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# Insurability of (GDPR) fines and penalties: European landscape and developments

4 October 2019 - a presentation for





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## GDPR fines: an overview



The GDPR provides two different tiers of fines:



The less severe infringements could result in a **fine of up to €10 million, or 2% of the firm's worldwide annual revenue** from the preceding financial year, whichever amount is higher.



- any violation of the articles governing the collection and process of data;
- certification bodies;
- monitoring bodies.



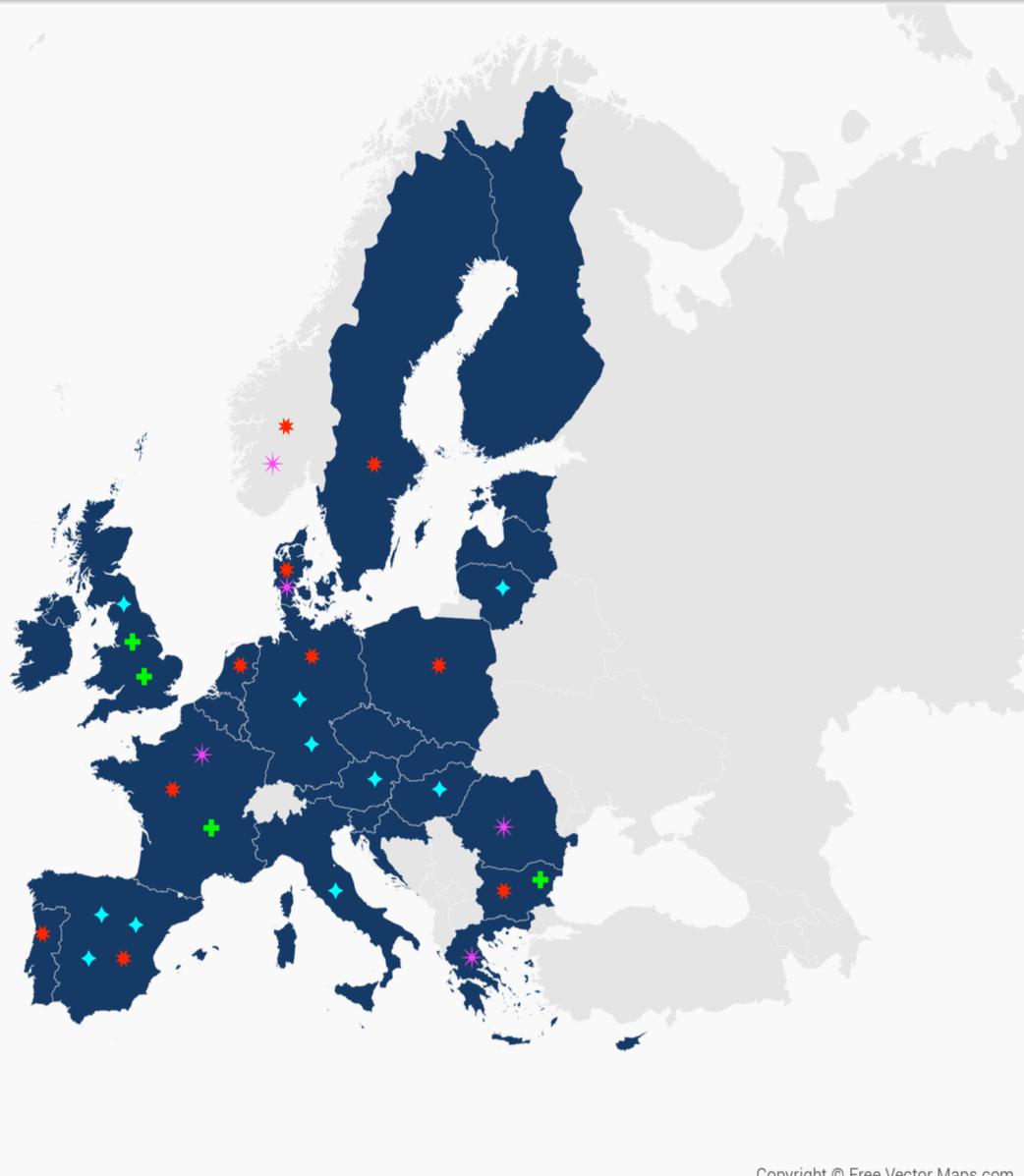
The more serious infringements could result in a **fine of up to €20 million, or 4% of the firm's worldwide annual revenue** from the preceding financial year, whichever amount is higher.



- all the violations that go against the very heart of GDPR:
- the basic principles for processing data;
  - the conditions for consent;
  - the data subjects' rights; the transfer of data to an international organization or a recipient in a third country.



- ◆ GDPR fines 50,000 - 100,000
- ✳️ GDPR fines 100,000 - 200,000
- ✳️ (red) GDPR fines 200,000 - 1,000,000
- ✳️ (green) GDPR fines > 1,000,000



**MAJOR GDPR  
ENFORCEMENT  
ACTIONS  
(as of September 2019)**



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8 July (UK)  
British Airways  
**€ 204,600,000**  
*(notice of intent)*

9 July (UK)  
Marriott  
International, Inc  
**€ 110,390,200**  
*(notice of intent)*

**€ 361,380,500**  
GDPR fines in  
2019

21 January (FR)  
Google, Inc  
**€ 50,000,000**  
*(imposed)*

28 August (BG)  
National  
Revenue Agency  
**€ 2,600,000**  
*(imposed)*



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## The insurability of GDPR fines in European countries

**INSURABLE**



Norway; Slovakia

**UNCLEAR**



Croatia; Czech Republic; Estonia; Germany; Greece;  
Hungary; Lithuania; Netherlands; Poland; Sweden

**UNINSURABLE**



Austria; Belgium; Bulgaria; Cyprus; Denmark; Finland;  
France; Ireland; Italy; Latvia; Luxembourg; Malta; Portugal;  
Romania; Slovenia; Spain; Switzerland; United Kingdom

The above is according to a publicly available publication by AON and DSLA issue in July 2019  
(<https://www.aon.com/unitedkingdom/insights/a-guide-to-the-insurability-of-gdpr-fine.jsp>)



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## The insurability of regulatory and administrative fines in the EU



In EU Member States administrative fines are generally (but not always) considered uninsurable...

In some cases, there is an express prohibition.  
For example:



- **ITALY:** pursuant to Section 12 of the Italian Insurance Code, coverage of *Sanzioni amministrative pecuniarie* is void;
- **SPAIN:** in respect of legal aid insurance, section 76(b) of the Spanish Insurance Contract Act expressly provides that the insurance shall not cover the payment of fines.

In other, coverage of fines has been considered as contrary to public policy



- such coverage would diminish the deterrent effect of the penalty;
- it could interfere with the effectiveness of the regulation.



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In some cases, providing coverage for administrative/regulatory fines and penalties might lead to **regulatory action** by the national authority:



(e.g.) **ITALY**: infringing the prohibition set by Section 12 of the Italian Insurance Code may expose the insurer to the application of a penalty ranging from 30,000 Euro to an amount equal to the 10% of the turnover of the insurer.



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## The insurability of regulatory and administrative fines: the view of Regulatory Authorities

-  **FINLAND:** on 16 October 2018 the Financial Supervisory Authority (FIN-FSA) stated that it is contrary to “*good insurance practice*” to provide insurance against a risk where the insurance might encourage actors’ indifference to regulatory compliance and compromise actors’ obligation to comply with the respective regulations.
-  **SPAIN:** in 2008, the Spanish General Directorate of Insurance and Pension Funds declared that the coverage of fines and penalties for criminal and administrative liability would be forbidden, since it would contradict public policy. Said argument was based on the potential reduction of the punitive effect of fines and penalties in case their effects are insured and, therefore, assumed by a third party.
-  **UK:** in 2003, the FSA prohibited any authorised person from entering into, arranging, claiming on or making a payment under a contract of insurance that indemnifies any person against all or part of a financial penalty imposed by the FSA.



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## ...and UK caselaw



House of Lord, ***Gray v Thames Trains***  
[2009] 1 A.C. 1339

In the context of a criminal wrong (manslaughter), according to Lord Hoffman's opinion, a person "cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage".



Court of Appeal in ***Safeway v Twigger***  
[2011] 2 All ER 841

Regarding fines imposed for breaches of the Competition Act 1998, according to LJ Pill's opinion, "the policy of the statute [i.e. ex turpi causa argument] would be undermined if undertakings were able to pass on the liability to their employees or the employees' D&O insurers... A deterrent effect is contemplated and the obligation to provide effective preventative measures is upon the undertaking itself."



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## The insurability of criminal and punitive fines and penalties



**Criminal or punitive fines have long been considered uninsurable for public policy reasons. For instance:**



**UK:** according to the legal doctrine of *ex turpi causa*, it is not possible to recover from a loss which results from one's own wrongdoing



**ITALY:** pursuant to section 1343 of Civil Code a contract that is against public policy is void



**PORTUGAL:** article 14 of the Law of Insurance Contracts prohibits insurance coverage of criminal liability



**Recital n. 148 of GDPR:** *Member States should be able to lay down the rules on criminal penalties for infringements of this Regulation, including for infringements of national rules adopted pursuant to and within the limits of this Regulation. Those criminal penalties may also allow for the deprivation of the profits obtained through infringements of this Regulation. However, the imposition of criminal penalties for infringements of such national rules and of administrative penalties should not lead to a breach of the principle of ne bis in idem, as interpreted by the Court of Justice.*



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## Are (GDPR) fines insurable?



The issue of whether (and to what extent) such fines are insurable is of high importance in the insurance market.



In **January 2019** the Global Federation of Insurance Associations (GFIA) called for clarity from the Organisation for Economic Cooperation and Development (**OECD**) regarding the insurability of fines and penalties: “*there is international confusion as to the insurability of fines and penalties. OECD work to clarify this issue would benefit consumer and insurer contract certainty*»



There is an appetite in the market, amongst Insurers for (cautiously and reasonably) insuring GDPR and similar fines when this is possible, especially as a complement to Cyber Risk Policies. Clauses allowing coverage of fines on the basis of the “most favourable jurisdiction” or of those fines which are insurable in the jurisdiction where they are issued are testament to this attitude



**Having said that, it remains true that GDPR (and similar) Fines remain mostly uninsurable in the EU.... but: Is there room for reconsideration, changes or developments?**



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## An extensive interpretation of the UK “*ex turpi causa*” doctrine ?



**Intentional wrongdoings**: fines or penalties based on intentional or wilful conduct are not insurable, whatever the type of fine, and are likely to be excluded by policy provisions in relation to fraud/dishonesty.



**Strict liability**: since the “*ex turpi causa*” doctrine requires the insured’s conduct to involve an element of “*moral turpitude or moral reprehensibility*”, where a fine is imposed on a strict liability basis, one can argue that such doctrine cannot be applied in the relevant case and therefore that such fines might be insurable.



**Negligence**: fines imposed for negligent conduct might be insurable as long as the insured’s negligent conduct does not reach the level of “*moral turpitude*” that triggers the illegality defence.



In *Sainsbury’s Supermarkets Ltd v MasterCard Inc and ors* (2016), the UK Competition Appeal Tribunal held that, “*whether an infringement of competition law can trigger an illegality defence depends upon whether that infringement is an “innocent” one (in which case, we consider it cannot) or a “negligent” or “deliberate” one (in which case it may do).*”



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## coverage for the “indirect” financial loss



In some cases, it could be argued that coverage could be provided for the “indirect” financial loss connected to the application of administrative/regulatory fines. For example, in Italy it is generally admitted that:



a party, who is not directly fined but is jointly liable with the infringer for the payment of a pecuniary sanction, may validly undertake insurance against the risk that the infringer becomes insolvent and unable to pay the sum due following the recovery/subrogation by the insured;



in circumstances where the law provides that the individual infringer’s liability for the fine is capped at a fraction of the fine itself (i.e. the infringer is allowed to pay only part of the entire amount of the fine), the relevant entity may remain jointly liable with the infringer for the payment of the entire, uncapped amount of the fine and is not actually entitled to recover against the infringer the amount exceeding the cap applicable to the infringer.



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## GDPR enforcement: the insurability of defence costs and investigative expenses

 It is generally admitted that the insurer could provide coverage for the “indirect” costs and expenses sustained by the insured in connection to a breach of GDPR provisions, such as :



investigation costs;



claims by third parties for the consequences of breach;



defense costs;



mitigation costs (such as public relations expenses).



There are however some limitations: such costs in fact are likely to be insurable if the insured has intentionally breached the GDPR.



**LITHUANIA:** such costs are insurable only if the loss covered by policy is caused by circumstances beyond the control of the insured.

# Thank you

Questions?

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