

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

Minutes of the Committee meeting held at 8.30am on 22 November 2018 at the offices of Stephenson Harwood LLP, 1 Finsbury Circus, London, EC2M 7SH (the “Meeting”)

Present: Jon Bartley, RPC LLP, Chair
Elizabeth Robertson, Skadden, Arps, Slate, Meagher & Flom LLP
Kevin Hart, City of London Law Society
Tim Hickman, White & Case LLP
Kate Brimsted, Bryan Cave Leighton Paisner LLP
Jonathan McDonald, Charles Russell Speechly LLP
Ross McKean, DLA Piper (UK) LLP
Jonathan Kirsop, Stephenson Harwood LLP
Giles Pratt, Freshfields Bruckhaus Deringer LLP
Rhiannon Webster, DAC Beachcroft LLP
Miriam Everett, Herbert Smith Freehills
Luke Dixon, Addleshaw Goddard
Rebecca Cousin, Slaughter and May (by dial-in)

Apologies: Sam De Silva, CMS Cameron McKenna Nabarro Olswang LLP
Cynthia O'Donoghue, Reed Smith LLP
Barry Fishley, Weil, Gotshal & Manges (London) LLP

1. Welcome

The Chair welcomed all in attendance to the third meeting of the Committee.

2. Apologies

Formal apologies were received from Sam De Silva and Cynthia O'Donoghue.

3. New members

The Chair welcomed Luke Dixon and Miriam Everett to the Committee.

4. Minutes approved – no comments

The minutes from the previous meeting of the Committee were tabled and approved.

5. Follow up points arising from previous meeting

- 5.1 The Chair reminded the Committee of the proposal to appoint a Committee Secretary that could be an associate of a Committee member. The Chair suggested that Committee members send names of any associates to be considered for this role to him by the end of the month.
- 5.2 The Chair noted that the Committee still needed to get back to the CLLS Land Law Committee regarding their request for GDPR input on a new standard form Property Management Agreement. The Chair intends to respond shortly, following input from Committee members.
- 5.3 The Chair asked Committee members on any updates regarding engagement with external stakeholders such as the ICO or DCMS. Rebecca Cousin confirmed that she had been in contact with the ICO and the DCMS. Tim Hickman explained that the Cabinet Office were looking to get advice and would be interested in engaging with the Committee. The Chair highlighted that if/when the implementation of a withdrawal agreement on Brexit is approved, the Cabinet Office may have more free time to engage with the Committee. The Chair asked for Committee members to continue seeking to engage external stakeholders as someone from the relevant organisations is likely to respond eventually.
- 5.4 The Committee discussed that it was not currently aware of any Brexit-related statutory instruments that would influence the work of Committee members.

6. Draft withdrawal agreement

- 6.1 The Chair asked Committee members for their opinions on the data protection provisions contained within the draft withdrawal agreement on Brexit.
- 6.2 Miriam Everett explained that from her reading of the withdrawal agreement, if implemented, the status quo would be preserved with the UK complying with the GDPR for the duration of the transition period with the intent of securing an adequacy decision by the end of this period. However, there appears to be a technical gap with regard to data transfer arrangements under the withdrawal agreement. Nevertheless, Miriam expressed that she hoped the UK and the EU will confirm that this technical gap was not intentional and is optimistic that arrangements will remain as they were in the transition period. Rebecca Cousin commented that the ICO has made clear that this is indeed the intention and that the approach of regulators across Europe will be consistent.
- 6.3 The Committee discussed and were sceptical about what the approach will be regarding an EU processor transferring data to the UK. Rebecca Cousin confirmed that it is expected that the ICO will be releasing guidance on this next week and will be taking a pragmatic approach.

7. ICO model clauses guidance

- 7.1 The Chair explained that the ICO is asking for comments on model clauses and that it is important that there is a UK voice in relation to this. The Chair noted that there is a GDPR working group at the Commission that comments on model clauses should be addressed to however it is important that any submissions made do not contradict what the ICO is expressing in relation to model clauses.

7.2 The Chair explained that the questions the ICO has asked in relation to model clauses are fairly open and concern whether the model clauses work for organisations.

7.3 The Committee discussed relaying comments on what clients key concerns are in relation to the drafting of the model clauses.

7.4 Rebecca Cousin noted that she would mention this to the ICO.

8. Territorial guidance

8.1 The Chair noted that the EDPB would soon be producing territorial guidance and this is something the Committee should comment on when the EDPB asks for input into this.

9. ICO call for views on direct marketing code of practice

9.1 The Chair highlighted that the ICO is calling for views on a direct marketing code of practice with a deadline of 24 December 2018. The aim is to create a more formal code of practice and it would be valuable if the Committee could make contributions to this in relation to the questions applicable to the work that members of the Committee do.

9.2 The Chair noted that the three questions of particular relevance to members of the Committee are as follows:

- (i) What changes to the data protection legislation do you think we should focus on in the direct marketing code?
- (ii) Please provide details of any case studies or marketing scenarios that you would like to see included in the direct marketing code.
- (iii) Do you have any other suggestions for the direct marketing code?

9.3 The Committee agreed that it understands that the ICO's plan was to produce the direct marketing code of practice now and then update this guidance again once the ePrivacy Regulation is agreed. The Committee were also in agreement that it is presumed that the UK will have to abide by the ePrivacy Regulation as if the withdrawal agreement on Brexit is passed, the UK will still have to apply new EU laws during the transition period.

9.4 The Chair highlighted that the ICO were not looking for comments on the GDPR within this call for views. A particular issue that does require clarification is the relationship between legitimate interest grounds and direct marketing issues especially alongside ePrivacy. Clarity is needed on what scenarios constitute legitimate interests for direct marketing.

9.5 Tim Hickman explained that the ePrivacy Regulation may not be implemented for some time as there has been significant intervention on the part of the Council of Ministers.

9.6 The Committee discussed whether the UK will need to implement ePrivacy legislation in order to obtain an adequacy decision post-Brexit. Ross McKean

suggested that perhaps this would not be necessary as, for example, the Privacy Shield does not extend to direct marketing and we already have robust marketing legislation in place.

- 9.7 The Committee agreed that common concerns should be collated and that short form comments should be issued to the ICO.

10. Further talking points

- 10.1 The Chair asked if there is anything else Committee members had seen from the ICO that the Committee could make a contribution to.

- 10.2 Ross McKean noted that the DCMS is publishing a SI on how to make the DPA 2018 fully compliant with the GDPR, which is intended to be published by the end of this year.

- 10.3 Rebecca Cousin confirmed that the Committee should also register as an interested party for the government's Smart Data Review.

- 10.4 The Chair asked how clients of Committee members had been responding to the recent *Morrison's* Court of Appeal judgement. The Committee agreed that hopefully the Supreme Court will grant leave to appeal the judgement and that there had been an increase in clients looking to take out cyber-security insurance. The Committee discussed what losses are currently covered by cyber-security insurance, with differences being identified across jurisdictions.

- 10.5 The Committee discussed the liability provisions under Article 82 GDPR. Members of the Committee agreed that the issue of apportioning liability between controllers or between a controller and a processor had not been addressed contractually because the limitation of liability provisions were deemed to be sufficient in the scenarios Committee members had encountered. Jonathan Kirsop commented on whether in the absence of anything contractual, Article 82 would be invoked as a default. Tim Hickman raised the point that Article 82(5) is only invoked when the controller or processor has paid full compensation for the damage suffered, and so it is difficult to envisage how liability can be apportioned from the outset.

- 10.6 The Committee discussed the interaction between Article 82 GDPR and limitations on liability. The Committee agreed that suppliers will have a cap on their liability and often the amount paid to data subjects will exceed this amount. The Committee also raised the point as to whether it would be possible to exclude Article 82 in contracts. Ross McKean suggested that this would be dependent on whether the provision was reasonable under the Unfair Contract Terms Act.

- 10.7 The Chair asked if there were any further points on issues members of the Committee had been dealing with in practice.

- 10.8 Elizabeth Robertson commented that she had been experiencing some difficulties in trans-Atlantic deals as there was often confusion between what is a security issue and what is a privacy issue, and therefore clients/colleagues assuming greater applicability than there actually is. Rebecca Cousin stated that there was a Law Society working group on this issue and that Elizabeth Robertson can be put in touch with the group.

- 10.9 Ross McKean raised the issue of what compensation will be payable to data subjects who have suffered distress as a result of a data breach. By way of analogy with cartel fines, the Committee discussed that it is likely that compensation for distress will amount to 1-1.5% of group revenues although this will depend on what personal data has been compromised.
- 10.10 The Committee discussed Article 3(1) GDPR in relation to the application of the GDPR to non-EEA processors and EEA controllers at length. Tim Hickman commented that it would take a new ECJ decision to determine that non-EEA processors can be subject to the GDPR where its processing is in the context of its establishment in the EU to make it clear that non-EEA processors can fall within the territorial scope of the GDPR under Article 3(1). Jonathan Kirsop raised the point that he could not see why the ECJ would go out of its way to bring non-EEA processors into the scope of Article 3(1) as the controller in the EEA will still be on the hook. The Committee agreed that in terms of enforcement, Article 3(1) should not be read as applying to non-EEA processors.

11. Future attendees

- 11.1 The Committee agreed that the Cabinet Office, Tim Hill (technology policy adviser at the Law Society) and the Tech and Law Policy Commission at the Law Society should be engaged in the work of the Committee.

12. IAPP Conference

- 12.1 Many members of the Committee expressed that they were attending the IAPP Conference. The Chair encouraged members of the Committee to talk about the Committee to those at the conference with a UK stakeholder perspective.

13. Meetings in 2019

- 13.1 Kevin Hart confirmed that the Law Society envisages the Committee having quarterly meetings and expects the next meeting to take place at the end of January. Kevin Hart suggested that the Committee use one meeting slot a year to invite a guest speaker to talk to the Committee and members of the Committee's associates.
- 13.2 Kevin Hart also made the Committee aware that the chair of the CLLS, Ed Sparrow, has been attending meetings of various committees and is likely to attend a meeting of the Committee at some point to find out more about what the Committee is doing.
- 13.3 The Chair informed the Committee about a post-Brexit litigation conference the CLLS is supporting on 7-10th May 2019. The Chair encouraged Committee members to attend as the conference may look at GDPR/data protection issues.
- 13.4 Kevin Hart told the Committee that there would be a dinner for all specialist committees of the CLLS on January 21 2019 as a thank you for the work that they are doing.

14. AOB

- 14.1 There was no other business to be discussed by the Committee and the Meeting was closed.