

Need and importance of data protection and privacy laws

Professor Ian Walden

Centre for Commercial Law Studies, Queen Mary, University of London



Introductory Remarks

- Protecting personal information
 - as private life: a human right
 - as a commercial asset
 - ‘oil of the digital economy’ & ‘surveillance capitalism’
- Data protection
 - growth of computing
 - processing power: capability to collect, store and match data
 - public & private sector processing
 - From Covid-19 apps to & unsolicited emails (‘spam’)
- Need and importance
 - Trust & confidence in eCommerce
 - Trade-related requirements

Data protection & privacy laws

- As fundamental individual rights
 - UN Declaration & EU Charter of Fundamental Rights, Art. 7 & 8
 - Balancing rights, e.g. freedom of expression
 - Exceptions, e.g. law enforcement investigations
- Subject matter
 - Wider: Private and public personal data
 - Narrower: Automated processing
- Substantive limits
 - ‘purely personal or household activity’
 - Natural (data protection), legal and deceased (privacy) persons
- Regulatory regime
 - “Compliance with these rules shall be subject to control by an independent authority”

Substantive rules

- Imposing obligations on Controllers and processors
 - Data protection principles
 - Applicable to those whose data is being processed
 - E.g. lawful, fair and transparent
 - Applicable to the quality of personal information and information systems
 - E.g. accuracy, data minimisation
 - Specific requirements
 - Security breach notification
 - Compliance & accountability
- Rights granted to data subjects
 - Transparency: notification and access
 - Control
 - E.g. ‘right to be forgotten’ & data portability
 - Remedies

Procedural rules

- Compliance (internal): Data protection officers
 - Records of processing
 - Impact assessments
- Oversight (external): National Supervisory Authority
 - Independence
 - resources
 - Notification system
 - Duties and powers
 - E.g. powers of inspection
 - Sanctions
 - Regulatory interpretations
 - ‘Soft law’: opinions, guidance, and recommendations

International data flows

- Legal thresholds
 - ‘essentially equivalent’, ‘adequate’, ‘appropriate’, ‘suitable’
- Legal mechanisms
 - International agreement, jurisdictional determination, national licensing/authorization regimes, and private law mechanisms
 - European Commission: Standard Contractual Clauses (June 2021)
- Data localization rules
 - WTO General Agreement on Trade in Services (1994), Art. XIV(c)(ii)
- Forces of harmonisation
 - Greater co-operation between regulatory authorities
 - International Conference of Data Protection and Privacy Commissioners

International Laws

- Council of Europe Convention (1981)
 - Amending Protocols: ETS 181 (November 2001), 223 (October 2018)
- OECD Guidelines ‘on the protection of privacy and transborder flows of personal data (1980), *revised 2013*
- Commonwealth states
 - Model ‘Privacy Act’ (2002)
- APEC ‘Privacy Framework’ (2005), *revised 2015*
- African Union
 - Convention on Cyber Security and Data Protection (2014)