

## Marriott's £99m fine - lessons for M&A

15 July 2019

### Summary

Marriott announced on 9 July that the UK Information Commissioner intends to fine it £99m. This relates to a cyber attack on a subsidiary, which started before it was acquired by Marriott. The ICO criticised the due diligence that was undertaken at the time of the acquisition.

As discussed at our recent M&A Perspectives Forum, a recent survey showed that 95% of large businesses consider cyber risk a high priority. This is not, however, always reflected in their approach to M&A. The Marriott fine has therefore brought cyber and data risks in M&A into even sharper focus.

### Facts

A variety of personal data contained in approximately 339 million guest records globally were exposed by the cyber incident, of which around 30 million related to residents of 31 countries in the European Economic Area. Seven million related to UK residents.

The ICO's investigation found that Marriott failed to undertake sufficient due diligence when it bought Starwood and should also have done more to secure its systems.

#### Elizabeth Denham, Information Commissioner:

*"The GDPR makes it clear that organisations must be accountable for the personal data they hold. This can include carrying out proper due diligence when making a corporate acquisition, and putting in place proper accountability measures to assess not only what personal data has been acquired, but also how it is protected."*

No further information on Marriott's perceived failings is available at this point as the ICO's Notice of Intention to bring enforcement action is not public. More detail on these failings will be included in the ICO's Enforcement Notice which will be published after Marriott's representations have been considered. We envisage this will likely be available in the Autumn.

### Timeline

2014	AN INTRUDER ACCESSED STARWOOD'S CUSTOMER SYSTEMS
2016	MARRIOTT ACQUIRED STARWOOD
2018	DISCOVERY OF CYBER ATTACK - CUSTOMER DATA STARTS TO APPEAR ON THE DARK WEB
9 JULY 2019	MARRIOTT ANNOUNCED THE ICO'S INTENTION TO LEVY A £99M FINE

## Learnings for due diligence

We had already seen a marked increase in the extent of data privacy due diligence post the GDPR and we can expect this fine to lead to increased focus on IT security arrangements.

Some suggested actions for your next M&A due diligence exercise are:

- Investigate the governance arrangements eg how often does the CISO and DPO report to the board, is there a board member with particular skills (or responsibilities) in these areas?;
- Don't just rely on documents - asking questions of management can often unearth what happens on the ground;
- IT diligence should cover at least the areas for on-boarding suppliers eg how often is pen testing done, what were the results, what certifications do they have?
- Consider engaging IT security specialists to undertake diligence on the target. Maybe undertake your own testing.

*Slaughter and May advises on all aspects of cyber, data protection and privacy. If you would like further information, please contact Rebecca Cousin or Victoria MacDuff or your usual Slaughter and May advisor. Further publications are available on our [website](#).*



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## Protections if the worst does happen ...

But what if you don't discover an issue until after exchange (or later)?

- What contractual protections would you want to cover the liability? Warranties, indemnities?
- If a material issue was discovered between exchange and completion, would you want a break right? What about a price adjustment? What about involvement in discussions with regulators etc?
- Does the target have cyber insurance?

## Approach to risk

There is always risk in M&A, but it should be a conscious decision to take on the risk on an informed basis. Therefore ensure that you have a plan to deal with cyber and data risk in M&A and document the reasons for your approach.



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