

**CITY OF LONDON LAW SOCIETY - DATA LAW COMMITTEE**  
**(THE “COMMITTEE”)**

**Meeting Date** 23 November 2022, 9.30am

**Location** CMS Cannon Place Office and Virtual Meeting Room

**Present** Jon Bartley (RPC),  
Cynthia O'Donoghue (Reed Smith LLP)  
Rhiannon Webster (Ashurst LLP)  
Kate Brimsted (Bryan Cave Leighton Paisner LLP)  
Luke Dixon (Freeths LLP)  
Rebecca Cousin, (Slaughter and May)  
Eve-Christie Vermynck (Skadden, Arps, Slate, Meagher & Flom LLP)  
Sam De Silva (CMS Cameron McKenna Nabarro Olswang LLP)  
Barry Fishley (Weil, Gotshal & Manges LLP)  
Ross McKean, (DLA Piper LLP)  
Tim Hickman (White & Case LLP\_

Guest minute taker: Georgia Fishwick (CMS)

**1. Apologies**

Giles Pratt, Freshfields Bruckhaus Deringer LLP, Kevin Hart, CLLS and Jonathan McDonald, Charles Russell Speechlys sent apologies ahead of the meeting.

**2. Welcome**

The Chair welcomed all those in attendance at the meeting, acknowledged this was the first in person meeting for several years. Reminder of CLLS dinner in January (date to be confirmed), typically held in one of the Guild Hall.

**3. Previous minutes**

It was reported that draft minutes from the previous meeting held on 15 September 2022 had been circulated. The approved minutes will be anonymised and uploaded to the CLLS website, unless anyone has any comments.

**4. IAPP conference in Brussels**

The Committee discussed attending the IAPP conference in Brussels and sessions which were of particular interest.

**4.1 *Behavioural biometrics session***

This was attended by several Committee Members. It was noted that the ICO made quite strident comments in terms of emotional and behavioural tools being a focus for enforcement.

ICO Workplace Monitoring Guidance has been put out for consultation.

The Committee Members noted that whilst there had been plenty of discussion about use of biometric technology, it seems to be largely hypothetical, and agreed there had been little in terms of actual instruction in this space.

**4.2 *Max Schrems and Eduardo Ustaran on the EU-US Data Privacy Framework***

Schrems indicated an intention to raise a 'Schrems III' as well as a desire to focus on legal basis for processing. The Committee discussed the use of a waterfall approach to transfer mechanisms, with the Data Privacy Framework as the primary approach and SCCs as back-up, given the likelihood of a Schrems III challenge. The Committee acknowledged that using

a dual approach is problematic as it subjects clients to another regulator (in the United States).

## **5. TRAs – risk-based approach**

DLA Piper and Clifford Chance have co-authored a paper on the case for Proportionality and a Risk-Based Approach in respect of International Data Transfers. The paper concludes that the European Charter of Fundamental Rights, the Treaty on the European Union, the GDPR and relevant CJEU case law do not simply permit but *require* a proportionate, risk-based approach to be applied to the assessment of personal data transfers to third countries outside the EEA, which can be implemented in practice and which will help to address the legal uncertainty created by an unlawful strict interpretation of Schrems II and Chapter V of the GDPR. It was reported to the Committee that the paper is intended to be a helpful contribution to the debate to support those data protection supervisory authorities by clearly setting out the arguments in support of proportionality and a risk based approach.

Noted by the Committee that recent decisions from Germany and Denmark have taken a very strict approach and the French CNIL indicated (at IAPP Conference) that using a risk based approach was not in its view compliant with GDPR. Committee considered this view and noted that the reality is there is widespread non-compliance particularly as very little data falls within low risk data, for example a name can be considered sensitive data, to the extent it reveals ethnicity and gender.

The Committee discussed the new UK ICO guidance and tool for TRAs. The ICO seems to have focused on human rights law environment, a Committee Member highlighted that the guidance included useful examples.

## **6. Australian Privacy Legislation Amendment Bill**

Australian Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 has been introduced into Parliament. It substantially increases penalties associated with serious breaches (30% of turnover, AU\$50 million or three times the benefit attributable to the breach). Maximum penalty is currently AU\$2.2 million. Bill also provides Office of Australian Information Commissioner with greater enforcement powers.

## **7. Data Protection and Digital Information Bill**

The Data Protection and Digital Information Bill (the UK Bill) has been taken back to the drawing board. A Committee Member stated that the Department for Digital Culture Media and Sport (DCMS) were intending to move the UK Bill forward without any additional consultation but that DCMS may be creating a business advisory group.

Several Committee Members indicated they would attempt to reach their contacts at DCMS and make them aware that the Committee is interested in participating in the business advisory group.

## **8. Employee monitoring in relation to devices**

The ICO released “Employment practice: monitoring at work draft guidance”. Discussion as to whether the Committee should weigh in on this guidance, noted that nothing particularly radical appeared in the guidance.

The Committee noted an increase in questions about monitoring employees use of technology, particularly for clients who are subject to financial regulation. Discussion of backlash in the media regarding Barclays use of Sapience Analytics.

The Committee discussed the difficulty of establishing if employers are the controller of information where personal devices are used for work purposes and vice-versa. Even where its policy specifically states no messaging apps are to be used, if the company is running a mobile management system and is therefore aware that a messaging app is on the phone, it seems

likely to be considered as tacitly approved. The employer could therefore hypothetically be a controller.

## **9. DSARs**

Now DCMS are revisiting the UK Bill, it is possible there will be more carve-outs made for DSARs. The Committee discussed that this should be an area of focus as from clients' perspective DSAR responses impose a significant burden on them.

Increase in redundancies is likely to lead to uptick in DSARs regarding the decision making process for such redundancies. The Committee discussed whether individuals are actually seeking to enforce their privacy rights when arguably the motivation behind the DSAR is to challenge the redundancy decision and whether therefore it may be possible to argue that there is no requirement to respond.

A Committee Member referred to a DSAR where the individual who made the DSAR confirmed they would withdraw the DSAR if settlement was made. In this case, the ICO was willing to accept that the DSAR was vexatious and the client was not required to respond to it.

The Committee discussed variance in the approach of the ICO to DSARs dependent on case officer.

The Committee noted that the ICO has been referring DSARs back to the business where an individual is unhappy with the information provided and requesting that the business reviews its own response and confirms it is happy they have met their obligations before reviewing it themselves for compliance.

The Committee also discussed third party websites such as Mine that allow individuals to scan their personal email account and see who has their data and make a DSAR at the click of a button. A Committee Member referenced a client who received 250 DSARs in an day after a website was set up allowing individuals to make an automated DSAR.

## **10. AOB**

The Committee agreed to monitor consultations and other items into which the Committee may wish to provide input.

### **10.1 *Discussion on privacy platforms***

The Committee discussed what clients were using as their privacy platforms. It also discussed the difficulty facing some clients where their platform seemed to ask business units for large volumes information but failed to provide anything helpful in response. The Committee discussed potential alternatives to this and whether they offered any notable benefits.

### **10.2 *Update on event with the Information Commissioner***

The Committee discussed an event with John Edwards (UK Information Commissioner) that CMS are hosting at their London office on 18 January 2023. The Information Commissioner will be giving a key-note speech this this event, followed by a "fire side chat" and a general Q&A session.

### **10.3 *Upcoming meetings***

The next Committee meeting will be held on 9 February 2023.