



## TABS™ Update Technology And Brands

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### 2008 Annual Data Protection Report released

Public and private sector organisations must treat the personal data of its customers with respect. This is the view of the Irish Data Protection Commissioner, Billy Hawkes, as evident from his annual report for 2008 ("the Report"). According to the Report, the Data Protection Office received 1,031 complaints in 2008 (a slight decrease on the previous year's figure of 1,037). Analysis of that figure revealed a significant decrease in the number of complaints relating to unsolicited direct marketing text messages, phone calls, fax messages and emails. The Commissioner welcomed this development which reflects increasing awareness of data protection obligations among service providers and the impact of prosecutions undertaken by the Commissioner to challenge illegal practices in the text marketing sector.

The Commissioner indicated that he will not hesitate to use his legal powers to ensure that data controllers comply with their obligations as he views the right to access and control one's personal information to be one of the most fundamental rights provided by the Data Protection Acts. The Commissioner also indicated his intention to continue to carry out privacy audits and inspections to ensure compliance with the Data Protection Acts and to identify possible breaches. Organisations may be selected for an audit based on complaints received by the Office or arising from specific allegations in the media. They may also be selected purely because they are representative of a particular sector. The audits are intended to assist data controllers in ensuring that their systems are effective and comprehensive.

The Commissioner has reported considerable success in the Office's efforts to encourage public and private sector bodies to voluntarily report personal data security breaches. On a separate but related note, an interim guidance was recently issued by the Office indicating how the Commissioner wishes organisations to deal with the loss of personal data. In the public sector, recent guidance from the Department of Finance on data security advises departments and agencies to report data breaches immediately to the Office. In its guidance, the Commissioner has recommended that the same approach be adopted by all organisations. While notification of data breaches is not a requirement under the Data Protection Acts, a working group established by the Minister for Justice, Equality and Law Reform is currently examining whether changes in data protection law are necessary to deal with data breaches.

For the second year, the Report includes what the Office considers to be the top ten threats to privacy as identified by its staff based on issues which they have encountered on a daily basis over the past year. The top ten threats to privacy are as follows:

1. Failure of organisations to have even the most basic protocols in place to minimise the loss of customer/employee data.
2. Continued lack of proper proceedings in public and private sector bodies to limit access by employees to personal data on a "need to know" basis.
3. Failure to take account of legitimate privacy expectations of the general public when moving towards greater efficiency of public services.
4. Tendency of new legislation to seek more personal data from the public and the sharing of that data between organisations without a real business case to justify such sharing.
5. Criminals using sophisticated methods to extract personal data from the general public for criminal and fraudulent use.
6. The extended use of the Personal Public Service Number (a number assigned to individuals to identify them when interacting with public bodies).
7. Publication and availability of excessive personal data on the internet.
8. Continued lack of awareness among data controllers of their data protection obligations.
9. Indifference on the part of data controllers to the consequences of their actions when they deliberately and persistently refuse to respect the data protections rights of their customers.
10. Continued lack of awareness on the part of the general public.

Compliance with data protection legislation is important for both public and private sector organisations because failure to comply with the law can have not only financial consequence but can also damage their reputation particularly if a breach is reported in the media and they are named in the Commissioner's annual report. Accordingly, it is essential that public and private sector organisations have a high standard of protection for personal data. They should therefore review their operations to ensure that they are data protection compliant. There is no time to lose - talk to your legal advisors today.



## Exclusion of liability for chatroom activities

Companies involved in gambling activities but who also provide other services that do not directly form part of such activities will be interested in a recent judgment delivered by the High Court concerning the scope of the E-Commerce Directive and the transposing Irish Regulations.

The proceedings arose out of two linked cases in which Seamus Mulvaney and Eileen Martin (“the Bookmakers”) claimed damages for libel against The Sporting Exchange Limited t/a Betfair (“Betfair”), the provider of an online betting exchange through its website, [www.betfair.com](http://www.betfair.com), which contained a chatroom where registered users could make comments concerning sports, betting or other issues. The proceedings concerned comments posted on the chatroom. The Bookmakers alleged that the inclusion of the comments constituted a publication of the comments by Betfair and therefore, pursued a claim of libel against Betfair on that basis. A variety of issues arose in the proceedings but it was agreed that issues as to the applicability of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market (“the E-Commerce Directive”) should be tried as a preliminary issue.

Betfair pleaded that it did not publish the alleged libels. As an alternative or additional ground of defence, Betfair relied on the exclusion of liability for internet intermediaries contained in the E-Commerce Directive which was transposed into Irish law by the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. 68 of 2003) (“the Regulations”). Betfair pleaded that it was an “intermediary service provider” under the Regulations providing a “relevant service” consisting of the storage of information provided by a recipient of the service. Accordingly, it claimed that it had no liability where it had no actual knowledge of the publication of the alleged defamatory material, was unaware of the facts and circumstances giving rise to same and where it expeditiously removed the material on obtaining knowledge of such facts and circumstances. The Bookmakers disagreed with this and argued that Betfair was not entitled to rely on such an exclusion.

As both the E-Commerce Directive and the Regulations contain an exclusion for gambling activities, the Court had to decide whether the exclusion applied in the cases at hand. If the exclusion did not apply, the Court then had to decide whether the E-Commerce Directive and Regulations applied to chatroom activities.

The Bookmakers pleaded that Betfair was not entitled to rely on the provisions in the E-Commerce Directive or the Regulations because of the exclusion/exemption in respect of gambling activities. Under the E-Commerce Directive, gambling activities such as “*lotteries and betting transactions*” are excluded whereas the Regulations exclude activities defined by reference to specific legislation such as the Betting Act 1931, the Gaming and Lotteries Act 1956 to 1979 and the National Lottery Act 1986. The Court questioned whether the provisions in the Regulations are as broad as the exemption in the E-Commerce Directive since the exclusion in the E-Commerce Directive appeared to relate to any form of gambling activity. However, it stated that in the cases at hand it did not need to address whether the Regulations are narrower in scope in its definition of gambling activity than the E-Commerce Directive. The Court stated that the focus of the gambling exclusion in both the E-Commerce Directive and the Regulations is centred on the relevant activity rather than the general business of the person engaged in the activity concerned. In the cases at hand, the Court stated that there was no “*significant nexus between the chatroom activity...and the betting activity*” which could “*reasonably lead to the characterisation of the chatroom as being part of any betting activity that might be said to take place on the Betfair website*”. Accordingly, it held that the gambling exclusion did not prevent Betfair from relying on the E-Commerce Directive in respect of the chatroom activities.

The Court found that the provision of a chatroom fell within the definition of an “*information society service*” under the E-Commerce Directive. Accordingly, Betfair (in providing this service) was a “*relevant service provider*” and thereby, an “*intermediary service provider*” within the meaning of the Regulations. It was therefore entitled, in principle, to the protection of the Regulations provided, as a matter of fact, in each individual case, it is able to establish the conditions concerning knowledge and expeditious action as set out in the Regulations. Whether these can be established will be determined at the full trial of the actions.

It is evident from the above that companies offering chatrooms or other information society services not directly connected with their primary gambling activities may rely on the exclusions of liability provided under the Regulations. If in doubt as to whether the exclusion applies to your operation, talk to your legal advisors.



## Advertising of medicinal products by third parties

Companies or individuals who promote the prescription, supply, sale or consumption of a medicinal product should note that their actions could constitute an advertisement under Directive 2001/83/EC of the European Parliament and of the Council of 6<sup>th</sup> November 2001 of the Community Code relating to Medicinal Products for Human Use (as amended) ("the Directive"). This is according to a decision of the European Court of Justice ("ECJ") in a reference for preliminary ruling by a Dutch court in criminal proceedings against *Frede Damgaard* C-421/07. The background to the case is as follows.

Frede Damgaard ("Damgaard"), a Danish journalist published information on a Danish website about the product, Hyben Total. He stated that the product contained rosehip powder, which purportedly relieves pain caused by various types of gout, and that it was available for sale as a medicine in Sweden and Norway. The product was prohibited in Denmark as it lost its medicinal licence in 1999, thereby leaving the product to be sold as a "food supplement". In Denmark, advertising an unauthorised medicinal product is an offence. The publication by Damgaard on his website of information relating to Hyben Total was, according to the Danish Agency for Medicinal Products, an advertisement prohibited under Danish law. Criminal proceedings were instituted against Damgaard and he was found guilty and sentenced to a fine. Damgaard appealed the judgment to the Vestre Landsret (Western Regional Court, Denmark) arguing that he was not employed by the manufacturer of Hyben Total and had no interest in the company or sales of the product. He claimed that his activities as a journalist in the health food sector was limited to communicating information on food supplements to retailers and other interested parties. Damgaard did not receive any remuneration from the manufacturer for the information that was disseminated. The Danish Public Prosecutor argued that the dissemination of information was aimed at encouraging consumers to buy the product irrespective of whether there was a link between Damgaard and the manufacturer/seller of the product. In the circumstances, that activity constituted "advertising" within Article 86 of the Directive and was therefore prohibited since the marketing of Hyben Total was prohibited in Denmark.

Damgaard argued that the information on his website did not constitute advertising within the meaning of Article 86 as "*that concept must be construed more narrowly, that is, as not covering door-to-door information effected by an independent third party*". The proceedings were stayed following the referral of the following question to the ECJ for preliminary ruling: "*Is Article 86 of Directive 2001/83...to be interpreted as meaning that dissemination by a third party of information about a medicinal product, including in particular information about the medicinal product's therapeutic or prophylactic properties, is to be understood as constituting advertising, even though the third party in question is acting on his own initiative and completely independent, de jure and de facto, of the manufacturer and the seller?*"

Under Article 87(1) of the Directive, advertising of a medicinal product is prohibited if a marketing authorisation has not been granted for the product in accordance with community law. Under Article 86(1), "advertising of medicinal products" is defined as "*any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of medicinal products*". It is interesting to note that the definition does not indicate or make any reference to the people who disseminate the information and so, the Directive does not rule out the possibility that a message from an independent third party can constitute advertising. The objective of the Directive is to safeguard the public health but the Directive does not require a message to be disseminated in the context of a commercial activity in order for the message to be held to be advertising. The ECJ stated that the situation of the author of a communication and in particular, their relationship with the manufacturer/distributor (of the medicinal product) is a factor which must be evaluated together with other circumstances such as the content of the message.

In relation to Damgaard's argument alleging infringement of his right to freedom of expression as a result of his criminal conviction, ECJ stated that, according to settled case law, "*fundamental rights form an integral part of the general principles of law, the observance of which the Courts ensures*". However, while the principle of freedom of expression is recognised by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that freedom of expression is subject to certain limitations justified by objectives in the public interest. The ECJ stated that if the information disseminated on Damgaard's website was found to constitute "advertising" for the purposes of the Directive, his conviction could be considered reasonable and proportionate in light of the protection of public health.



In response to the question raised, the ECJ stated that Article 86 is to be interpreted as meaning that “*dissemination by a third party of information about a medicinal product, including its therapeutic or prophylactic properties, may be regarded as advertising within the meaning of that article, even though the third party in question is acting on his own initiative and completely independent, de jure and de facto, of the manufacturer and seller of such a medicinal product*”. It is now a matter for the Danish court to determine whether the dissemination of information relating to Hyben Total by Damgaard constituted “*a form of door-to-door information, canvassing the activity or inducement designed to promote a prescription, supply, sale or consumption of medicinal products*”.

The above decision could have implications for companies/journalists that publish information that promote unauthorised medicinal claims about a product as it may be construed to be illegal product marketing. Accordingly, companies/journalists should take care in respect of their activities because otherwise they may end up in (legal) difficulties. If in doubt as to the implications of the above decision for your company/yourself, seek legal advice today.

## **New Tax Relief Scheme for IP in Finance Bill**

Companies that invest in intellectual property will be interested in a new scheme proposed in the Finance Bill 2009 (“the Bill”). Under the Bill, a company may claim tax relief in the form of capital allowances against trading income on capital expenditure incurred on intellectual property (“Intangible Asset(s)”) for the purposes of trade. A company will be eligible for a writing-down allowance in accordance with the accounts-based depreciation of the Intangible Asset or can instead opt for a fixed write-down period of 15 years, thereby allowing it to elect the most favourable treatment to its circumstances. Intangible Assets have been broadly defined to include patents, trade marks, brands, copyright, designs, know-how, plant breeders’ rights, licences or authorisations and goodwill.

There are restrictions on the use of allowances under the scheme. Firstly, allowances will only be available against income from activities which consist of managing, developing or exploiting Intangible Assets (including the sale of goods/services that derive the greater part of their value from such assets). Such activities will be treated as a separate trade and any income from such activities will be separately assessed. Secondly, the aggregate amount of capital allowances (and related interest expense) that may be claimed for any accounting period can not exceed 80% of the trading income in any one year. However, any excess allowance and/or interest expense can be carried forward indefinitely for offset against future trading income from the separate trade.

There will be no claw back of allowances where the Intangible Asset is disposed of more than 15 years after the beginning of the accounting period in which the asset was first provided for the trade unless the disposal results in a connected company claiming allowances in respect of capital expenditure on the asset.

It is anticipated that the Bill will be approved and signed into law very shortly. Once enacted, the scheme will apply to expenditure incurred by a company after 7<sup>th</sup> May 2009. The new measures have been welcomed as it sends a signal that the Irish Government is determined to maintain Ireland’s tax competitiveness. Companies should (at the earliest opportunity) discuss with their tax advisors the implications of the proposed scheme for their business.

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