Privacy and data protection: tighter controls for electronic communications and cookies

New rules from Europe mean that companies now have to obtain consent from each user when setting a cookie on their computer. These rules are contained in the so-called "Cookies Directive" which is implemented by the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011. It was drafted in response to the need to provide more protection in the light of the increased power of data controllers and the increasing number of serious data leaks over the last number of years.

The Cookies Directive applies directly to electronic communications companies (telecoms companies and ISPs) and to any entity using such communications and electronic communications networks to communicate with customers, for instance, by telephone, via a website or by email.

Individuals' personal data particularly require protection from unauthorised use including leaks and theft. The Data Protection Acts 1988 - 2003 protect data including individuals' personal data which is held by entities who collect, process, keep or use such data. More special data protection rules also apply to the protection of personal data by data controllers in the electronic communications sector.

On the 1st July, the Data Protection Commissioner published guidelines on the Regulations. The main new requirements are as follows:

- **Compulsory notification.** All telecoms companies and ISPs are now required to notify the Commissioner of every data breach involving a subscriber. They are also required to notify customers where there is a risk their data may be accessed. Failure to report can lead to prosecution by the Commissioner with a fine of up to €5,000 per instance. The Commissioner can also prosecute companies in this field for the data breach with fines (on indictment) of up to €250,000.

- **More stringent requirements for the implanting of “cookies”**. Any company or website placing information usually by way of a cookie on user equipment (computer, smartphone etc) must provide appropriate information to the user and collect their consent except in limited circumstances where the cookie is strictly necessary for the provision of the service in question. In practice this means that websites placing cookies on user equipment that are not deleted when the user leaves their website must identify a means of obtaining user consent. If a cookie is necessary to facilitate a transaction requested by the user - for example, storage of items in an online shopping cart - advance consent is not required if it is deleted at the end of the services. The Regulations do not prescribe how the information is to be provided or consent is to be obtained, other than this should be as user friendly as possible. There is a lot of confusion as to how website operators are to comply with this requirement for example, is a banner notification on a website sufficient or should the customer give overt consent by clicking an 'OK' box before continuing?

- **Sending of electronic marketing messages and the making of marketing phone calls.** It is now an offence for any company or entity to phone a person on their mobile phone for a marketing purpose without having obtained their prior consent. The requirements extend to all forms of marketing carried out by means of a publicly available electronic communications service – including, for example, the soliciting of support for charitable organisations or political parties.

Note that companies, statutory bodies, and formally-constituted voluntary bodies are all bound by the Data Protection Acts in the same way as individuals. The new Regulations came into legal effect on the 1st July 2011. Directors, managers or other officers of a body corporate are also guilty of an offence, if it is proved to have been committed with their consent or connivance or to be attributable to any neglect on their part. Therefore both the officer and the body corporate can be prosecuted. It is important for all entities to carry out an audit of their data protection processes to ensure they are compliant with the Acts especially in the marketing field.

**Contact:**
Claire Callanan – Partner, Litigation & Dispute Resolution
Beauchamps Solicitors
Riverside Two, Sir John Rogerson’s Quay, Dublin 2
Tel +353 (1) 418 0600 Fax +353 (1) 418 0699
email c.callanan@beauchamps.ie web www.beauchamps.ie