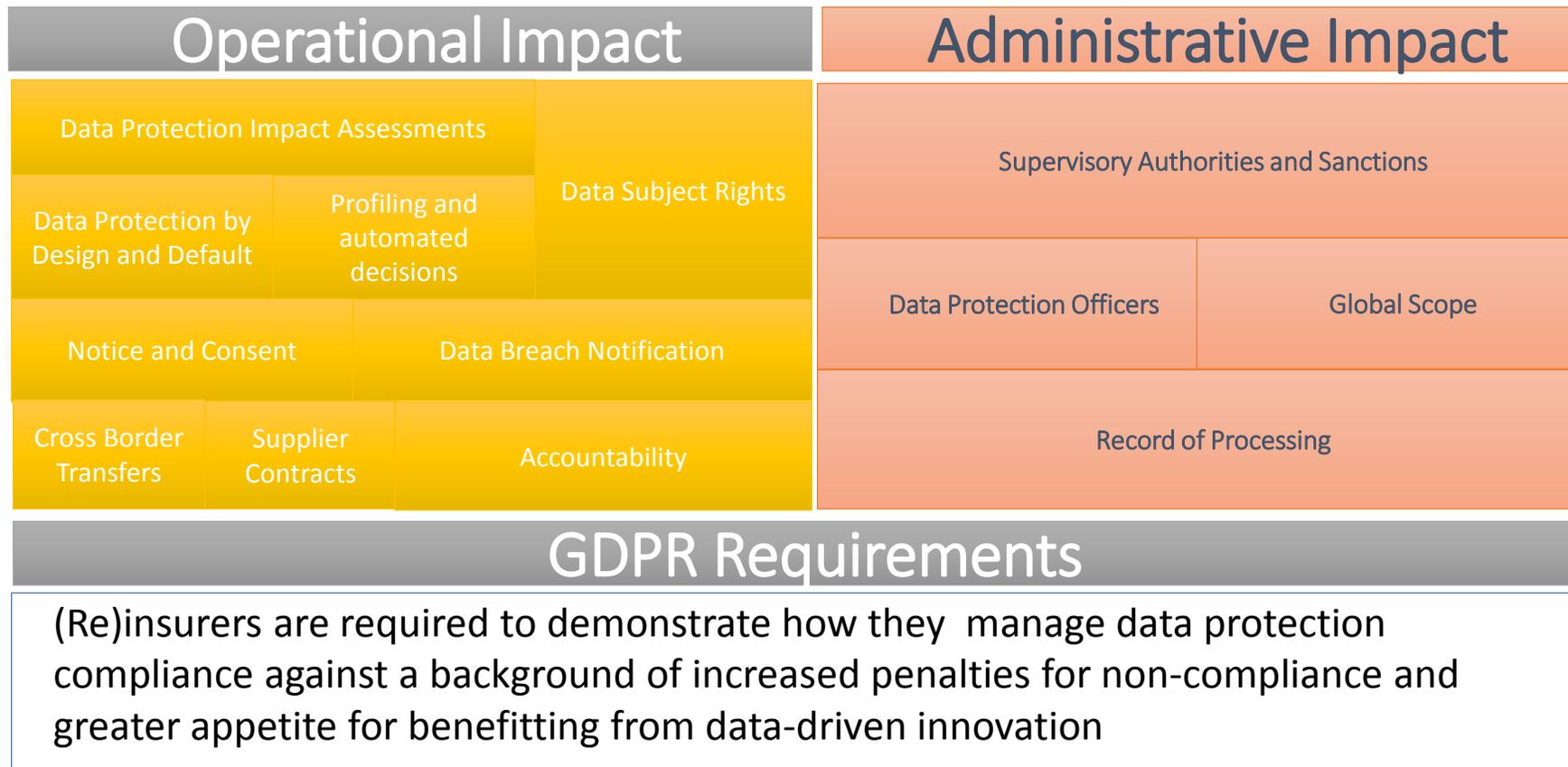
- *GDPR introduced significant changes to EU data protection law.*
- Protect fundamental rights and freedoms
- Enable free movement of personal data within the EU
- Reflect the manner in which personal data are collected and processed in the age of Big Data, IoT, Social Media and so on
- Harmonise data protection laws across the EU

Important to remember that GDPR enhances the existing rules set out in Data Protection Directive 95/46EC – in other words many of the duties imposed by GDPR are not new.

Impact on the business

GDPR not just an issue for Legal & Compliance.

Business needs to use the new processes/tools, adopt proactive approach to data protection risk, including active consultation of DPO, to achieve/demonstrate full compliance with GDPR.



GDPR Material Scope

- GDPR applies to organisations which process personal data.
- Personal data is defined as any information relating to an identifiable person who can be directly or indirectly identified in particular by reference to an identifier (such as a Policy Number or Policy Holder ID)
- Processing is defined as any operation performed on personal data. This definition is extremely broad and includes collecting, recording, storing, amending, comparing, sharing and erasing personal data.
- Reinsurers is an organization which processes personal data including the information received from clients in the course of conducting a Reinsurance business. Reinsurers therefore fall under the material scope of GDPR.
- It is then important to consider the territorial scope of GDPR and consider in particular how EU data protection legislation might impact a reinsurer's processing activity.

GDPR Territorial Scope (*includes Canadian Companies!*)

GDPR applies to **any processing undertaken in the context of an establishment in the EU** regardless of whether the processing takes place in the EU

Example

If a reinsurance entity established in an EU Member State facilitates the collection of personal data in that Member State then GDPR applies even if the substantive processing operations take place in Canada

GDPR applies if the controller is not established in the EU but the **processing relates to offering goods and services to data subjects in the EU**

Example

If a reinsurance entity in Asia processes personal data as part of a value chain which ends with a product being offered to a data subject in the EU then GDPR applies

GDPR applies in any case where the **processing consists of monitoring the behaviour of data subjects in the EU**

Example

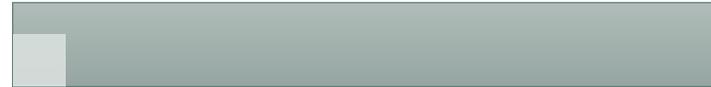
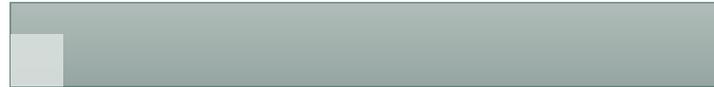
If a reinsurance entity in Canada collects data relating to data subject activity in the EU – eg social media, driving behaviour, web browser data – then GDPR applies

GDPR – brief overview

Came into effect *25 May 2018*

Sweeping changes (directly applicable in EU)

Soundbite



Increased Territorial Scope	→	Applies globally
Tougher financial penalties	→	Fines up to EUR 20m or 4% global annual turnover if higher for serious breaches
Mandatory breach notification requirements	→	To Supervisory Authority and in some cases, to individuals, within 72 hours
Strengthening of <i>Data Subject</i> rights/broader definition of <i>Personal Information</i>	→	Data Subject access, deletion, rectification, “right to be forgotten”
Strengthening of <i>Conditions for Consent</i>	→	Consent must be based on clear affirmative action
Increases power of data protection regulators	→	Single lead regulator enforcement action
<i>Cross Border Transfers</i>	→	No significant change – <i>NB Canada</i> considered ‘adequate’ by EU

Consumer /pressure groups / privacy campaigners aggressively pursuing complaints.

GDPR fines/penalties so far

- >94,000 complaints / 64, 684 data breach notifications but few fines - Total imposed fines according to Art 58.2 (i) GDPR **€55,955,871** so far.
- According to data protection authorities/rights groups - it's too soon. Comparable timeline to state prosecutions. Data Protection Authorities will make to ensure that their administrative orders are "court-proof." The target has a right to reply. DPA don't have resources to pursue all.
- Fines – just one available tool, *DPA's can use powers of assessment/audit in order to look at certain organization's data protection practices.*
- British Airways
 - max fine : 4% of global turnover (£500 million)
 - Likely fine : £17 k (EUR 20k) - Huge fines the **exception**.
- Google fined **€50m** for violating EU data privacy rules (Facebook?), another complaint outstanding 27 Nov 2018 re user location tracking.
- *Note - GDPR fines may not be insurable, but may still affect share price. Article 83: fines in each case to be "effective, proportionate and dissuasive."*

UK DPA have yet to impose any sanctions.

French DPA busy !

Impact on reinsurance contracts

- Affects L&H reinsurers globally, if within GDPR territorial/material Scope
- Required the design/implementation of new processes, safeguards & controls for DP compliance.
- Reinsurance Contracts:
 - 1) It is not necessary to have a GDPR-related clause in reinsurance programs – compliance is necessary in any event.
 - 2) If a GDPR clause is used - the minimum standard for a reinsurance GDPR clause contains:

*Statement that both parties are **Data Controllers** ?*

*Both parties will **comply** with GDPR (it should not go **beyond** the requirements of GDPR).*

*Both parties will reasonably **cooperate** to assist each other to fulfil GDPR obligations.*

- does it place obligations on reinsurers which they would struggle to meet or which place an unnecessary **burden** on the business?

- contractual obligations which are **contrary** to the requirements of the GDPR?
 - 3) It makes sense to develop model GDPR clauses – an acceptable alternative, when an unacceptable clause is proposed. E.g.

Model GDPR clause

Short version

Both parties shall **comply** with all applicable data protection regulations and laws including the General Data Protection Regulation (GDPR).

This **includes**, where applicable, compliance with data breach notification; data subject consent and notice; and data subject rights.

Both parties shall provide reasonable **cooperation** to enable each to fulfil its respective obligations.

Model GDPR clause

Life & Health Clause

For the purposes of compliance with data protection laws regulating the processing of personal data each party undertakes to ensure its **compliance** with the terms of the same.

In particular, without prejudice to the generality of the foregoing, the Company confirms that it has obtained and undertakes that it will obtain on a continuing basis all requisite **consents** from its policyholders both for its own compliance purposes, for the purposes of the treaty and for the purposes of any facultative business with the Reinsurer, and the parties confirm that each will use only **secure processes and systems** (as mutually agreed) in accordance with the provisions of the applicable data protection act for the transfer of such data.



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Sanctions Clauses

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Sanctions - Background

- Sanctions are restrictions imposed on individuals, entities, countries or sectors designed to bring about a change in policy or activity by the target individual, entity or country.
 - Governments
 - Multinational bodies (e.g. UN, EU)
- Types = Economic and trade sanctions, diplomatic, military, etc
- Financial institutions must observe and enforce.
- Data is screened against watch lists that are not static.

Sanctions (re)insurance implications

- Where sanctions apply, one or more of the parties to a (re)insurance contract may be prohibited from performing certain contractual obligations.
- Where asset freezing restrictions apply, the (re)insurer may not be able to pay claims or return premiums to the individual or entity designated under sanctions.
- Can affect the scope of coverage a (re)insurer can provide under a (re)insurance contract.

Sanctions (re)insurance implications

- (Re)insurers and their employees have to comply with international trade controls and economic sanctions relevant to the jurisdiction of their legal entity and applicable to their business, such as those issued by EU / UN / US restricting business operations.
- The **risk** for (re)insurers is prohibited dealings with an individual / entity that is subject to sanctions.
- Breach of sanctions can expose (re)insurers to significant financial fines and reputational risk, criminal charges, regulatory investigations.

Sanctions Clause – Purpose

Why include it in my (re)insurance contracts?

- A means of achieving contract certainty/awareness.
 - Protection from the “unknown”.
 - Protection against penalties.
 - Clarifies administrative handling in the event of a breach.
 - Last line of defence.
-
- BUT it is NOT a substitute for due diligence/screening

Sanctions Clause – Sample wording

“The (re)insurer will not provide cover and will not be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose the (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of any jurisdiction applicable to the (re)insurer.”

“In the event that either party is found to be in noncompliance
.....”

Sanctions Clause – Sample wording

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“In the event that either party is found to be in noncompliance
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Confidentiality in Reinsurance

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Confidentiality in reinsurance

- General principles vs prescriptive approach to drafting
 - Early reinsurance agreements did not have a confidentiality clause
 - Insurers and reinsurers share a lot of confidential, personal and proprietary information
- Increasing regulation (privacy legislation, data protection)
- Potential consequences of a breach (damage to reputation, lost commercial opportunities, litigation and fines)
- Inherent value of information

Confidentiality agreements

- When do (re)insurers need a confidentiality agreement?
 - Prior to a reinsurance audit
 - Prior to receiving reinsurance quotes
 - Engaging third party consultants
 - Pre-transaction non-disclosure agreements (NDAs)
 - In your reinsurance agreements
- Could be one-way or two-way

What is “Confidential Information”

- Basically all information that is shared between the parties
 - “including, but not limited to...”
 - Data, financial information, business plans, trade secrets, analyses, compilations, forecasts, reports, studies, underwriting manuals and guidelines, applications, contract forms, quote terms, actuarial data and assumptions, valuations, financial condition, specific terms of and conditions of the agreement, pricing information, investment portfolio, systems, programs, data systems, trade secrets, work product, inventions, technological know-how, processes, agent and customer lists, customer data, product information, proprietary technical documentation and financial data, strategic and development plans, co-developer identities, business records, project records, reports, employee lists, business manuals, policies and procedures...”
 - May include information in any form ie. oral, written, electronic
 - Whether or not marked “confidential”
 - Limit to the stated purpose

Common exclusions

Common exclusions from the definition of “Confidential Information”:

- i. Information already in the recipient’s possession
- ii. Is or becomes public through no fault of the recipient
- iii. Obtained from another source not under an obligation of confidentiality to the disclosing party
- iv. Independently developed by the recipient
- v. Required to be disclosed by a court order

Provisions in the M&A context

- “Confidential Information” includes negotiations and fact of negotiations
- Exclusivity
- No warranty as to accuracy and completeness of information
- Non-solicitation
- Neither party committed to enter into a transaction
- Control over public announcements

Limiting access

- Who can access Confidential Information?
 - Disclosure is on a “need to know” basis
 - “Representatives” ie. directors, officers, employees
 - May specifically include recipient’s affiliates and subsidiaries, advisors, reinsurers...
 - Recipient responsible for informing representatives of their confidentiality obligations
 - Sometimes asked to maintain a list of representatives or obtain written agreements from each representative
 - Recipient liable for breach by any of its representatives

Duration of confidentiality obligations

- Fixed vs Indefinite
 - Depends on type of agreement
- Following termination
 - Destruction vs return of confidential information
 - Certification by officer of the recipient
 - Exception for electronic backup records and information retained in accordance with recipient's records retention policy or for audit
- Confidentiality obligations can survive termination
 - For however long the recipient has confidential information in its possession

What happens if there is a breach?

- Must comply with legal and contractual requirements
- Remedies for breach
 - Damages > don't agree to exclude consequential or special damages
 - Injunction > is disclosing party entitled to equitable relief or only entitled to seek it?
- Not many cases
- Conclusion: confidentiality agreements are more useful to prevent breaches than compensate a party after a breach occurs



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Questions???