LEGAL Q&A: WELL, WAS ALL THE FUSS WORTH IT?

Mark Lubbock of Brown Rudnick LLP explores the post-GDPR world

/// INTRODUCTION

Ever since the European General Data Protection Regulation (GDPR) was adopted by the European Council on 8 April 2016 (and indeed for those of us who followed its genesis until then - well before that date) up to the date on which it came into force in the European Union on 25 May 2018, it has attracted masses of publicity, good and bad, and still is. All of us have in recent months been bombarded with emails and letters announcing updates to privacy policies and changes to data protection procedures - most of which remain unread.

As a lawyer who was involved in redrafting many such policies to bring them closer to compliance (I hesitate to say "make them compliant" because there is so much uncertainty as to what much of the language in the GDPR actually means) I can only look in awe at how much time, effort and money has been spent by companies, small and large, to attempt to adhere to the new regime. For many but the largest companies this process probably only started in earnest between a year to 6 months before GDPR came into force but even so compliance costs in many businesses must have rocketed. Now that the dust is beginning to settle, businesses can begin to consider whether it was all worthwhile.

/// HAS THE PROCESS SUCCEEDED IN ITS AIMS?

The objectives of GDPR are set out extensively in its recitals starting with the first, which states "*…The protection of natural persons in relation to the processing of personal data is a fundamental right…* " and that "*…everyone has the right to the protection of personal data concerning him or her…*". At a most basic level, GDPR is attempting to do two things; first, to raise the importance of data privacy in the modern, digital world (and make the legal framework fit to support this objective) and, second, to provide the authorities with serious powers to punish transgressors of the law.

At this level, the GDPR has achieved its aims - there can be few people who are not aware of the value of data privacy (even if they do not always take control of their data) and there can

be no doubt that, had the UK's Information Commissioner's Office (ICO) had the powers bestowed on it at the time it issued its Notice of Intent relating to Facebook's involvement in the Cambridge Analytica matter, it would have been aiming to levy a significantly larger fine than the stated £500,000 - see the Annex ii of the Notice here

/// WAS ALL THE EFFORT WORTH IT?

On the basis of the above, the answer is probably yes but serious questions remain as to whether the approach taken could have been better done in a more proportionate manner. A lot can be written on this but there seems little doubt that in respect of one of its aims - to modernise the law- GDPR is already out of date.

The regulation was conceived at about the same time as blockchain technology was invented and there are serious questions as to whether the use of blockchain technology will comply with it. The regulation struggles with everyday data applications such as Snapchat and WhatsApp but even with more prosaic data processing there are many interpretative and practical difficulties.

A recent example is highlighted by the letter dated 5 July 2018 written to a member of the European Parliament by the European Data Protection Board (EDPB) (a body comprised of representatives of national data protection authorities such as the ICO - until Brexit anyway - whose job includes ensuring the consistent application of the regulation and advising the Commission on privacy issues).

This related to a question raised by the MEP as to whether the processing by banks of so-called "silent party data" in the context of the revised Payment Services Directive (PSD2) is legitimate when the individual in question has not given explicit consent to such processing (e.g. where individual A instructs his or her bank to make a payment to individual B, B - the "silent party" - does not consent to the processing of his or her personal data by the bank in making the payment). Not surprisingly the EDPB indicated that such processing may be allowed on the basis of the legitimate interests of the data controller, but the letter did not clarify whether, in these circumstances, the bank is a controller or a processor and how the controller (whether the bank or in the example above individual A) complies with the obligations in Article 13 GDPR to provide information to the data subject at the point at which the data is collected. This issue with "silent party data" is not confined to banking transactions. It also arises in many other areas of processing.

/// AND WHAT PROBLEMS DOES THE IMMEDIATE FUTURE HOLD?

GDPR is also arguably an example of serious over-regulation in a market where most companies try to do the right thing with the data they control - a consequence perhaps of the regulation coming from the Germanic approach to legislation (i.e. everything is forbidden except that which is allowed) as opposed to the Anglo-Saxon approach (everything is allowed except that which is forbidden).

We can already see quite a few issues on the horizon. These include

- **that the UK's position in this area upon Brexit is increasingly uncertain;**
- **calls for suspension of and challenges to the EU-US privacy shield;**
- **challenges to the use of model clauses especially as regards transfer of data to the US;**
- **the need for and the role of Data Protection Officers;**
- **the relationship between GDPR and other pieces of legislation such as PSD2 and the delayed e-privacy regulation;**
- **a massive increase in data breach notifications and the related increase in the work load of national data protection authorities;**
- **a significant increase in the workload of the EDPB is ensuring consistency in the application of the GDPR in different member states;**

and that's just for starters.

A colleague asked the audience of a conference on GDPR that I recently chaired "what is the similarity between the GDPR and the Napoleonic Wars?". The answer was that the wars with Napoleon introduced income tax into English law for the first time. This initiative resulted in the creation of a massive industry (arguably none of which is productive in an economic sense) in advising on, collecting and avoiding income tax. My colleague foresees a similar growth in personal data industry - and he may well be right.

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