IP & Media

Our newsletter on recent developments March 2016

IPB

The government published a new draft investigatory powers bill on Tuesday- seehttp://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0143/cbill_2015-20160143_en_1.htm. This made very few new or substantive changes to the November draft despite some 123 recommendations of the Joint Committee:http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-investigatory-powers-bill/

We made a submission to the Joint Committee in late December which is here:http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-investigatory-powers-bill-committee/draft-investigatory-powers-bill/written/26424.html

The most pressing issue at the start of the week was whether the bill should await the outcome of cases seeking to test the UK approach against *Digital Rights Ireland* C 293/12 & C 594/12 (striking down the Data Retention Directive as an unlawful interference with the privacy rights of all EU citizens). These include *Watson & Davis v. Home Sec.* (on DRIPA's compliance) and *Big Brother Watch v UK* (no.

58170 on bulk collection). The bill is on a very short timeframe indeed. We joined many academics and others in an open letter to be published in the Telegraph this week urging that more time be taken with the legislation given this is to be a once in a generation complete overhaul of the regime:http://www.telegraph.co.uk/comment/letters/12178545/Rushing-the-Investigatory-Powers-Bill-through-Parliament-is-not-in-Britains-interest.html

Many take the view that as the bill reflects what is now acknowledged to be the Intelligence Services' practices, the focus is on safeguards and whether they are sufficient -this bites mainly on legal tests for societal necessity and proportionality (as required for derogation from convention rights) as defined in this context by case law, including those cited above, particularly in relation to bulk gathering and use and internet connection records. The authorities are conflicting on what is sufficient independent authorisation from a convention perspective and this is an open question, see *Kennedy*No. 26839/05 (UK's mixed system not fatal) and *Kakharov v. Russia* No. 47143/06 (even judicial authorisation was insufficient in light of executive power). Also of great concern are the 600 UK public authorities who have the ability to access communications data under the bill-everyone from HMRC to Trading Standards and the FCA/PCA.

The bill has been criticised from many quarters but whether we will see significant changes is as yet unclear. We can be sure however that it will be tested in litigation by NGOs after passage.

The legal terrain has been altered as the fundamental right to respect for private life, as guaranteed by Art. 8 ECHR, is now also supplemented by the freestanding privacy and data right in Art. 7 of the Charter on the Functioning of the EU (TFEU). Note that it is the ECJ which has jurisdiction under the Charter -rather than the ECHR-and can strike down legislation rather than merely declare it incompatible with the convention. The ECJ has form here in that it struck down The Data Retention Directive in *Digital Rights v. Ireland*(above) and also the Safe Harbour in *Schrems* (below).

Data Shield

The European Commission has published details of its new "Privacy Shield" agreement with the US. Many have characterised this as more of an 'agreement to agree' than an agreement. It is a framework for US transfers where companies accept the eight data protection principles and agree to dispute resolution by arbitration and sign up to complaints procedures for data subjects.

The "shield" replaces the Safe Harbour framework, struck down by the ECJ last year in*Schrems* C 362/14 --where the Irish data regulator had failed to investigate Facebook Ireland's transfers to the US and whether the US adequately protected the data and privacy rights of EU citizens and whether the safe harbour was a sufficient answer in light of the disclosures of US mass surveillance.

The new deal is timely given the Safe Harbour fell with the decision in Schrems - following which there was (and is) a vacuum and no adequate level of privacy for transfers to the US -including under the Binding Corporate Rules or Standard Contract Clauses. The Art. 29 Working Party (the group of all EU data regulators) agreed last year to a transition period which expired at the end of January -causing potential chaos for tech giants but also users of many cloud services.

The UK ICO has decided on an unofficial grace period (from enforcement) but the German regulator is reported to be starting enforcement where transfers are not protected.

See the FAQs: http://europa.eu/rapid/press-release_MEMO-16-434_en.htm

GDPR

The General Data Protection Regulation (GDPR) (replacing the Directive) was agreed in December 2015 and is expected to be adopted in May this year and to enter into force in early 2018. See http://ec.europa.eu/justice/data-protection/reform/index_en.htm. The broad framework remains but with the expected shift in territorial reach from the equipment and establishment of a controller or processor to a focus on EU data subjects and interactions with them. IP addresses are clearly included in the definitions of personal data and pseudonymisation is generally encouraged as a best practice. The bar for consent is raised and subject rights' strengthened -including rights to be forgotten, to withdraw consent, of rectification and erasure and to prevent automated processing and to supplement and to portability of data. Crucially for publishers and others, exemptions protect Freedom of Expression and Archives. Also important for business is the welcome clarification that not all breaches must be notified.

Trademarks

The EU has allowed CTM owners, of trade marks filed before 22 June 2010 with a class heading specification, until *24 September 2016* to amend their marks if the literal heading does not cover their actual goods or services covered by the mark. All mark owners are urged to audit their portfolio. We can assist with this audit and amendments

Coke failed to register its bottle shape as a CTM, as the General Court held it was not sufficiently distinctive so that the application failed on absolute grounds. This was despite the success of an earlier application in 2005. We suspect we have not heard the last of this application. See Case T-411/14.

Intermediary Liability

In February, the ECHR in Magyar *Tartalomszolgáltatók Egyesülete and Index.hu zrt v Hungary* (no. 22947/13) held that two media portals were not liable for defamatory user generated content where despite portal terms with warnings and disclaimers and good Takedown procedures --no Takedown requests had been given and the content was only removed once the claim was issued. While the content was abusive and offensive --described by one Justice as "value judgments of no value" it fell short of hate speech (which is excluded from Art. 10). The Court noted more could be expected from professional publishers but found the domestic courts had not balanced the competing rights of reputation and expression and courts should be slow to find liability in such contexts due to Art. 10 and the potentially chilling impact on speech. The court noted use of and giving effect to the Ecommerce Takedown regime -could itself provide this balance. The court expressly distinguished the controversial decision in *Delfi v Estonia*(no. 64569/09, ECHR 2015) where the speech was found to constitute hate speech and incitement to violence -but one Justice warned that this new decision was no licence for ISPs to profit without concern for the reputation rights of individuals.

30th Flr, 40 Bank St, Canary Wharf, London E14 5NR
www.mcevedys.com | 020 7243 6122

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