

Privacy & Data Protection

ADVISORY

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INTERNATIONAL DATA PRIVACY UPDATE NOVEMBER 2009

This eAlert provides a brief round-up of recent international data privacy developments, including key amendments to the EU's data protection regime.

AMENDMENTS TO THE E-PRIVACY DIRECTIVE

European legislators finally appear to have agreed to amendments that introduce a data breach notification requirement and new rules regarding the use of internet cookies. Following final votes this month, these reforms to the e-Privacy Directive 2002/58 are likely to come into force in early 2010 - Member States will then have 18 months to incorporate the new provisions into their national legislation.

NEW DATA BREACH NOTIFICATION REQUIREMENT

Under the new data breach notification rule, providers of publicly-available electronic communications systems ("ECSs"), such as telecoms firms and ISPs, must notify a personal data breach to its competent national authority as soon as they become aware of it. The ECS must also notify the individuals affected where the breach is likely to adversely affect the individual's personal data or privacy, though this is not required if the ECS has satisfied the competent authority that it has implemented appropriate technological protection measures and if those measures were applied to the data affected by the breach. The rules also set out what information notifications must contain, and invite national competent authorities to issue guidelines on the format and manner by which notifications are to be made. Although appeals to expand the scope of the rule to include providers of "information society services" over the internet were rejected, the European Commission recently has signaled that it is open to extend the breach notification regime to all sectors.

CHANGES TO REGIME FOR HANDLING COOKIES

The EU's regime for handling internet cookies also is set to change: at present, the e-Privacy Directive simply refers to furnishing the subscriber or user concerned with "clear and comprehensive information" and a "right to refuse" cookies that are not strictly necessary to provide a requested service; in future, the Directive will refer to obtaining the consent of the subscriber or user, although the original "clear and comprehensive" language has been retained. Considerable uncertainty surrounds the precise meaning of the newly agreed text, and efforts are ongoing to persuade the European Council to adopt a resolution clarifying that the revised provision (Article 5(3)) does not create a mandatory opt-in regime. We expect more developments, and hopefully clarification, in the coming weeks and months, as this will affect any online service provider and advertising network that deploy cookies.

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31ST INTERNATIONAL CONFERENCE OF DATA PROTECTION COMMISSIONERS, MADRID

This year's conference was hosted by the Spanish data protection authority in Madrid and attended by over 1,000 people. The different panels at the conference give some indication of the topics of most concern to data protection regulators: BT advertising, security breach notification, the processing of data on children (particular via the internet), the emerging conflict between IP rights and privacy online, and determining applicable law in a world of cross-border data flows. One of the interesting outcomes from the event was the adoption of the "International Standards on the Protection of Personal Data and Privacy," which although not legally binding, is intended to offer guidance to States that do not have a data protection legislative framework in place.

COUNCIL OF EUROPE RECOMMENDATION ON PROFILING

On October 2, the Council of Europe's Consultative Committee of the Convention 108 on Data Protection ("T-PD") made publicly available its "Draft Recommendation on the Protection of Individuals with regard to Automatic Processing of Personal Data in the Framework of Profiling." The Recommendation seeks to ensure that profiling is fair, lawful and proportionate, that individuals are notified when they are profiled, and privacy enhancing technologies or PETs are used to ensure profiling is consensual. See http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/events/t-pd_and_t-pd-bur_meetings/2T-PD-BUR_2009_02rev4_en.pdf

NATIONAL ROUND-UP

DEUTSCHE BAHN FINED 1.1 MILLION EUROS FOR EMPLOYEE MONITORING

On October 16, the Berlin data protection commissioner imposed a record fine of 1.1 million Euros on Deutsche Bahn, the national rail operator, for monitoring thousands of their employees (and their relatives). It had emerged that the rail operator had been accessing confidential staff data including emails and bank accounts for more than a decade. The company claimed that the surveillance was carried out as part of an anti-corruption campaign, in order to find out if the individuals had any contact with suppliers and competitors. The head of Deutsche Bahn, Harmut Mehdorn, was forced to resign, and the company has since set up a new department dedicated to data protection.

UK HOME OFFICE PLANS FOR INCREASED COLLECTION OF COMMUNICATIONS DATA PUT ON HOLD

In April 2009, the Home Office published a consultation on proposals to increase requirements on Communication Service Providers to collect, retain and use communications data. Last week, however, the Home Office published a summary of responses to the consultation, which indicated that the majority of respondents opposed the plans. In light of this opposition, the shortage of time before next year's General Election, and the potential cost of the plans, legislation to implement the proposals is unlikely to be introduced in the short term. See <http://www.homeoffice.gov.uk/documents/cons-2009-communication-data/cons-2009-comms-data-responses?view=Binary>

UK CONSULTATION ENFORCEMENT PENALTIES

The Ministry of Justice has launched a consultation on the maximum level of fine that the UK Information Commissioner will be able to impose under Sections 55A of the Data Protection Act 1998 on data controllers who commit serious breaches of the data protection principles. The government is proposing a maximum fine of £500,000 and is looking for respondents' comments on whether this is a proportionate sanction for serious contraventions. If implemented, this could give rise to a major change in companies attitude to risk regarding data protection. The consultation closes on December 21, 2009. Parties who may wish to respond to the consultation can contact the authors of this alert. See

<http://www.justice.gov.uk/consultations/docs/civil-monetary-penalties-consultation.pdf>

AUSTRALIAN GOVERNMENT RESPONSE TO WIDE-RANGING DATA PRIVACY REPORT

The Australian government recently released the first-stage of its response to the Australian Law Reform Commission's 2008 report that contained numerous recommendations to amend Australia's data privacy regime. The Australian government has been considering amending its data protection regime for some time, and the Rudd government's report is seen as one more step in that direction. Australia's privacy laws have evolved from a series of overlapping standards at both the federal and state and territory levels, and between the public and private sectors, and one of the overriding aims of the reform effort is to simplify and streamline the law. Some expected changes include:

- strengthening the Privacy Commissioner's powers of investigation, compliance and enforcement;
- providing additional guidance for the use of health information;
- improving guidance and education on privacy and new technologies; and
- working with the Australian States and Territories to harmonize privacy law across Australia.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our privacy & data protection practice group:

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