



Headlines this month:

- EU data protection regulation to be concluded by May 2015
- National Parliaments raise pressure on data protection
- Credit reference data handling
- Mobile apps failure to provide privacy information
- 'Big Data' and EU privacy law
- Right to be Forgotten
- 'Cookie law' reform
- Recent data breaches
- EU update

Commentary:

■ EU data protection regulation to be concluded by May 2015

Jean-Claude Juncker, the new President of the European Commission has tasked the Vice President for the Digital Single Market with the conclusion of negotiations on the EU data protection regulation and the review of the US safe harbor arrangements, by the end of April 2015.

Some of the key changes are listed below:

- Mandatory data breach notification within 72 hours
- Individual's right to erasure of information
- Strict restrictions in the use of profiling
- Data Protection Officers for all organisations processing data on more than 5,000 customers in a year
- Explicit consent requirements
- Authorisation from the data protection authority before data is transferred outside the EU
- Fines are increased up to a maximum of 100 million Euros or up to 5% of global annual turnover
- Privacy by Design, Privacy Impact Assessments, robust policies and procedures

■ National Parliaments raise pressure on data protection

16 EU Member States have called upon the EU to quickly adopt the legislative package on data protection. A joint declaration said it was essential that the adoption happened before 2015.

The representative from Luxembourg said:

"The EU must impose its data protection standards on third countries, otherwise they will do it first. I am thinking particularly of the United States."

The 16 member states consisted of Germany, Austria, Belgium, Croatia, France, Greece, Hungary, Lithuania, Luxembourg, the Netherlands, Portugal, the Czech Republic, Romania, the United Kingdom, Slovakia and Sweden.

■ Credit reference data handling

The Information Commissioner's Office has praised the credit reference industry on its data handling having reviewed the three main agencies - Experian, Equifax and CallCredit. A report has been published focussing on the accuracy of personal data processed by the agencies.

The ICO's Head of good practice said:

"Many people rely on credit, so it's unsurprising lenders are the most frequently complained about sector at the ICO. This review should reassure customers that the credit reference industry understands the importance of data protection.

"We were satisfied the credit reference agencies monitored, reviewed and shared personal data to an appropriate standard. Staff received adequate training and they had the appropriate policies and procedures in place."

"This doesn't mean the industry is perfect, and errors do occur, but we established the appropriate measures were in place to solve them. Where we identified areas for improvement we suggested solutions"

Appendices in the report also go on to draw attention to the following:

- The ICO is less likely to impose a monetary penalty if an organisation has good **corporate governance or audit arrangements** in place or where specific procedures or processes exist
- The ICO considers how much direct control an organisation has over data where a breach occurs - **does the data controller have a contract in place with data processors and has it monitored the data processor's compliance with that**

contract. If a third party processes a controller's data they should be subject to the same Quality Assurance as the controller

- When considering the amount of a monetary penalty, the ICO considers following:
 - What steps had been taken to avoid a contravention (eg **staff training**)
 - What **processes or procedures** were in place
 - What role senior managers take and do they demonstrate high standards of behaviour
- Organisations should ensure that training plans are maintained for all staff and that training is not only applicable to new starters. Anyone changing roles should receive further training
- The ICO deem the following circumstances to be appropriate for conducting a **Privacy Impact Assessment**:
 - A new IT system for storing and accessing personal data
 - A new data sharing initiative
 - A proposal to identify people in a particular group or demographic and initiate a course of action

- Using existing data for a new, unexpected or more intrusive purpose
- A new surveillance system
- A new database consolidating data held by different parts of an organisation
- When new legislation, policy or strategies will impact on privacy through the collection or use of information

■ Mobile apps failure to provide privacy information

A survey of over 1,200 mobile apps has been conducted by 26 privacy regulators across the world showing that a number of apps process large amounts of personal information without explaining how the information is used.

The survey was undertaken by the Global Privacy Enforcement Network (GPEN) of which the UK's Information Commissioner's Office is a member. The ICO therefore examined 50 of the top apps released by UK developers.

The results showed:

- 85% of apps failed to effectively explain how they were collecting, using and disclosing personal information
- 59% of the apps did not make privacy information easy to find
- 1 in 3 apps appeared to request an excessive number of permissions to access additional personal information
- 43% of apps failed to tailor privacy communications to the small screen

■ 'Big data' and EU privacy law

The Article 29 Working Party has adopted a statement on the impact of the development of Big Data and how it impacts on compliance with EU Privacy law.

The Working Party rejected a reconsideration of the principles of data minimisation, purpose limitation of that data should be adequate, relevant and excessive in this situation because it deemed the benefits of Big Data were still to be proven.

The Working Party stated that it believes that working within the current privacy framework is key to creating and keeping trust with any stakeholders.

The ICO has previously defined big data as:

"... a way of analysing data that typically uses massive datasets, brings together data from different sources and can analyse the data in real time. It often uses personal data, be that looking at broad trends in aggregated sets of data or creating detailed profiles in relation to individuals, for example lending or insurance decisions".

■ Right to be Forgotten

The European Commission has issued a fact sheet in relation to the Google ruling with the intention of dispelling misconceptions about the Right to be Forgotten.

The fact sheet comments on six 'myths' regarding the judgment:

- **The judgment does not nothing for citizens:**

The right to be forgotten is about individuals deciding what is available about them online and being in control of their personal data. An individual should be able to have personal data about them removed if certain conditions are met and where they are met a search result linking to a specific webpage will need to be removed.

- **The judgment entails the deletion of content:**

The Court's judgment only concerns the right to be forgotten regarding search engine results in a person's name. The content there is not affected and the content could still be found through the same search engine based on a different enquiry.

- **The judgment contradicts freedom of expression:**

The Court ruled that the right to personal data protection, of which the right to be forgotten is a part, is not absolute. It needs to be balanced against other rights such as the freedom of expression and of the media.

The right to be forgotten applies where information is inaccurate, inadequate, irrelevant or excessive for the purposes of data processing and therefore search engines must assess requests on a case by case basis.

- **The judgment allows for censorship:**

The right to be forgotten does not allow governments to decide what can and cannot be seen online or what can be read. It is a right of individuals.

- **The judgment will change the way the internet works:**

The internet remains an important source of information and content will remain in the same location.

- **The judgment renders the data protection reform redundant:**

The data protection reform includes an explicit right to be forgotten. It is fundamental modernisation of rules establishing a number of new rights for citizens.

■ Cookie law reform

The EU cookie laws are likely to be revisited after Jen-Claude Juncker, the President of the European Commission, has requested further reforms to be pursued.

The Privacy and Electronic Communications ('e-Privacy') Directive was last reformed in 2009 when the way website operators display information about cookies was changed.

The French Regulator, the CNIL, has undertaken a sweep to examine how organisations comply with its guidance on cookies.

■ Recent data protection breaches

Isle of Scilly Council

The Council of the Isle of Scilly has been ordered to introduce new data protection policies and training further to two data breaches.

The first breach related to an email including an attachment including personal data relating to a disciplinary hearing. The second related to documents containing personal data that were in public circulation.

The council has agreed to introduce mandatory data protection training plus refresher training. They must also introduce data sharing guidance and a redaction policy.

Winchester and Deakin Limited

A Welsh direct marketing company has been issued with an enforcement notice ordering them to cease making nuisance calls. An investigation showed that unsolicited marketing calls were being made to people who had registered with the Telephone Preference Service. 144 concerns had been reported to the ICO by the general public.

The Welsh Assistance Commissioner said:

"If people have asked you not to call them, don't call them. If people are registered with the TPS so they don't receive unsolicited marketing calls, don't call them. It's not complicated. Nuisance calls are annoying, bad business practice and, above all, against the law.

"Winchester and Deakin Limited must follow the rules like everybody else. If they don't, it will be treated as a criminal offence."

■ EU update

The below provides an EU update from a Regulatory Strategies' partner, Newgate Public Relations, in Brussels, and provides an insight into the progress of the EU's draft data protection regulation:

Earlier this month Martine Reicherts, the caretaker Commissioner for Justice replacing Viviane Reding, shed some light on the way forward for the data protection regulation.

After the Court of Justice had rendered a historic decision on the right to be forgotten in the Google case, she feared the Court would have to intervene again to fill the existing legal vacuum until the new rules are being put in place.

The legislator has made significant progress according to the Commissioner, and the European Parliament is ready to start negotiations with the Council. The current Presidency of the Council,

under the aegis of Italy, is working hard on the file so as to make it ready for the triologue negotiations to start soon.

These are crucial times, now that the European Parliament has to make its voice heard on the suitability and competence of Vera Jourova, the Czech Commissioner designate to take the portfolio of Justice, Consumers and Gender Equality who is keen to follow in Vice-President Reding's footsteps.

Vera Jourova has been auditioned as a Commissioner designate for Justice, Consumers and Gender Equality on 1 October. The President-elect of the Commission Jean-Claude Juncker



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chose to completely reshuffle the Commissioner's competences under the Barosso administration, seeking for more coherence and less "silo's": all Commissioners will have to cooperate under the auspices of 7 vice-Presidents so as to obtain more coordinated and coherent policies.

As to the exact content of her competences, Jourova will be the Commissioner with the most immediate responsibility for data protection: in her briefing from Juncker, she was told to take "ambitious legislative steps towards a connected digital single market by swiftly concluding negotiations on common European data protection rules."

In her opening speech at the hearing, she said: "I want to ensure that the rights of the individual are protected through the swift adoption of a modern data protection reform."

Jourová said to MEPs: "I welcome the European Parliament vote in first reading, which supports the structure and the main elements of the reform. The partial general approach agreed in the Council in June this year is another important step forward. It indicates that we are very close to a common position of the Member States. It shows that all three institutions have understood the importance of the reform for the rights of Europe's citizens as well as for the growth of its businesses."

Moreover, she committed to have the reform package adopted within the first 6 months of her mandate.

This statement led to a conservative MEP from Poland asking her what her plans are to make sure the new rules would be enforced. Unfortunately, she did not come up with any straightforward answer and limited herself to saying that the reform pursues one important objective: to increase the trust of people.

"I will always be in favour of data protection and privacy," she replied in response to a question from Jan Phillip Albrecht, the MEP who is charged with steering the controversial Data Protection Regulation through the Parliament.

Albrecht wanted to know how she would get all EU Member States on board with the proposed Regulation within the six-month deadline. Jourová said that although Member States have their doubts about whether the regulation would be functional, they should at least attempt to stick to it.

Albrecht commented publicly after the hearing that if Jourová wants to deliver it in six months, she had better bring the Council to an agreement immediately.

Albeit that Jourova might have undergone a tough grilling, chances of her having to come back for a second hearing are high. Private discussions between party leaders in the European Parliament have led to the conclusion that she had not impressed the MEPs and hence her candidacy is currently put on hold.

The business community might take an interest in following closely on what the next steps may look like, since the Direct Marketing Association of the UK has estimated that the introduction of the Data Protection Regulation might leave British businesses with a huge hole in their pockets in terms of lost sales. The data reforms could also rewrite the rules of data-driven marketing forever, bringing in a new opt-in only regime and in one fell swoop rendering tens of thousands of marketing databases illegal.

There is still an opportunity for businesses to engage with EU institutions and make its voice heard. As it stands, MEPs have voted for the change, but the Council and the Commission have yet to agree their positions. The so-called trilogue negotiations are expected to get underway in December 2014-January 2015, with the legislation passed later in 2015. This will be followed by a two-year "grace" period to give companies the time to adapt.



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