

## General Data Protection Regulation: first enforcement notice shows extra-territorial reach

The UK data protection regulator, the Information Commissioner's Office (ICO), has issued its first enforcement notice under the EU's new strict data protection law, the General Data Protection Regulation (679/2016/EU) (GDPR). The notice is particularly noteworthy because it has been issued against a company located in Canada, which does not appear to have any presence within the EU (see box "Background").

Not only is it the first extra-territorial notice issued by the ICO under the GDPR, but it is the first action ever taken by the ICO against an entity outside the UK. It is understood that the notice is being appealed. The extra-territorial reach of the GDPR is as yet untested and, without any regulatory guidance as to interpretation, how that appeal plays out may be an early indicator as to the issues that could arise in extra-territorial enforcement under the GDPR (for background, see *News brief "EU General Data Protection Regulation: on your marks, get set, go!"*, [www.practicallaw.com/w-014-9290](http://www.practicallaw.com/w-014-9290)).

### The breaches

The ICO found that AggregatIQ Data Services Ltd failed to comply with the GDPR in the following ways:

- It processed personal information, including names and email addresses of UK individuals, in a way that the data subjects were not aware of, for purposes which they would not have expected, and without a lawful basis for that processing.
- The processing was incompatible with the purposes for which the data were originally collected.
- Damage or distress is likely as a result of data subjects being denied the opportunity to: properly understand what personal data about them may be processed by the controller; or to effectively exercise the various other rights of a data subject in respect of those data.

Under the terms of the notice, AggregatIQ is required to cease processing any personal data of EU citizens for the purposes of data analytics, political campaigning or any other advertising purposes within 30 days of the date of the notice.

### Background

AggregatIQ Data Services Ltd is an analytics business located in Canada. The enforcement notice issued against it by the Information Commissioner's Office (ICO) arose out of the ICO's investigation into the use of data analytics in political campaigns for the Brexit referendum. It is not the only enforcement action resulting from that investigation, for example, the ICO has also published a notice of intent to issue a monetary penalty notice against Facebook. However, it is the first enforcement action to be taken under the new General Data Protection Regulation (679/2016/EU) (GDPR) regime. The proposed fines against Facebook have been issued under the Data Protection Act 1998 because they relate to breaches which occurred before 25 May 2018 when the GDPR came into force. In contrast, the notice against AggregatIQ has been issued under the GDPR because the alleged breaches are ongoing.

Failure to comply with an enforcement notice was previously a criminal offence under the Data Protection Act 1998. This is no longer the case. However, should AggregatIQ fail to comply, the ICO will be free to issue a monetary penalty notice fining the company up to €20 million, or 4% of its annual worldwide turnover, whichever is the higher.

### Extra-territorial scope

In April 2018, it was reported that AggregatIQ was implicated in the data privacy issues involving Cambridge Analytica's use of Facebook data but was refusing to co-operate with the ICO's investigation. At that time, the Information Commissioner said that AggregatIQ had so far not answered the substance of the questions in the ICO's investigation. She added that AggregatIQ had informed the ICO that it would not answer any more questions from the ICO, stated it was not subject to the ICO's jurisdiction, and considered the matter closed. The ICO said it was considering the legal steps available to obtain the information.

Although AggregatIQ disputed its failure to co-operate, this does suggest that the jurisdiction of the ICO is likely to form a part of the appeal.

The territorial scope of the GDPR is set out in Article 3 of the GDPR (Article 3). It provides that the GDPR applies to organisations outside of the EU when they process personal data which, among other things, relate to monitoring the behaviour of individuals who are in the EU (Article 3(2)(b)).

According to the notice, the ICO considers AggregatIQ to be directly subject to the GDPR as a result of Article 3(2)(b). To date, no regulatory guidance has been published by the Article 29 Working Party (which ceased to exist on 25 May 2018), the European Data Protection Board (which replaced the Article 29 Working Party) or the ICO with respect to the way in which Article 3 will be interpreted. However, the recitals to the GDPR describe "monitoring" as tracking on the internet, including using data processing techniques to profile a natural person and analyse or predict their personal preferences, behaviours and attitudes.

The notice does not go into any detail regarding AggregatIQ's monitoring but any interpretation of Article 3 coming out of this enforcement action and subsequent appeal will undoubtedly be welcomed.

### Appointment of EU representative

In addition, tangentially relevant to the present case is Article 27 of the GDPR, which requires an organisation outside of the EU to appoint a representative in the EU.

The EU representative is obviously intended to provide a target within jurisdictional reach of EU regulators for enforcement purposes. In the case of AggregatIQ, it does not appear from the notice that any EU representative has been appointed. Failure to appoint an EU representative is itself a breach of the GDPR. However, aside from this technical breach, the lack of an EU representative will no doubt flush out the practical challenges of enforcing against wholly foreign entities.

### Enforcement outside the EEA

Other than the appointment of an EU representative, the framework for enforcement under the GDPR does not specifically contemplate targeting a non-EU data controller or processor falling within the GDPR. In the UK, the Data Protection Act 2018 (DPA 2018) likewise does not specifically contemplate enforcement outside of the jurisdiction, although section 207 of the DPA 2018 replicates the territorial scope of Article 3. As a result, this may ultimately be a test case for the practical enforceability of the GDPR against foreign defendants.

### Where to from here?

Financial regulation provides an interesting comparison point for extra-territorial enforcement under the GDPR. The propagation of relatively consistent

standards combined with an increase in international regulatory co-operation means that, within developed economies, cross-border conduct in the financial services realm is often efficiently prosecuted by at least one competent authority with territorial jurisdiction over the offender.

By contrast, data regulation and enforcement in cross-border cases is in its infancy. Enforcement has, until now, always been local. The GDPR has set a comparatively high bar internationally and the framework for co-operation between EU member states and their international counterparts is less well developed by comparison. Accordingly, how the *AggregatIQ* case plays out could shape how that framework develops in the near future to address multi-jurisdictional misuse of data.

Despite these challenges, given the severe penalties that can be imposed under the GDPR, it is advisable for organisations located outside of the EU to understand whether and how the GDPR applies to their businesses, and to take appropriate steps to ensure compliance if it does apply.

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*Miriam Everett is head of Data Protection and Privacy in London, Peggy Chow is a senior associate in the Technology, Media and Telecommunications team in Singapore, and Jeremy Birch is a senior associate in the Disputes team in Hong Kong, at Herbert Smith Freehills LLP.*

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*The ICO's notice is at <https://ico.org.uk/media/2259362/r-letter-ico-to-aiq-060718.pdf>.*

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