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Weekly Data Privacy Alert

27 March 2017

France

Use of Email Content for Marketing Purpose Requires Consent on a Yearly Basis

As reported in a previous blog post, the new French Digital Republic Bill (Bill) came into force on 7 October 2016, which had the effect of amending article L. 32-3 IV of the code of electronic communication in relation to the **secrecy of correspondence**. In particular, the Bill:

- Extends the obligation of secrecy to OTTs (thus, it is no longer limited to telcos)
- Defines what elements are protected by confidentiality (i.e., the content, the identity of the correspondents and, if applicable, the header of the message and the attached documents)
- Defines the use that can be made with the consent of the user (automated analysis for advertising, statistics or service improvement)
- Defines the type of consent (express, specific to each processing and at least once a year)

A decree of 28 March 2017 modifies article D. 98-5-I of the code to require that **consent be obtained from the user every year**. Where telcos or OTTs are already using such data before 1 April 2017 (the date on which the new rules come into force), they will need to obtain users' consent for the first time on or before 1 August 2017.

The changes outlined above are material. Stakeholders must now organise the periodic collection of consent, which must be obtained expressly and specifically for each purpose. The process has to be separate from any consent to the terms and conditions or other policies. Our specialist Data Privacy & Cybersecurity team in Paris can advise on how the changes could affect you. Please feel free to call Stephanie Faber for more information.

Germany

"*Netzwerk Datenschutzexpertise*" Issues Report on Right of Standing for Consumer Associations in Privacy Issues

The "*Netzwerk Datenschutzexpertise*", an association of German data protection experts, has issued an 18-page report on the right of consumer associations to issue proceedings against companies for breaches of privacy legislation, a right that has existed in Germany since 2016. The aim of the report is to foster public debate on privacy issues. The report concludes that this right of standing has not and would not lead to a wave of lawsuits in the future, because consumer organizations lack the necessary resources. However, according to the report, the right of standing constitutes an important instrument for repairing enforcement deficits in privacy law and does not compete with the tasks of data protection authorities.

Bavarian Data Protection Authority Presents Activity Report for 2015/2016

The Bavarian Data Protection Authority, which is the competent authority for more than 700,000 companies (including global players), associations and freelancers, has presented its seventh activity report for 2015/2016. The report is still mainly concerned with the application of German privacy law, but also deals with the upcoming EU General Data Protection Regulation. Private video surveillance (e.g., through wild cameras or dash cams) has emerged as one of the central topics in the activity report. The report states that the last few years have seen a constant increase in requests and complaints by data subjects. About one half of the complaints led to the detection of privacy breaches which, as a rule, also constituted administrative offences. File procedures, however, had been initiated only exceptionally, for reasons of capacity.

UK

ICO Imposes £70,000 Penalty on Airline Over Marketing Emails

The Information Commissioner's Office (ICO) has imposed a penalty of £70,000 on the airline Flybe Limited (Flybe) after finding that the firm had sent more than 3.3 million marketing emails to individuals who had opted out of receiving such communications. Flybe sent individuals an email entitled "Are your details correct?" and instructed the recipients to update their marketing preferences. The email also advised recipients that by updating their marketing preferences they could be entered into a prize draw. According to the ICO report, Flybe knowingly sent the emails to individuals who had opted out of marketing communications on the basis that they were carrying out a data cleansing exercise. The ICO found that Flybe had contravened regulation 22 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) by instigating the transmission of more than 3.3 million unsolicited marketing emails to individuals. The ICO also noted that emails or texts sent for the purpose of obtaining consent to future marketing messages constituted marketing messages of themselves, meaning that consent to such communications is required. In imposing the monetary penalty on Flybe, the ICO expressed the intention that it would act as a deterrent against non-compliance with the PECR and an incentive for businesses to ensure that they only send marketing communications to individuals who have consented to the receipt of marketing. This case should be viewed as a cautionary tale for companies seeking to update their marketing databases in preparation for the General Data Protection Regulation coming into force.

ICO Introduces New Resources for the Health Sector

The ICO has introduced a suite of resources aimed at improving the way data is managed in the healthcare sector. The launch of these new tools follows a number of audits conducted by the ICO, in which they discovered that a third of health organisations did not have an information asset register or nominated information asset owners and more than 200 self-reported incidents of data being posted or faxed to the incorrect recipient in the last financial year. The resources are designed to complement existing ICO guidance and to offer advice that will assist data protection officers and other designated individuals to provide training for colleagues to ensure they are compliant with data protection legislation.

US

US Congress Votes to Rescind FCC's Broadband Internet Privacy Rules

Acting pursuant to the Congressional Review Act, the US Congress, on partisan votes by Republican members, has approved a joint resolution that would rescind the detailed privacy rules adopted by the Federal Communications Commission (FCC) last fall for retail broadband internet access service providers (ISPs). The White House has stated that it favours Senate Joint Resolution 34 and will recommend that President Trump sign it. At that point, ISPs would still be subject to a general statutory requirement imposed on telecommunications carriers to "protect the confidentiality of proprietary information of and relating to … customers". But until the FCC further acts there will be no specific FCC rules relating to this obligation. FCC Chairman Pai, who opposed the rules at the time of their adoption, stated upon completion of Congressional action that "moving forward, I want the American people to know that the FCC will work with the FTC [Federal Trade Commission] to ensure that consumers' online privacy is protected through a consistent and comprehensive framework. In my view, the best way to achieve that result would be to return jurisdiction over broadband providers' privacy practices to the FTC, with its decades of experience and expertise in this area." Because the FCC reclassified ISPs as telecommunications carriers in 2015, the FTC has no current jurisdiction over such practices.

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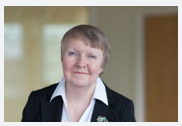

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