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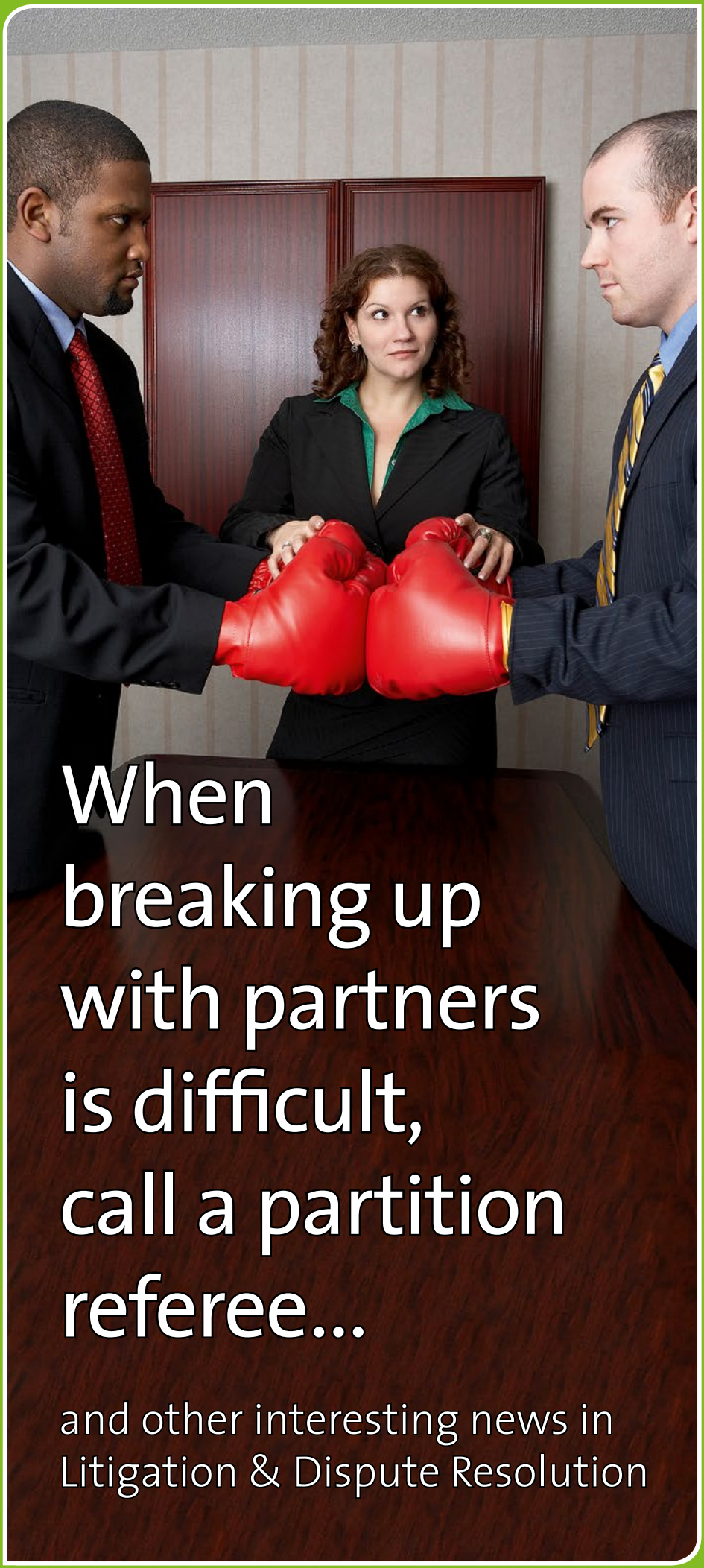

When breaking up with partners is difficult, call a partition referee...

and other interesting news in Litigation & Dispute Resolution

Newsletter
No. 07 | Winter 2017

Editorial

Dear Reader,

I have the great pleasure in presenting you with Issue No. 7 of our GGI Practice Group Litigation & Dispute Resolution Newsletter. It is packed with interesting articles on a wide variety of topics. They cover such different areas of law as the role of a partition referee in Californian property law, tips for successful mediation, the scope of informed consent under Italian medical law, criminal compliance in Spain, tax-related issues in connection with the sale of a partnership interest by a non-US partner, considerations on whether trademarks are worth registering, the new EU General Data Protection Regulation, issues relating to the UK Criminal Finances Act 2017, and, last but not least, a piece on security for costs by defendant in court proceedings in light of Article 6 of the ECHR. We are very thankful for the reliability and steadiness of support from our Practice Group members. It is due to your overwhelming resonance that we are again in the position to produce this newsletter.

I would like to encourage all PG members to spread the news amongst all other GGI members that our newsletter is a vibrant and colourful platform to present professional expertise to a broad readership of fellow professionals worldwide.

Our next PG meeting will be held at the GGI World Conference in Vienna, which takes place during 19-22 October 2017. Additionally, our PG will hold an extraordinary meeting during a three-day cruise from Miami to the Bahamas and back again during 3-6 November 2017 (see page 10 of the July issue of GGI INSIDER for details). I look forward to meeting you at one of these events, where we can discuss current legal topics in litigation and dispute resolution while enjoying the waltz-dancing in Vienna and/or the cruise to the Bahamas!

Dr Karl Friedrich Dumoulin
Global Vice Chairperson of the
GGI Litigation & Dispute Resolution
Practice Group

When breaking up with partners is difficult, call a partition referee

Part II
(Part I published in the Spring Issue)

By Byron Moldo

The referee should negotiate and make every effort to obtain the highest possible price on the best terms and should not necessarily accept any particular offer before trying to negotiate a higher price, unless the parties agree. It is also important that any final sale contract should specify that court confirmation is required of any sale, that overbidding may occur in court and that the property is sold in its asis condition. A referee should avoid making any representations or warranties regarding the condition of the property.

The referee must obtain Court approval of the sale and overbidding is

allowed. Overbids must be in writing and exceed the sales price by at least 10% of the first USD 10,000 of the offered price and by 5% of the balance.

The referee should advise all bidders that if a buyer fails to complete the sale, their deposit will be forfeited to the referee as damages. The referee's agreement to sell the property should also specify that the deposit forfeiture does not limit the damages the referee may recover.

After the sale or escrow has closed, the referee will file a report and request instructions regarding the distribution of funds. In the same report, the referee will request court approval of his fees and costs, exoneration of any bond posted and to be discharged. After the court has approved the referee's final report, has entered an order and the referee has performed all of the required tasks as directed by the court, the referee's job is complete.

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The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm or its clients. This article is for general information purposes and is not intended to be, nor should it be taken, as legal advice.

Tips for successful mediation

Part II
(Part I published in the Spring Issue)

By Anthony J. Soukenik

Try to reach an agreement with the other side and their counsel without the case collapsing. A good place to start is a mutually agreed roadmap of time and cost to bring the case to a final non-appealable conclusion and the ultimate discussion of collection of the judgment. If you are the defendant, commence your offers in instalments over time as opposed to lump sums as this subliminally arouses temporal anxiety on the other side. However, always be prepared to pay as much as possible in a discounted lump sum and the cost of mediation after the negotiations.

As a counsellor, your role is to never

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give up and to continue to find solutions. If the parties are at loggerheads, offer to meet with the other side's counsel; if that is not successful, invite the opposing counsel to meet with you privately. If this is still not successful, invite the mediator to a caucus. If you are still not successful, then encourage a well-rehearsed client to meet with the other side without attorneys and then begin the process of attorneys meeting with one another again and with the mediator. Continue to change up the process until a conclusion is reached and if still unsuccessful, ask the mediator to call a joint session to summarise the mutual ground and the range of damages. Always recognise that the mediation process can continue between the parties if not concluded at the end of your session.

As a final thought, always be conscious of your client's and your own nonverbal signs. Smile, keep your arms relaxed and unfolded, be firm in your posture and refrain from using the word 'never'. Maintain a 'yes' or a 'yes, but ...' attitude.

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The Effects of Insolvency on International Arbitration – the EU Perspective

By Matteo Zanotelli

The relationship between pending arbitral proceedings and the insolvency of one of the parties involved is a matter for study and discussion.

It is well known that where one party has been declared insolvent in a State other than the one where the arbitral proceedings are being held, a conflict of laws may occur and, as a consequence, the arbitral tribunal shall need to ascertain the effects of the insolvency on the pending arbitration.

The EU has issued a specific conflict rule, under art. 18 EC Reg. 848/2015 (former art. 15 Reg. 1346/2000) to uniformly regulate the issue: *'The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat'.*

Consequently, the Arbitral Tribunal shall verify the effect of one party's

insolvency on the pending arbitration according to the *lex arbitri* applicable, even if those rules differ from the corresponding rules, according to the *lex concursus*.

For example, it may be the case that, according to the applicable *lex concursus* rules, the arbitration would ordinarily have been suspended/terminated, but according to the insolvency law of the State where the Arbitral Tribunal sits (ex art. 18 EC Reg. 848/2015), the arbitral proceeding proceeds instead (see the leading case of *Elektrim v. Vivendi*).

As a further example, in a case recently handled by the author, the Arbitral Tribunal correctly applied the above mentioned EC Regulation and ordered a temporary suspension of the proceeding, with the possibility of resumption thereof, derogating from the otherwise applicable *lex concursus*.

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The Scope of Informed Consent Given by a Patient

By Laura A. Patti

This short contribution takes as its starting point an orthopaedic surgery, preceded by the correct information and consequently the informed consent by the patient, where the surgeon decided – in the middle of the procedure – to correct what in his eyes seemed a beauty imperfection, without obtaining the consent of the patient regarding this supplemental procedure.

In the absence, so far, of a specific regulation, the issue of informed consent is placed among the right, protected by the Italian Constitution (art. 32), of health and physical integrity – thus going beyond the idea that the absence of informed consent determines only a prejudice to the right of self-determination.

The Italian highest court has stated that when the patient's conditions change during the surgery, the surgeon will be held (criminally) liable for operating

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without a new informed consent – except in the event of an unpredictable negative development of the patient's condition. This principle is now contained in the draft for the first law in the Italian legal system about informed consent (now approved by the Chamber of deputies), where it is stated that, in emergency situations, the doctor and the staff members ensure all the necessary treatments, respecting the patient's determinations where his/her clinical conditions and the circumstances enable them to do so.

The mentioned orthopaedic surgery case will soon be placed on the trial calendar – but it is hardly likely that an alleged beauty imperfection will be allowed to go beyond the given informed consent.

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Criminal Compliance in Spain

Essential Issues that any Company Doing Business in Spain Should be Aware of

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GRUP VILAR RIBA is a multidisciplinary firm that provides legal services, tax and accounting services, auditing services and commercial consultancy services. The firm, that this year celebrates its 30th anniversary, has over a hundred and twenty members, distributed in three offices in Spain: Barcelona, Vic and Puigcerdà.

Jordi Pallarès is a Partner of GRUP VILAR RIBA, and head of the firm's Litigation and Criminal Law departments, as well as the Private International Law department. He has broad professional experience. He has acted as an arbitrator and is also officially qualified as a mediator and bankruptcy receiver.

GRUP VILAR RIBA

By Jordi Pallarès

What is a Criminal Compliance Programme? – A Criminal Compliance Programme is a tailor-made plan that seeks to identify situations that generate a risk of commission of criminal offenses and to prevent the commission of such criminal offenses both by the company itself and by its individual members.

The four steps for implementing a Criminal Compliance Programme – The first step is to carry out a Due Diligence of the company from a criminal perspective to identify and evaluate the situations or areas where the risk of commission of criminal offenses is potentially higher.

The second step is to adopt measures to amend any identified organisational defaults and to establish policies

governing the behaviour of the members of the company (through a high-policy document - the Ethical Code - complemented by specific-policy documents - Protocols and Procedures).

The third step is to inform all the members of the company of those regulations and of their obligation to abide by them.

The fourth step is to appoint a criminal compliance officer with the authority and resources to ensure that the Criminal Compliance Programme is fulfilled and kept updated.

Is it compulsory to implement a Criminal Compliance Programme? – Currently no legal provision enforces its implementation. However, if a criminal offense is committed, both the company and its directors might be held liable if the Court concludes that the criminal offense could have been prevented if a Criminal Compliance Programme had been implemented.

New criminal offences with an international reach

The UK's Tax Evasion Crackdown

By Ryan Lynch

On 30 September 2017, broad new laws came into force in the UK which make businesses criminally liable where parties associated with them, such as employees and agents, facilitate tax evasion.

The Criminal Finances Act 2017 includes two new criminal offences which allow firms to be prosecuted for 'failure to prevent facilitation of tax evasion'. A firm can therefore commit an offence even if it had no knowledge of the relevant tax evasion, with potential consequences including an unlimited fine, restrictions on its business and reputational damage.

A defence will, however, be available where 'reasonable' procedures are in place, designed to prevent a firm's associated parties facilitating tax evasion.

The new legislation applies to both UK and non-UK firms and extends to acts concerning taxes due to any country, not just the UK. It is therefore highly relevant to businesses worldwide.

Given this increased risk of criminal prosecution for a broad range of UK and international firms, particularly providers of professional services, many have been assessing their level of risk and the steps they can take to have a possible defence if they face prosecution.

The UK Government's draft Guidance makes it clear there is no one-size-fits-all approach. Each firm has to assess its own level of risk and implement procedures appropriate to its business.

Firms should undertake this work as soon as possible, so they have a possible defence if they become targets for prosecution in the future.

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Ryan Lynch is a Senior Associate in Memery Crystal's Dispute Resolution Team. Ryan acts on a variety of commercial disputes and is currently advising a number of UK and international clients in relation to their potential exposure to criminal prosecution under the Criminal Finances Act 2017.

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Trademarks: Are They Worth Registering?

By David Greber

Businesses often use trademarks or service marks to market products or services that they offer. How do these businesses avoid being sued for infringing other 'marks' and prevent other businesses from using confusingly similar marks? By performing trademark searches and registering the trademarks with the US Patent and Trademark Office and by demanding that infringers stop. Trademark rights are acquired primarily by actually using a trademark, not by registering it. Generally, the first business to use a trademark has priority in enforcing the exclusive use of the mark in its geographic market; federal registration adds national protection. A trademark search should include a search of the Internet, state incorporation databases, Internet domain names, state trademark registration databases and trade publications. A complete search usually requires a professional trademark search firm with access to all of the most commonly used databases and the knowledge to formulate appropriate search queries to find confusingly similar marks.

Defensively, businesses want to minimise the likelihood of their own infringement. Offensively, businesses may want to demand that newcomers 'cease and desist' from using confusingly similar marks. Trademarks can be either assets or liabilities. Trademark searches and registration can both avoid business liability and create a valuable business asset.

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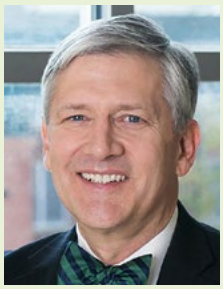

David Greber

Offit Kurman, Attorneys at Law is a dynamic, full-service law firm. We are our clients' most trusted legal advisors, and help them maximise and protect their business value and individual wealth. In every interaction, we consistently strive to maintain our clients' trust and help them achieve their goals.

David Greber's extensive business law experience includes representation of companies and corporations in all stages of their business life-cycle, from initial founding, through growth and expansion, to sale. His intellectual property law background includes the registration and protection of copyrights, trademarks and trade secrets, and litigation of intellectual property infringement cases. David also holds the CIPP/US privacy law certification from the International Association of Privacy Professionals.

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Sale of a Partnership Interest by a Non-US Partner

Tax courts find Rev. Rul. 91-32 is not based on Law

By Stanley C. Ruchelman

The IRS has a long history of misapplying US tax rules applicable to a sale of a partnership interest. For US tax purposes, a partnership interest is treated as an asset separate and apart from an indirect interest in partnership assets. However, in Rev. Rul. 91-32, the IRS claimed that foreign partners in partnerships operating in the US (including foreign members of LLCs) are properly taxed on their capital gains under a look-thru rule to the assets owned by the partnership – with little justification other than an acknowledgement that any other approach would prevent the IRS from the collecting of tax.

It was widely held that the IRS position was incorrect – principally, in light of specific provisions of the Internal Revenue Code and case law. However, in field advice to an agent setting up an adjustment, the IRS publicly stated that the ruling was a proper application of US law when issued and remains so today. The adjustment was then challenged in Grecian Magnesite Mining, Industrial & Shipping Co., SA v. Commr. Grecian Magnesite languished in the courts for three years. Then, on 13 July, the US Tax Court finally afforded Rev. Rul. 91-32 the deference it deserved in light of the absence of any cogent rationale in the ruling – no rationale, no deference. In summary, the Tax Court confirmed that Rev. Rul. 91-32 was not based on law. Rather, it was based on administrative wishes.

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ruchelman

The Continuing Value of the Joint Session in ADR

By Leslie A. Berkoff

Traditionally, most mediations began with a joint session and no lawyers were involved in the process. The joint session allowed the mediator to set the tone for, and explain, the process. Overtime, lawyers began to be retained by the parties and the process became a precursor to litigation or a stop along the path to the courthouse. The dynamic changed; frequently the joint session evolved into quasi-litigation where the lawyers postured and argued their case, the clients did not talk but rather became more entrenched in their positions and the mediator became a referee. In recent years, some

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advocates have requested, and some mediators have decided, to dispense with the use of the joint session. While there are indeed times that a joint session should be skipped (for example when the exchange of vitriol or threatening messages will lead to a breakdown in communications and the overall settlement process), it is still a valuable tool that should not be automatically pushed aside. Remember, mediation is a client driven process and its gives the clients a chance to create a solution that meets both of their needs in a different manner to Court proceedings. Most importantly, it may be the only time clients get to speak to each other directly or speak at all without the constraints and limits of testimony at deposition or trial. So from this mediator's perspective, the session should be utilised judiciously, and when it is - lawyers, please encourage and prepare your clients to speak!

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England and Wales: Might Ordering Security for Costs Breach Article 6 of the ECHR?

By Peter Hornsey

Where a defendant ('D') to an action suspects that a claimant will not, or cannot, pay the costs of the litigation in the event D successfully defends a claim, D may apply to the Court for an order for security for costs. When made, the order typically requires the claimant ('C') to pay money into the Court before the claim proceeds, in order to secure D's position.

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The courts may refuse to order such security if they consider it inappropriate to do so, but additionally, this power may also infringe C's access to the Courts and the right to a fair and public hearing under Article 6 of the European Convention on Human Rights.

In Tolstoy Miloslavsky v United Kingdom, the European Court of Human Rights considered this very issue. Tolstoy had been ordered to pay very substantial compensation to the claimant, for libel. His appeal was made conditional on his payment of a significant sum as security for costs of the appeal. Tolstoy could not pay, so claimed a breach of Article 6.

The Court ruled that Tolstoy had had several fair court hearings; his appeal had no real prospect of success; and the security for costs jurisdiction fulfilled legitimate aims of protecting those who win such cases. There had been no breach of Article 6.

Therefore, adherence to traditional concepts of 'natural justice' makes a finding that such an order contravenes Article 6 unlikely. However, the Court did state that Article 6 may be breached if an order for security denied a party access to a Court of first instance.

Global Reach of the General Data Protection Regulation

By Michiel Teekens

Ever since the Court of Justice declared the Safe Harbour Principles invalid (Maximillian Schrems/Data Protection Commissioner, Judgment in Case C-362/14) transatlantic data transfers have formally been compromised. In short, it is extremely uncertain if cross-border data transfers from the EU to the US can actually be compliant with the relevant EU regulations. The EU-US privacy shield should have brought some relief, but critics claim it won't hold before the Court of Justice. Recent developments, such as President Donald Trump's controversial travel ban which includes an attempt to exclude privacy protection for refugees and immigrants (Sec 14, Executive Order: Enhancing Public Safety in the Interior of the United States, January 25, 2017), fuels that criticism.

The EU is also moving forward on its own in another direction with the General Data Protection Regulation (EU) 2016/679 (GDPR) which replaces the Directive on the protection of individuals with regard to the processing of personal data (95/46/EC). The GDPR applies to controllers and processors established in the EU, but also to non-EU controllers and processors who target or monitor EU data subjects. Therefore the scope and effects of the GDPR are global and can also apply to US companies and organisations. The GDPR contains an elaborate legal system for data protection, such as data subject consent, profiling limitations, data anonymisation, breach notification, trans-border data transfer requirements and the mandatory appointment of data protection officers, to name a few. Penalties are severe. The GDPR authorises regulators to levy substantial fines in amounts exceeding EUR 20 million or 4% of annual global turnover. For GGI members, the GDPR is a huge opportunity to seek cross-border opportunities to provide tailor-made services for their clients.

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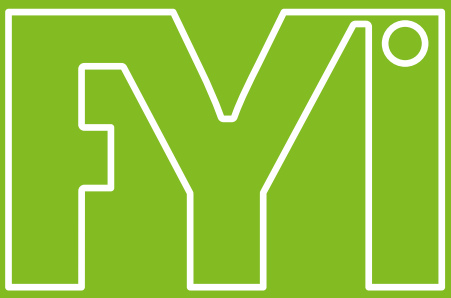

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