



INSOL International

The General Data Protection Regulation in Practice – A Global Survey

September 2019

INSOL SPECIAL REPORT

The General Data Protection Regulation (GDPR) in Practice - A Global Survey

Contents	i
Acknowledgement	ii
1. Introduction	1
2. GDPR issues in insolvency	2
2.1 Status of appointment takers	3
2.2 Justification for data processing	3
2.3 Data security	3
3. Survey	3
3.1 Location of respondents	3
3.2 GDPR awareness	4
3.3 Is the GDPR a strategic consideration?	4
3.4 GDPR issues encountered on appointment	5
3.5 Impact on the outcome for creditors	6
3.6 Changes made to local procedures in response to the GDPR	6
4. What do the results tell us?	7
4.1 Awareness	7
4.2 Levels of compliance	7
4.3 Extra - territorial effect	7
4.4 Types of cases	7
4.5 Extent of regime change	8
4.6 Recent implementation	8

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Acknowledgement

INSOL International is pleased to present a Special Report titled, “The General Data Protection Regulation (GDPR) in Practice – A Global Survey” by Ben Jones and Sophie Taylor of Bryan Cave Leighton Paisner, United Kingdom.

The European Union’s GDPR came into force on 25 May 2018. The GDPR has impacted on restructuring and insolvency cases both within the EU and Worldwide. The provisions of the GDPR do not exempt companies in formal insolvency proceedings thus requiring these companies to deal with compliance matters at a time of financial distress.

This paper provides a good overview of the new GDPR provisions that apply to insolvent companies and their office holders and explores the effectiveness of GDPR in the EU and non-EU countries. As part of the research that was done to write this report, INSOL carried out a survey to collate views from its members as to awareness of the GDPR, levels of compliance, extent of regime changes and the extra-territorial effect. Readers will see that the responses are varied and interesting.

INSOL International sincerely thanks Ben Jones and Sophie Taylor for their continued interest and efforts over several months to formulate the survey questions, analyse the responses and write this excellent report.

September 2019

The General Data Protection Regulation (GDPR) in Practice – A Global Survey

By Ben Jones* & Sophie Taylor
Bryan Cave Leighton Paisner, United Kingdom**

1. Introduction

The General Data Protection Regulation (GDPR) came into force on 25 May 2018 and is directly applicable in all European Union (EU) member states without the need for further domestic legislation. EU member states are, however, permitted by the GDPR to pass domestic legislation in certain specific areas.

The GDPR encapsulates the EU's response to the increasingly prevalent question of how data is collected, stored and used by organisations. Grabbing the headlines has been (1) maximum fines of the greater of €20 million or 4% of annual global turnover and (2) the potential global reach of GDPR.

Unlike the EU data protection regime it replaced, the GDPR is intended to apply extra-territorially. It not only applies to controllers and processors with an establishment in the EU, but also to those with no physical presence within the EU if they either (1) offer goods and services to individuals in the EU, or (2) monitor the behaviour of individuals in the EU.

Other key changes include:

- Mandatory reporting of data breaches within 72 hours.
- Stricter rules on obtaining consent.
- Additional rights for individuals, such as the right to be forgotten.
- Limited, but direct regulatory obligations on processors.
- A parental consent requirement when offering information society services directly to a child under the age of 16 years (or 13 years if lowered by the relevant member state).
- A lead data protection regulator for pan-European businesses in the EU member state where they have their place of central administration.

Key definitions

Data subject

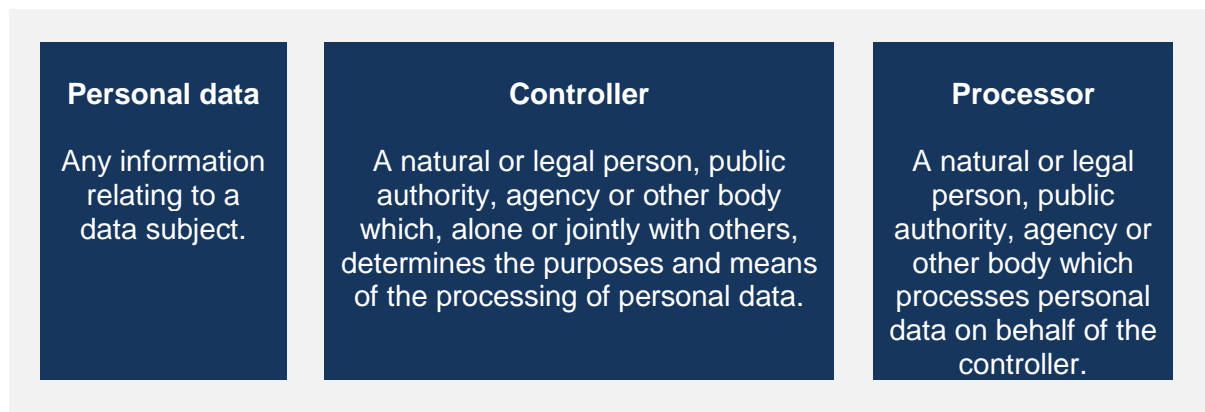
An identified or identifiable natural person. An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

Processing

Any operation or set of operations which is performed on personal data or sets of personal data, whether or not by automated means. This is very widely defined and includes processes such as collection, recording, organisation, storage, alteration, use, dissemination or destruction of data.

* The views expressed in this report are the views of the authors and not of INSOL International, London.

** The authors would like to thank Stuart Wesley and Louise Hales of PwC, David Zetoon and Kate Brimsted of Bryan Cave Leighton Paisner and Kim Lucassen of Loyens and Loeff N.V. for their assistance with this project.



The GDPR sets out a series of data protection principles which controllers shall be responsible for and must be able to demonstrate compliance with. Personal data must be:

- processed lawfully, fairly and in a transparent manner,
- collected for specified, explicit and legitimate purposes,
- adequate, relevant and limited to what is necessary,
- accurate and, where necessary, kept up to date,
- kept for no longer than is necessary, and
- processed in a manner that ensures appropriate security of the personal data.

In addition to these principles, processing will only be lawful if the data subject has consented, or if processing is necessary:

- for the performance of a contract to which the data subject is party, or in order to take steps at the request of the data subject prior to entering into a contract,
- to comply with a legal obligation to which the controller is subject,
- to protect the vital interests of the data subject or another natural person,
- for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, or
- for the legitimate interests of the controller or a third party, except where overridden by the interests or rights and freedoms of the data subject.

There are additional protections for certain special categories of personal data such as racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, medical records or sexual orientation. Criminal conviction data is also subject to additional protection.

2. GDPR issues in insolvency

The GDPR does not carve - out or exempt businesses facing financial difficulty or in formal insolvency proceedings. As a result, the provisions of the GDPR apply to an insolvent company and any appointment taker in formal insolvency proceedings. This can be challenging at a time when the business has limited resources to put towards compliance with the GDPR.

2.1 Status of appointment takers

Insolvency professionals will need to consider carefully whether they could personally be categorised as controllers and / or processors. When appointment takers assume control of the business on a formal insolvency appointment, this is a particularly important issue as they will assume all the multiple categories of data of the insolvent business, including its books and records, client list and employee records. The appointment taker will also collect data during the course of the insolvency appointment such as information about the directors and the creditors.

2.2 Justification for data processing

Insolvency professionals who identify themselves as controllers distinct from the company must ensure that they have the right to process personal data. In the case of employment records, they may have to reach the higher threshold imposed on special category personal data. Relevant lawful grounds for handling personal data which is not 'special category' may include 'complying with a legal obligation' in conducting the formal insolvency appointment.

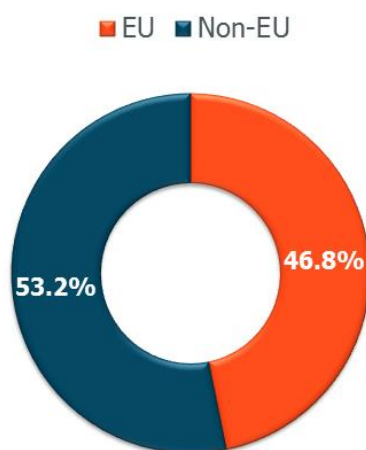
2.3 Data security

As more and more data are held by companies, so the security under which it is held and transmitted becomes of increasing significance. The various high - profile data breaches which have made the news over the past couple of years are a testimony to this. As such, the GDPR seeks to place greater control over how personal data is processed and stored. Technical and organisational measures must be implemented to ensure appropriate levels of data security are maintained, which may involve potentially significant costs to controllers and processors if their current systems are not sufficiently secure. If any processing operations present a specific privacy risk, a 'data protection impact assessment' may need to be undertaken.

3. Survey

We surveyed the INSOL International membership to canvas views and opinions on how the implementation of the GDPR was playing out in practice. Due to the extra - territorial reach of the GDPR, we did not limit the survey to members based within the EU. We received 295 responses.

3.1 Location of respondents




The location of respondents was relatively evenly divided, with 46.8% of respondents located in the EU and 53.2% outside the EU. The fact that we received such a good proportion of responses from respondents located outside the EU would appear to indicate that this is an important issue for practitioners worldwide.

The primary focus of our survey was to ascertain respondents' experience of, and views on, the GDPR. Where respondents indicated at the outset that they had not heard of the GDPR, we have removed their responses to the remaining questions. We refer to those results as 'non - EU (adjusted)' throughout this report.

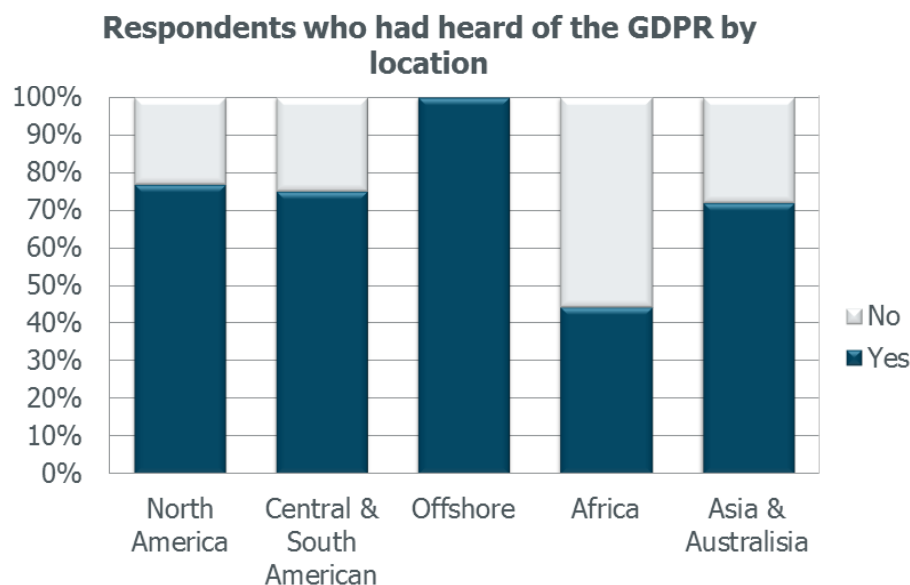
3.2 GDPR awareness

Our first question to non - EU respondents was to ascertain awareness of the GDPR. Overall, 30.1% of respondents located outside the EU had not heard of the GDPR. Whilst this headline figure is relatively high, it may not fully reflect the true position.

As members of INSOL International, our survey respondents will naturally have a cross - border focus that other practitioners may not benefit from. In addition to this, it is impossible to quantify how many respondents did not complete the survey at all because they had not heard of the GDPR. The true level of awareness may therefore be much lower.

 Overall, 30.1% of respondents located outside the EU had not heard of the GDPR 

Rates of awareness varied significantly depending on the respondent's location. There was 100% awareness of the GDPR in offshore jurisdictions, 76.9% in North America, 75% in Central and South America, 71.9% across Asia and Australasia and then dropping to 44.4% in Africa.



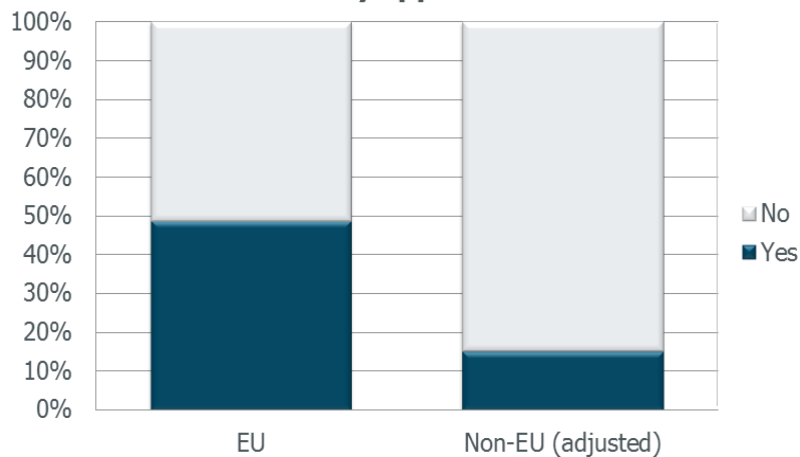
3.3 Is the GDPR a strategic consideration?

We asked respondents to consider whether the GDPR is a strategic consideration for both:

- (i) contingency planning before a formal insolvency appointment; and
- (ii) conducting a formal insolvency process.

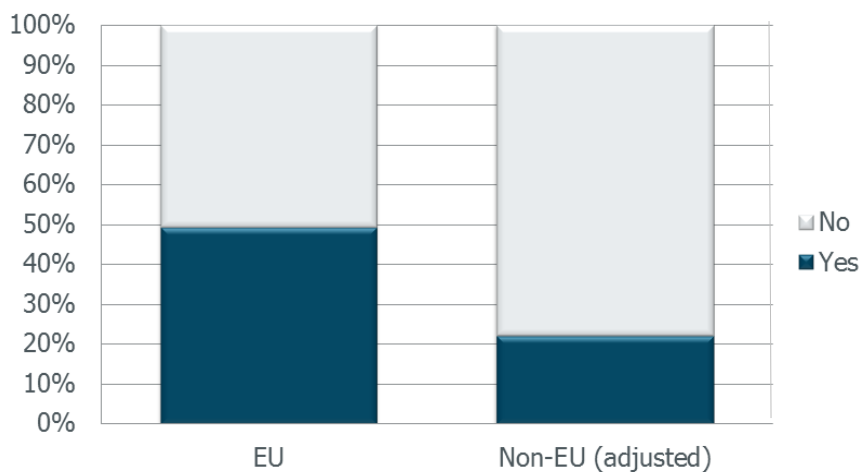
The responses for both of these questions were relatively similar. For EU respondents, 48.8% said that the GDPR is a strategic consideration when undertaking contingency planning ahead of a formal insolvency appointment. In comparison, only 15.4% of non - EU respondents felt the same.

Is the GDPR a strategic consideration for contingency planning before a formal insolvency appointment?



When considering whether the GDPR is a strategic consideration for conducting a formal insolvency process, 49.4% of EU respondents thought that it was in comparison to only 22.2% of non-EU respondents.

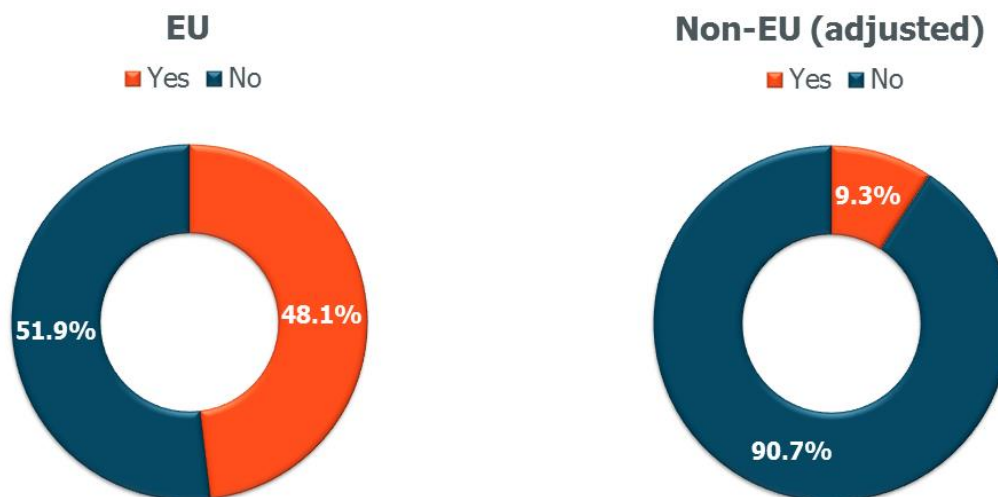
Is the GDPR a strategic consideration for conducting a formal insolvency appointment?



3.4 GDPR issues encountered on appointment

Taking it one step further, we asked respondents whether they had actually encountered GDPR issues on an appointment. Again, there was a significant difference between EU and non - EU respondents. 48.1% of EU respondents had experienced GDPR issues on a formal insolvency appointment compared to only 9.3% of non - EU respondents.

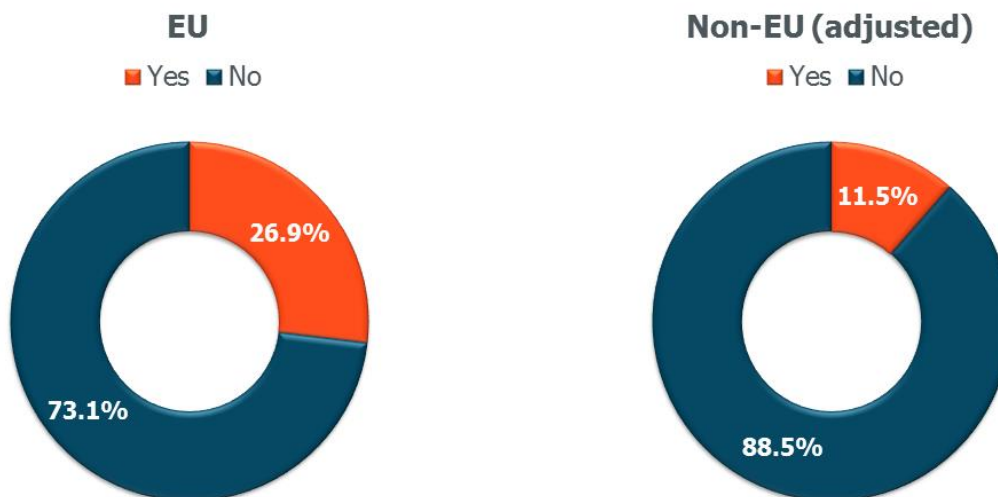
GDPR issues encountered on appointment



3.5 Impact on the outcome for creditors

We also asked respondents to comment on whether the GDPR was having a significant impact on the outcome for creditors. Within the EU, 26.9% of respondents felt that there was a significant impact compared to 73.1% who felt that there was not. In comparison only 9.3% of non - EU respondents thought that there was a significant impact on the outcome for creditors.

Impact on the outcome for creditors



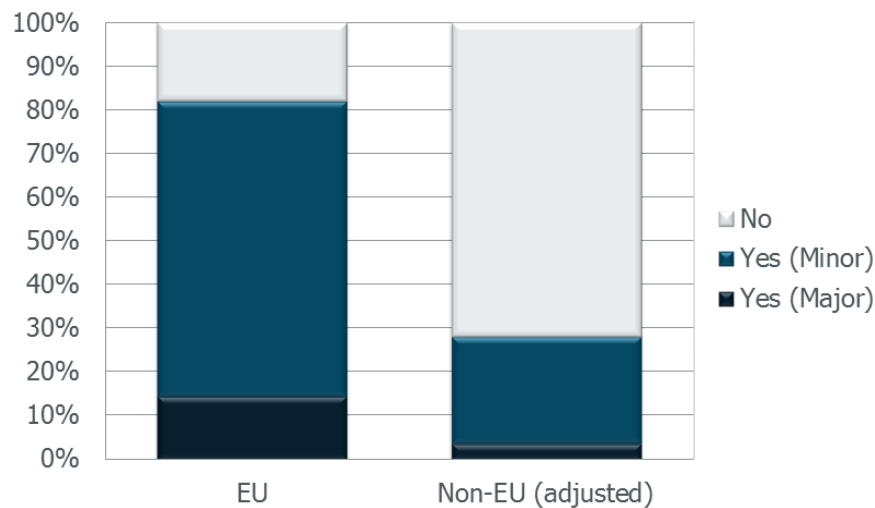
3.6 Changes made to local procedures in response to the GDPR

In our final question, we asked respondents whether they had changed their procedures in:

- a major way,
- a minor way, or
- not at all in response to the GDPR.

As can be seen from the graph below, a large majority of respondents within the EU have changed their procedures because of the GDPR – 14.5% in a major way and 67.5% in a minor way. Outside the EU the results are almost opposite with 71.7% of respondents stating that they had not made any changes in response to the GDPR.

Have you changed your procedures in response to the GDPR?



4. What do the results tell us?

There is a clear and consistent variance in the responses received from EU and non - EU respondents. A number of factors could explain this.

4.1 Awareness

Awareness of the GDPR may explain some of the difference. We have used the adjusted figure for non - EU respondents to eliminate those respondents who were unaware of the GDPR. However, even those who are aware of the GDPR may not yet fully appreciate its potential reach.

4.2 Levels of compliance

Linked to awareness is the level of compliance with the GDPR. We cannot accurately measure compliance on a global basis. However, anecdotal evidence from both in and outside the EU suggests that whilst multinational organisations tend to be compliant, smaller domestic businesses are reluctant to incur unnecessary costs to invest in compliance. Those businesses in the middle are generally adopting a risk - based approach to compliance.

4.3 Extra - territorial effect

Whilst the GDPR applies pervasively within the EU, it is only relevant outside the EU where the extra - territorial criteria apply. As a result, it is understandable that respondents perceive the impact of the GDPR to be less widespread outside the EU.

4.4 Types of cases

The extent to which data protection issues are relevant on a formal insolvency appointment will vary significantly depending on the nature of the business in question. Consider the position of a special purpose vehicle with no employees compared to a medical practice with extensive patient records. Given the relatively short period between the implementation of the GDPR and our survey, practitioners may not yet have encountered cases where data protection is a significant issue.

4.5 Extent of regime change

Whilst there has been significant press attention surrounding the GDPR, it is worth considering to what extent it has actually changed the data protection regime of individual countries. In the UK, for example, putting aside the headlines surrounding the increased fines and extra - territorial effect, many commentators have observed that the substantive regime has not materially changed.

If countries already have a robust data protection regime, it follows that the impact of the GDPR will be less significant.

4.6 Recent implementation

As alluded to above, there was a relatively short period between the implementation of the GDPR and our survey. It would be interesting to see whether the results change significantly if we repeat the survey in one, or even five, years' time.

The full impact of the GDPR remains to be seen. We have yet to see how the national supervisory authorities will approach enforcement, particularly against non - EU organisations. The approach taken is likely to shape levels of compliance going forward.



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