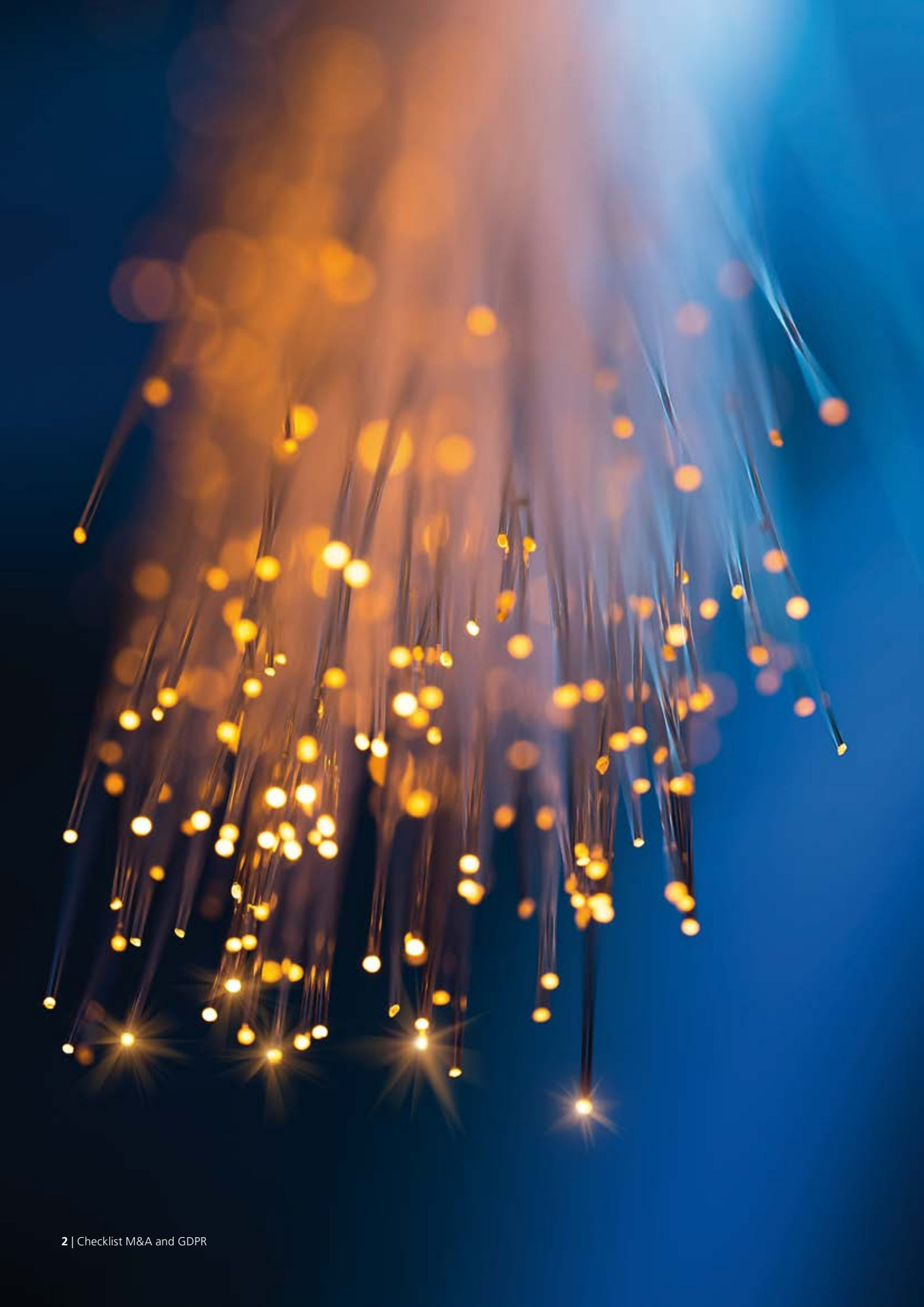


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Checklist M&A and GDPR



Checklist M&A and GDPR

The scope of the EU General Data Protection Regulation (GDPR) extends to M&A transactions. Sanctions for infringements of data protection rules include, amongst others, a fine of up to EUR 20 million or 4% of worldwide annual turnover. For compliance reasons, it is important to consider data protection requirements as early as possible in the M&A process and to ensure the relevant documentation is in place so as to exclude, or at least minimise, the risk of liability.

Early in the preliminary stages of any M&A transaction, it is generally recommended that clients extend their data protection statements to cover the transfer of personal data to third parties in connection with a disposal of assets, restructuring, merger or sale (“extension of declaration of purpose”). In addition, legal advisers should ensure that rules governing internal data transfer and processing are in place (“data processing agreements”).

The following checklist helps to ensure that the M&A process complies with data protection rules. However, it is not a substitute for specific professional advice. It is important that a professional evaluation and weighting of the requisite individual measures is undertaken and documented. Simply carrying out the actions listed below will not, on its own, result in full compliance and implementation of the GDPR’s requirements. Furthermore, it is necessary to identify the specific role and responsibilities of every person involved in the M&A process (sellers, buyers, advisers, service providers) within the meaning of the GDPR, in order to ensure that the obligations relating to the handling of personal data are determined precisely and complied with.

As an alternative to providing data in a data room, the seller can instead carry out a vendor due diligence and compile a legal fact book, in which the relevant information is provided in a data protection compliant manner.

The following definitions are provided to aid your understanding of the checklist:

“Personal data”

Personal data within the meaning of the GDPR includes any information relating to 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, an identification number, location data, an online identifier or to one or more factors specific to the physical, psychological, genetic, mental, economic, cultural or social identity of that natural person. Accordingly, personal data includes simple personal email addresses or telephone numbers.

“Anonymisation”

Anonymisation within the meaning of the GDPR is the alteration of personal data in such a manner that the individual information about personal or factual circumstances can no longer or only with a disproportionately high effort in time, costs and labour be attributed to a specific or determinable natural person.

“Pseudonymisation”

Pseudonymisation within the meaning of the GDPR is the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person.

Continuous

Documentation of compliance with data protection requirements and weighting of interests, in particular weighting of the legitimate interests of the controller (legal/economic/ideal interest in transferring the data) against the interests or fundamental rights and freedoms of the data subjects which require protection of personal data (Art. 6(1)(f) GDPR).

Compilation of data for inclusion in the data room

Compile due diligence documents and identify the relevant data to be provided to bidders/interested parties in the course of the due diligence process.

Ascertain whether each data subject affected by the transfer of personal data has previously provided an effective and valid consent to the data processing for the purposes of the transaction or consent can be obtained. The date of any existing consent also needs to be ascertained.

Consider whether it is necessary to inform data subjects of the further purposes for which their personal data is now being processed (Art. 13(3) GDPR).

Evaluate personal data and ascertain the individual identifiers in respect of each data subject (in particular, consider employee-, supplier- and customer data. Legal persons' data is not included).

Identify the type of personal data involved (special categories of personal data such as data regarding health, sexual orientation, political/religious beliefs, etc. may not be disclosed; as regards other types of personal data, a weighting of interests must be carried out based on the sensitivity of the personal data on the one hand and the necessity of disclosure on the other hand).

Consider whether it is appropriate to liaise with the relevant state data protection authority.

Anonymise all personal data, i.e. through definitive deletion of all identifiers (e.g. with the support of CMS Smart Operations and Legal Tech).

Pseudonymise all personal data i.e. through redacting (e.g. with the support of CMS Smart Operations and Legal Tech).

Aggregate personal data, e.g. through the use of statistical average values for different data groups (e.g. with the support of CMS Smart Operations and Legal Tech).

Confidentiality Agreement

| | | |
|---|--------------------------|--------------------------|
| Does the Confidentiality Agreement include rules governing the handling of personal data (obligation to encrypt the data provided/ delete or return it at the end of the transaction and corresponding guarantees)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Does the Confidentiality Agreement include obligations on the buyer to use the personal data solely for the agreed purposes and to comply with all data protection requirements? | <input type="checkbox"/> | <input type="checkbox"/> |
| Does the Confidentiality Agreement sanction data protection infringements with contractual penalties? | <input type="checkbox"/> | <input type="checkbox"/> |
| Does the Confidentiality Agreement include specific rules, in particular the standard contractual clauses issued by the EU Commission on the processing of data in countries outside the EU where the level of data protection is not deemed to be sufficient by the EU (ensuring an appropriate level of data protection)? | <input type="checkbox"/> | <input type="checkbox"/> |

Data room

| | | |
|---|--------------------------|--------------------------|
| Has submitted data been anonymised, pseudonymised or aggregated (see above)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has a data processing agreement in accordance with Art. 28 of the GDPR been concluded with the provider/operator of the data room (if this is the case, non-redacted documents can be provided to the provider/operator for processing and administration)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has the capability of data room users been limited to viewing (without the ability to print or save personal data)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Should a "red data room" be set up to contain the relevant personal data, to which only a limited number of people have access? Is there an obligation to report on an anonymised, aggregated basis? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has the seller provided information to the data subjects by the due diligence process in compliance with confidentiality obligations and other legal and contractual obligations? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has the buyer provided information to the data subjects during the due diligence process in compliance with confidentiality obligations and other statutory and contractual obligations? | <input type="checkbox"/> | <input type="checkbox"/> |

Signing

| | | |
|---|--------------------------|--------------------------|
| Has the seller provided information to the data subjects at Signing (information letter)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has the buyer provided information to the data subjects at Signing (information letter)? ¹ | <input type="checkbox"/> | <input type="checkbox"/> |

¹ Information letters to the personnel of the target company, suppliers and customers in respect of the transfer of data do not have retrospective effect from the time when the transfer of data occurred, and can therefore be too late in individual cases. Nevertheless, as a minimum, information letters should be provided at this point in time.

Closing

| | | |
|--|--------------------------|--------------------------|
| Transfer of personal data. | <input type="checkbox"/> | <input type="checkbox"/> |
| <ul style="list-style-type: none"> — Asset Deal: Transfer of personal data is usually permitted, insofar as this is necessary for the continuation of the business (in particular, the continuation of business relationships by application of § 613a of the German Civil Code). — Share Deal: Usually, no transfer of personal data is necessary, since there is no change of parties to contracts with personnel, customers or suppliers. — Reorganisations: In the case of a merger or other form of universal succession which does not involve any act of transfer contemplated by data protection laws, there is no transfer of personal data. | | |
| Has the seller provided information to the data subjects at Closing (in case of an asset deal, such information should ideally be provided in the form of an employee information letter or in the context of a consent of the suppliers or customers regarding the transfer of contract)? | <input type="checkbox"/> | <input type="checkbox"/> |
| Has the buyer provided information to the data subjects at Closing (in case of an asset deal, such information should ideally be provided in the form of an employee information or in the context of a consent of the suppliers or customers regarding the transfer of contract)? | <input type="checkbox"/> | <input type="checkbox"/> |

Post-Closing

| | | |
|---|--------------------------|--------------------------|
| Has the buyer put in place new data protection statements, data processing agreements and declarations of consent in forms appropriate to the nature and activities of its own corporate group? | <input type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|



If you are interested in more information, please contact our team at contact@cms-hs.com





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