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The Data Protection Bill

If you are feeling a little queasy about the General Data Protection Regulation (GDPR), then the publication of the Data Protection Bill will give you chronic nausea. Having ingested vials of antacid, I now feel able to give you a brief overview of the Bill, which has received its first and second readings before the House of Lords. No firm date has been provided for its coming into force, which is expected to be spring 2018, but in any event, it needs to be in place by 25 May 2018 to supplement the GDPR. It may be further amended before then.

The Bill's purpose

The Bill has three main aims:

1. To implement the GDPR into domestic law, which will ensure that UK and EU data protection standards are aligned post Brexit.

2. To fill in the gaps in the GDPR i.e. to make provision for matters delegated specifically to EU member states, for example exemptions from particular provisions of the GDPR and more detailed provision for processing "special categories of personal data" (i.e. sensitive data).

3. To extend the GDPR provisions to areas like law enforcement and intelligence services, which are outside of the jurisdiction of the EU.

Points to note

Aficionados of the Data Protection Act 1998 (DPA) will find much of its language and content replicated in the Bill. Some notable features are as follows:

1. Definition of "public authority"
A public authority for the purposes of the GDPR is any body which is regarded as a public authority under the Freedom of Information Act. This will include all publicly funded universities and subsidiary companies wholly or jointly owned by such universities or other public bodies. The consequence of being construed as a public authority is that legitimate interest cannot be relied upon to justify processing personal data in the performance of universities' and their subsidiaries' public tasks.

2. Special categories of personal data and data relating to criminal history
The Bill imposes additional conditions for justifying the processing of special categories of personal data and data relating to criminal history, which are similar to the additional conditions which are provided for under the DPA's Schedule 3.

Additional safeguards not found in the DPA or in the GDPR are also introduced in the Bill (Schedule 1 Part 4). For example, universities will be required to have an "appropriate policy document" which explains their procedures for securing compliance with the GDPR's data-protection principles in relation to special-category and criminal-history data, as well as for the retention and erasure of such data. The policy must be retained for six months after the processing has ended and made available to the ICO on request. Demonstrable compliance in the form of documentation is a theme of the GDPR and, as this requirement illustrates, it is extended in the Bill.

3. Subject access and third party data
Universities will be very familiar with the challenge of deciding what to do when disclosing personal data in response to a subject access request which would ineluctably reveal personal data relating to a third party e.g. a witness's opinion of a complainant recorded in a witness statement. The DPA's requirement to disclose the third party data in the absence of consent if reasonable in all the circumstances to do so has been retained. Under the Bill, disclosure will be presumed to be reasonable in the context of personal data relating to those who work in education (i.e. schools), health, social work and in the area of child abuse.

4. Children's data and the age of consent
Under the GDPR, the age of consent for children for the provision of "information society services" (e.g. on-line services) is 16 but can be reduced by EU Member States to 13. The Bill has reduced it to 13.

5. Duty to notify breaches
Universities could be forgiven for feeling daunted by the new breach-reporting duties in the GDPR. Those duties are to report breaches to the ICO within 72 hours where the breach represents a risk to the individual, and to the individual him/herself without undue delay where, without mitigation, the breach poses a high risk. The Bill does not dilute the GDPR's requirements.

6. International transfers of personal data
The GDPR's provisions regarding transfers of personal data outside of the EU could have adverse consequences for the UK post Brexit. Clearly there is a need to ensure that the UK will provide adequate protection for transfers of personal data from the EU when it is no longer a member, and the Bill seeks to address that need. The Bill adopts the strict GDPR standards and also empowers the Secretary of State to make regulations exempting certain overseas transfers from those strict rules for important reasons of public interest.

7. Exemptions
The Bill sets out exemptions from various parts of the GDPR which are similar to the exemptions that currently apply under the DPA, for example exemptions for the prevention/detection of crime/apprehending offenders, legal proceedings, protection of the public (health & safety). These are contained in schedules 2, 3 and 4 of the Bill. Some of the miscellaneous exemptions contained the DPA have also been retained, e.g. confidential references, negotiations and examination papers.

The Bill introduces a new and very wide exemption for immigration control, which appears neither in the DPA nor the GDPR. It provides an exemption from all of the data subject's rights if satisfying those rights would "prejudice the maintenance of effective immigration control" or "the investigation/detection of activities that would undermine the maintenance of effective immigration control". Some commentators have expressed concern that if this exemption is used widely and prejudices an individual's ability to appeal against an immigration decision, then it could result in a finding by the EU that the UK has a low level of protection for the rights and freedoms of individuals in relation to their personal data.

8. Offences
Offences under the DPA have been reproduced i.e. knowingly or recklessly obtaining or disclosing personal data without the consent of the data controller or selling personal data obtained under those circumstances.

There is a new offence of knowingly or recklessly re-identifying information that is de-identified personal data without the consent of the controller responsible for de-identifying the personal data. It is also an offence knowingly or recklessly to process such data.

9. ICO's powers
The ICO will be empowered to levy the increased fines for which the GDPR makes provision.

When the Bill becomes law, it will have to be read in conjunction with the GDPR from 25 May 2018. Brace yourselves.

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Using technology to drive economic growth

This year's annual conference and training seminar in Brussels for the EU free movement rights programme that I work with was less subdued than I was expecting. I think that the shock of the UK referendum vote from last year has played itself out and the rest of my EU colleagues have other issues to deal with. While Brexit and Catalonia were, of course, discussed in the basement conference hall, what was evident from the agenda of the programme and the Commission officials was that the EU institutions have moved on to other, more pressing matters: economic growth.

As well as the usual updates on the free movement of EU nationals, the key message was to use legal, political and administrative tools to develop economic growth and therefore wealth and therefore happiness. This marks something of a shift for the culture of the advice programme. The focus of the programme has been (and to be fair, still is) on individual rights, especially free movement of workers. This is, of course, great for mobile EU citizens, who tend to be younger, better educated and multi-lingual. But there remain a majority who are left behind, who only see free movement as a tool for strangers to immigrate, rather than for them to emigrate. At the same time, the economic rights ensured by the EU project seem only to support the rights of big business to move from one place to another based on the relative market of taxation and employment costs.

Technology has had an enormous impact on creating a single market by reducing or removing barriers, and on the agenda were a number of initiatives to bring the benefits of the single market to citizens, driven by technological change. Among these were the Commission's current proposal to prevent "geoblocking". Geoblocking is the mechanism used by some businesses to identify where a citizen is resident (typically by reference to the user's IP address) to limit access to goods or services. This is in order to split the EU into territories, allowing traders to make different offers in different countries. Sometimes a customer can be re-directed to a local website, rather than the one making a better offer, or a trader will not ship to a particular destination.

For some, the proposal does not go far enough. It does not create an obligation to deliver throughout the EU, for instance, and it does not cover movies or music streaming services. However, it does allow customers to be treated without discrimination so traders cannot refuse to provide local deals just because the customer's address or credit card is from another EU member state.
Read more here.

As well as this legislative initiative, the EU programme discussed "Watify" – an Esperanto-style portmanteau of the phrase "What if I?", and not derived from a well-known music streaming service. Watify is a platform which brings provides mentoring to enterpreneurs in order to use the power of technology to start and to grow small businesses. A telling statistic is that the EU has only half the level of entrepreneurialism (measured by reference to small business numbers) as the US. Watify aims to help by providing a network for mentoring by tech entrepreneurs, and research and innovation hubs. Many of our clients in the education sector have either started or are looking to start innovation hubs in order to develop growth.

For as long as we have access to it, it might be worth contacting **Watify** to see if they can provide insights in a location near you.

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The lessons of Grenfell

While it will still be some time before we fully understand how the Grenfell disaster started or why it took hold in the way it did, attention has focused on the cladding system used in the refurbishment of the building.

Grenfell might provoke a return to the concept of blacklisting 'deleterious' materials, at least as far as cladding materials are concerned. Materials are seldom deleterious in themselves, and it is always a question of the circumstances in which they are used. What appears evident is that the specification of combustible composite cladding materials in circumstances that present a serious fire risk will expose the specifier to potential negligence claims, whether arising from increased insurance premiums, actual property damage, or even, in extreme cases such as Grenfell, fatalities.

Building Regulations are to be reviewed, in response to criticism that 'deregulation' has gone too far. Whatever technical criticisms of the relevant regulations may ultimately be made, the accusation of a lack of regulation does not really stand up. The regulations regarding combustibility of external walls are in fact detailed and prescriptive. The effectiveness of regulations really depends on the thoroughness with which they are enforced.

The industry must act fast as a sign of respect for those who lost their lives by taking into greater account the potential risk to life. By making improvements in the quality and safety of buildings in the UK at the expense of saving money, the industry can do something to demonstrate to those who have lost loved ones that action is being taken, to ensure that smart safety regulations that protect people are in place. As such, universities would be wise to use this opportunity to review their polices and procedures and resist pressures for short-term cost-cutting at the expense of long-term performance and safety.

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Potential extension to the rights of pregnant workers

On 14 September 2017, the Advocate General provided her Opinion in relation to Porras Guisado v Bankia SA (Case C-102/16) and others on the interaction between the Pregnant Workers Directive and the Collective Redundancies Directive.

Overview of the case

The claimant, Ms Guisado, worked for a Spanish bank, Bankia SA, and was dismissed as part of the bank's collective redundancy exercise. At the time of her dismissal, Ms Guisado was pregnant, however the bank claimed to have no knowledge of her pregnancy when she was dismissed.

Ms Guisado challenged her dismissal and eventually a number of questions regarding the interaction between the EU's Pregnant Workers Directive and the Collective Redundancies Directive were referred to the European Court of Justice for preliminary ruling.

Advocate General's Opinion

In relation to the interaction between Pregnant Workers Directive and the Collective Redundancies Directive, the conclusions drawn by the Advocate General reflect the approach taken by the courts and lawyers in the UK; collective redundancy is not always an "exceptional case" which justifies the dismissal of a pregnant worker under the Pregnant Workers Directive, and for a dismissal of a pregnant employee to be lawful, there must be no realistic possibility of reassigning the pregnant worker to another suitable positon within the company.

However, in terms of future potential change to UK law, the Advocate General's conclusions regarding the "tension" she identified between the definition of "protected period" and the definition of "pregnant worker" under the Pregnant Workers Directive differ from the approach in the UK. Under UK law, a female employee will only be afforded the benefit of statutory protection from dismissal or discrimination when pregnant once she has notified her employer. The Advocate General was of the view that a pregnant worker should be protected against dismissal from the moment she becomes pregnant, not from the moment the employer is made aware of the pregnancy; however she has asked the ECJ to clarify this position in their judgment.

Conclusion

The decision of the ECJ in relation to this case and when protection is afforded to pregnant workers should eagerly be awaited by employers as it has the potential to alter previous understanding and applicable law in relation to the treatment of and dismissal of pregnant workers.

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