

Bird & Bird & data protection update

April 2013

We are enclosing our Easter data protection update of news and developments in March. Key points to note are as follows:

- In the EU, comments from both the A29 Working Party and the European Data Protection Supervisor on the draft Regulation and Directive. These contain very crisp summaries of existing regulatory thinking on key concepts such as consent, personal data, anonymisation and pseudonymisation: it remains to be seen if these 'established' views will be carried over in the new order;
- An opinion from the Article 29 Working Party on mobile apps – look out for our separate alert on this;
- In the UK, must-read guidance from ICO in Bring Your Own Devices and a tantalising Court of Appeal case on awarding damages under the Data Protection Act for distress (a full judgment is not yet available: we will do a full analysis once it is).

As ever, please do not hesitate to contact us if you have any queries.



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| Title | Description |
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| UK | |

Information Commissioner's Office (ICO)

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| <p>5 March 2013</p> | <p>ICO holds annual data protection officer conference</p> <p>Over 800 data protection officers attended the ICO's annual data protection officer conference, which was held in Manchester. In his introduction to the event, the Information Commissioner briefly discussed the data protection challenges ahead in 2013. He identified the ICO's main challenges as:</p> <ul style="list-style-type: none"> • The many changes to data protection legislation which will occur as a result of the new draft EU Data Protection Regulation and Lord Justice Leveson's report into the regulation of the press; • Keeping abreast of new trends and technological developments in order to maintain a clear and steady focus in order to respond to these developments; and • Maximising efficiency in order to deliver the best results possible from the ICO's "limited and stretched resources". <p>The keynote speaker at the conference was Françoise Le Bail from the European Commission. Her speech focussed on the EU's proposals for reforming data protection regulation. She stated that update to the regime is necessary in the internet era. She maintained that it is important for the new regulation to strike a balance between greater rights for individuals and making the regime simpler so that it is easier for businesses to comply.</p> <p>A Storify review detailing the events of the conference can be found here.</p> |
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| Title | Description |
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| 7 March 2013 | <p data-bbox="609 300 1413 328">ICO publishes “bring your own device” (“BYOD”) guidance</p> <p data-bbox="609 357 2047 443">The ICO has published guidance on BYOD, following the results of a survey, carried out by YouGov, which revealed that 47% of UK adults use their personal devices for work purposes and only one third of those individuals received guidance about how they should do this safely.</p> <p data-bbox="609 472 2047 558">The ICO guidance makes clear that organisations remain responsible for any processing of personal data that takes place on personal devices and that allowing BYOD without clear policies and security measures risks placing the organisation at risk.</p> <p data-bbox="609 587 1043 616">The ICO's key recommendations are:</p> <ul data-bbox="658 638 2038 919" style="list-style-type: none"><li data-bbox="658 638 2018 667">• Be clear with staff about which types of personal data may be processed on personal devices and which may not.<li data-bbox="658 673 1182 702">• Use a strong password to secure devices.<li data-bbox="658 708 1346 737">• Enable encryption to store data on the device securely.<li data-bbox="658 743 2038 794">• Ensure that access to the device is locked or data automatically deleted if an incorrect password is input too many times.<li data-bbox="658 801 1973 852">• Use public cloud-based sharing and public backup services, which you have not fully assessed, with extreme caution, if at all.<li data-bbox="658 858 2038 919">• Register devices with a remote locate and wipe facility to maintain confidentiality of the data in the event of a loss or theft. <p data-bbox="609 954 1599 983">ICO also recommends developing an Acceptable Use Policy and Social Media Policy.</p> <p data-bbox="609 995 1106 1024">The full guidance can be found here.</p> |

| Title | Description |
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| 14 March 2013 | <p data-bbox="609 296 1299 328">ICO releases details of its 2013-2016 business plan</p> <p data-bbox="609 354 2047 478">The ICO has published its business plan for the three years from 1 April 2013. The business plan, which was finalised on 25 February 2013, states that the ICO's aim is to be recognised by stakeholders as the "authoritative arbiter of information rights" and to deliver relevant and timely outcomes. The ICO states that it will be responsive and outward-looking in its approach, aiming to be a model of good regulation.</p> <p data-bbox="609 504 1543 536">The ICO has identified 6 objectives for the next three years. They are as follows:</p> <ol data-bbox="609 545 1798 730" style="list-style-type: none">1. Organisations have a better understanding of their information rights obligations.2. Enforcement powers are used proportionately to ensure improved information rights compliance.3. Customers receive a proportionate, fair and efficient response to their information rights concerns.4. Individuals are empowered to use their information rights.5. The ICO is alert and responsive to changes which impact on information rights.6. An efficient ICO well prepared for the future. <p data-bbox="609 740 2047 836">The business plan also sets out the outcomes which the above objectives will help it to achieve, such as a large proportion of businesses being aware of their obligations under data protection legislation and being able to routinely and easily meet those obligations.</p> <p data-bbox="609 861 1146 893">The full business plan is available here.</p> |

| Title | Description |
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| Cases | |
| <p><i>Halliday V Creation Consumer Finance Ltd (2013)</i></p> <p>15 March 2013</p> | <p>Damages for distress under the DPA</p> <p>In this unreported case, the Court of Appeal upheld the appellant's claim for damages against a finance company. Mr Halliday had made a claim for distress against Creation Consumer Finance Ltd ("CCF") for its failure to process his data in accordance with the DPA. Mr Halliday had purchased a television under a credit agreement for the value of £1,500. The finance agreement was later discharged. CCF agreed to delete all data it held about Mr Halliday. Mr Halliday later discovered that CCF had sent information to a credit reference agency which showed (incorrectly) that he owed CCF £1,500. The judge at first instance held that there was no proof that Mr Halliday suffered distress and that substantial damages should not be awarded. The Court of Appeal assessed nominal damages at £1 and held that Mr Halliday's frustration at CCF's failure to comply with the DPA should be remedied in some way, so damages of £750 were awarded.</p> <p>A transcript of the judgment is not yet available: once it is, we will issue a fuller report.</p> |
| Enforcement | |
| <p>1 March 2013 – 27 March 2013: 1 monetary penalty and 1 prosecution</p> | <p>The Information Commissioner imposed one monetary penalty for breach of the Privacy and Electronic Communications Regulations. An individual who worked as a receptionist at a GP's surgery was prosecuted under s55 of the DPA for unlawfully obtaining sensitive medical data.</p> <p>Please see attached Enforcement Table for more details.</p> |

| Title | Description |
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| Europe | |
| Draft Data Protection Regulation and Directive | |
| 27 February 2013 | <p>Article 29 Working Party publishes statement on the draft Regulation and Directive</p> <p>The statement focuses on 6 specific areas of concern, as follows:</p> <ol style="list-style-type: none"> 1. Flexibility for the public sector – the Working Party dislikes this 2. Personal data and pseudonymisation – the statement repeats earlier guidance 3. Consent – the statement repeats earlier guidance 4. Governance – the successor to the Working Party and DPAs should have the flexibility and budget to be effective 5. International data transfers - emphasizing the need for use of the Mutual Legal Assistance Treaty; and 6. The risk-based approach with which the Working Party sympathizes, whilst noting that this is both a matter of size and nature of data processed. <p>The Art 29 WP statement can be found here.</p> |
| 7 March 2013 | <p>Viviane Reding addresses criticisms of the draft Regulation in speech to 2nd Annual Cloud Computing Conference</p> <p>Reding explained that the European Parliament has accelerated its work on the draft Regulation and that all parties are pressing forward to complete negotiations on the new data protection regulation regime. She went on to criticise lobbyists for “scaremongering tactics” which have lead to some areas of the debate, such as the discussion about consent, being “overblown”. Reding maintained that reform of data protection legislation is critical for EU citizens and that the debate should be concluded as soon as possible, within the mandate of the current European Parliament. She reminded her listeners that the rules proposed by the Commission had not “fallen from the sky” and were based on EU law which has been in force since 1995.</p> <p>The text of the speech can be read here.</p> |

| Title | Description |
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| <p>19 March 2013</p> | <p>JURI adopts opinion on Draft Regulation</p> <p>Following the publication of the draft report of Jan Phillip Albrecht in January, discussions have been taking place in four EP Committees charged with publishing official opinions on the Regulation. These Committees are:</p> <ul style="list-style-type: none"> • ITRE (Industry, Research and Energy Committee); • IMCO (Internal Market and Consumer Protection); • EMPL (Employment Committee); and • JURI (Legal Affairs Committee). <p>The ITRE, IMCO and EMPL committees all voted on their official opinions in February (as noted in our March Update). JURI voted to adopt its opinion on 19 March. JURI supports the right to be forgotten, but states that the right should not apply to healthcare data, which is important to retain. The opinions of the four committees are non binding and LIBE (the Civil Liberties, Justice and Home Affairs Committee) will vote on the draft Directive and draft Regulation at its meeting on 29-30 May 2013.</p> <p>The JURI press release can be read here.</p> |
| <p>Article 29 Working Party</p> | |
| <p>13 March 2013</p> | <p>Article 29 Working Party adopts opinion on apps for smart devices</p> <p>The Art 29 WP has released its opinion on apps for smart/mobile devices, which was adopted on 27 February 2013. The Opinion addresses the key data protection challenges which have arisen following the development and use of apps on mobile devices. The opinion provides advice and some non binding recommendations to help companies which operate in this field to meet their data protection obligations. We have released a NewsFlash for our clients which reviews the Art 29 WP's opinion and its recommendations in more detail. The NewsFlash can be read <i>here</i>.</p> <p>The Art 29 WP Opinion can be read here.</p> |

EDPS

7 March 2013

EDPS publishes article discussing data protection and responsible internet usage

Written for the EESC Conference "Towards a more responsible use of the internet - The European civil society perspective", Peter Hustinx's article states that data protection is key for responsible use of the internet. The article begins with a short review of the development of data protection legislation. It states that we should use the current reform of data protection legislation to "reduce the current diversity and complexity" of data protection regulation. Hustinx concludes by saying that the draft Data Protection Regulation will ensure more harmony and consistency across the EU and will lead to data protection bodies cooperating more closely on various issues. He claims that this will lead to the internet being used more responsibly.

The article can be read [here](#).

20 March 2013

EDPS releases additional comments on the proposed reform of data protection regulation

EDPS' comments relate to specific issues which the EDPS believed needed to be clarified following his review of amendments proposed by various European Parliament committees.

The main comments related to:

- Anonymisation, pseudonymisation and the definition of personal data;
- Restriction of the scope of the proposed regulation;
- The definition of explicit consent;
- Sanctions and collective action; and
- Transfer of data to countries outside the EU.

The EDPS' comments can be accessed [here](#).

Enforcement notices and undertakings

| UK | | | | |
|---------------|------------------------|--|---|--|
| Date | Entity | Enforcement notice, undertaking or monetary penalty? | Description | Summary of steps required (in addition to the usual steps*) |
| 18 March 2013 | DM Design Bedrooms Ltd | Monetary penalty | The Glasgow based company made thousands of unsolicited marketing calls to the public as it consistently failed to check whether individuals had opted out of marketing calls by signing up to the Telephone Preference Service. The company also failed to respond to most of the complaints it received from members of the public. | Monetary penalty of £90,000. The full monetary penalty notice can be found here . |

This briefing gives general information only as at the date of first publication and is not intended to give a comprehensive analysis. It should not be used as a substitute for legal or other professional advice, which should be obtained in specific circumstances.

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