

# Privacy & Data Protection

## ADVISORY

September 22, 2009

### RECENT DEVELOPMENTS IN EUROPEAN DATA PROTECTION LAWS

There have been important data protection developments in several EU Member States over the course of the summer. Below is a summary of some of these developments.

#### **Germany - Amendments to the German Data Protection Law and draft Law on Employee Data**

In July 2009, the German Parliament made several amendments to the Federal Data Protection Law (*Bundesdatenschutzgesetz*). In particular, the legislator introduced a horizontal security breach notification obligation applying to breaches of sensitive personal data, credit card data, and personal data subject to confidentiality obligations. We reported on this development in our previous e-alert. The amendments also provide increased protection for the collection, processing and use of employee data and describe, among other things, how employee data may be processed in the context of investigations into criminal offenses. The amendments also contain detailed new requirements for data processing contracts, complex rules on the use of personal data for scoring, marketing and opinion research. Under the new rules German data protection officers are granted additional protection *vis-a-vis* their employer.

While many German companies are still in the process of examining the latest changes to the Federal Data Protection Law, in September of this year, the German Government released for consultation a draft Law on Employee Data (*Gesetz zum Datenschutz im Beschäftigungsverhältnis*). The draft law contains again detailed provisions and restrictions on the collection, use and disclosure of employee data by the employer, the use of video surveillance and biometrics, the monitoring of a company's IT systems and the use of data processors for employee data, among other things.

#### **France - Recommendations on Discovery Requests**

The French Data Protection Authority (*Commission nationale de l'informatique et des libertés*) ("CNIL") has issued guidance to French data controllers on responding to discovery requests arising in US proceedings. The non-binding guidelines should provide a useful road map to companies, particularly multinationals, who must navigate competing obligations under US civil procedure rules and French data protection law.

In *Deliberation 2009-474* (the "Guidelines"), the CNIL clarifies that discovery requests must be analyzed in accordance with both the French Data Protection Act of 1978 and a 1968 French blocking statute that prohibits the disclosure of certain types of documents (economic, commercial, technical, financial) to foreign authorities in connection with a civil or administrative proceeding.

For international transfers in the context of discovery requests, French data controllers may, in certain circumstances, rely on the exemption in Article 69.3 of the French Data Protection Act, which permits the transfer of personal data for the "establishment, exercise or defense of a legal claim." Reliance on this exemption, however, should be limited to single transfers

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of limited amounts of personal information. In such cases, the CNIL must be notified but no prior authorization is required. More important transfers must, according to the CNIL, be based on transfer contracts, Safe Harbor or binding corporate rules. In exceptional cases, consent may also be an option.

### **UK - Substantial Fines for Data Breaches**

The UK's Financial Services Authority ("FSA") has fined two companies this summer for failing to adequately secure personal data. Subsidiaries of banking and insurance giant HSBC were fined £3 million for incidents in which disks containing customer data were lost in the post. One disk contained 1,917 pension numbers and addresses; another contained unencrypted data on 180,000 policyholders. In another case, the FSA took action for the first time against a stockbrokerage firm for weak data security controls. The FSA fined Merchant Securities Group Limited £77,000 for a range of lax security measures that resulted in a failure to adequately protect the company's customers from the risk of identity fraud.

### **EU: Ongoing Consultation on the 1995 Data Protection Directive**

Shortly before the summer recess the European Commission launched a consultation process on the 1995 Data Protection Directive. Is it still adapted to today's world, with its increased globalization and rapidly changing technology? If you hold views on this subject and want to make them known to the Commission, individually or as part of an industry coalition, you can contact any of the individuals listed below or file your comments directly with the European Commission. Deadline for filing is December 31, 2009.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our privacy & data protection practice group:

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