

The Interaction of Data Privacy and AI Podcast

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Cindy Knott	Hello and welcome to our podcast on the interplay between data privacy and AI. This is a podcast in our Digital Horizon Scanning series. I'm Cindy Knott, Knowledge Counsel and Head of Data Privacy Knowledge at Slaughter and May.
Rebecca Cousin	I'm Rebecca Cousin, the Global Head of our Data Privacy practice at Slaughter and May.
Cindy Knott	Today, Rebecca and I are going to discuss some of the latest developments, trends, and hot topics in the world of AI and data privacy.
Rebecca Cousin	And unsurprisingly, there's been an awful lot happening in the world of privacy and AI over the last few months. And certainly if I look back 18 months ago and compare how things have changed at that point, many organisations were still at the early stages, I would say, in putting in place AI governance frameworks and the use cases they were contemplating or were indeed using, but typically pretty low risk. We found now, since then, all manner of things have changed, and certainly those use cases have dramatically evolved. And we're seeing things such as AI in the context of recruitment being a much more common feature, and also much more use of facial recognition technologies as well. And then the new kid on the block being the agentic AI, with everyone looking to see what that could bring to the party as well. On the legislative side of things, the EU AI Act is pressing ahead with a range of provisions now in force. Obviously been lots of commentary around - will some provisions be postponed or not? As things currently stand, it is pressing on. Whilst on the UK side it does seem that we will be getting some form of AI act at some point in time, but the scope and timing around that is still a little bit uncertain. So, lots of stand on the legislative side of things. I think it's fair to say that against that background, there's also increased pressure on businesses to keep up with innovation, to be making the most of innovation. No one wants to be the last mover. You might not want to be the first mover, but you don't want to be the last mover. Businesses are really focusing on ensuring they're making the most of not only the efficiencies that AI can potentially bring, but also looking at improved customer offerings as well. So, looking at the cost side of things, but also the revenue generating side as well.

	So, in terms of from a privacy team, what does that mean? Well, we see this often translating as to the privacy team having to walk that tight line between supporting the business, supporting their organisation with their commercial aims, whilst also looking to get those tools to be compliant and often against quite a tight timeframe as well. So, some real challenges for the privacy teams in balancing these different competing objectives.
Cindy Knott	You mentioned legislation, Rebecca, and of course in the UK we have the Data Use and Access Act (DUA) that was passed this year and that does have some implications for AI. So, one area is ADM or automated decision making. So, we might see some changes there that are likely to be relevant to AI because as we know, AI is often used in the context of ADM. So, DUA will significantly relax the current position by allowing organisations to carry out ADM in reliance on legitimate interests or some other UK GDPR legal basis, but in most cases removing the requirement for consent. There are still some important protections in place. So, for example, the relaxations don't apply to special category data and the existing requirements for transparency and the need for human intervention, DUA confirms, has to be meaningful, but all those things are preserved. Another area DUA might have some implications for AI is around scientific research. So, as you know, processing is carried out for those purposes. And when it is there are some adjustments and exemptions to the usual rules under the GDPR. And DUA confirms that commercially funded private sector research, which much of the AI research will be, may well fall within the definition of scientific research, but this is only as long as the activities can reasonably be described as scientific. So, I mean, to be fair, this is largely a codification of existing ICO guidance, but nonetheless, it might provide AI developers with a little bit more clarity and confidence and slightly more open doors, as it were.
Rebecca Cousin	And it'll be interesting to see how much organisations look to benefit from those, particularly as this is an area of divergence from the EU GDPR. So, you know, does that lead to organisations trying something in the UK first, maybe giving them more flexibility here or, you know, given that we're in a global marketplace, does that actually move the dial or not? I think only time will tell on that one.
Cindy Knott	Yeah. In terms of divergence obviously, another area of divergence is of course enforcement. So we're seeing different enforcement action being taken across Europe in relation to the processing of personal data by AI tools and even some court cases as well. We have the Italian Data Protection Authority that is fairly active in relation to, AI enforcement action. They've issued a €5 million fine against Luka. That was earlier this year in April, and a €15 million fine against OpenAI last December in relation to ChatGPT. In both cases, they've identified failings around appropriate lawful basis transparency and also the organisation's approach to age verification. And then more recently, we've seen a number of data protection authorities initiating investigations into the DeepSeek chatbot

	as well. And then in terms of cases, we know the Upper Tribunal has found in favour of the ICO in the Clearview AI appeal, confirming that Clearview AI is within the material and extraterritorial scope of the GDPR. So a little while ago, the ICO had fined Clearview AI £7.5 million for its use of images of UK residents, and those images were collected from the Internet and social media to create a global online database which could be used for facial recognition. We know that other EU DP's have also fined Clearview so there's going to be, I think, significant interest in this decision. Although I wouldn't be surprising if it were appealed.
Rebecca Cousin	Yeah, I think you're right there. I've got to say it's, a really important case from a number of different principles, actually, not just around AI. So, in many ways it would be good to get it appealed so that we've got a really good authority on what the position is on some of those points that have been debated. I think the other thing I just wanted to touch on in terms of around enforcement was that it's not just big tech now that we are seeing in the frame. So we're seeing organisations who are actually deploying the tech as well being brought to account. Now, this tends to tie back from a GDPR perspective to the automated decision making. So what you talked about before, Cindy, in terms of some of the changes on the UK side, but on the basis of the current EU version of that, and we've seen a couple of cases come out of Austria around this. So one was a referral to the CJEU in the Dun & Bradstreet case in the spring this year. And that one confirmed that information on automating decisions should describe in a way that data subjects can actually understand the procedure and principles used in the decision. So not the actual algorithm itself or complex formula, so that they're not required and indeed wouldn't actually suffice even if they were provided because it wouldn't be clear enough, but really making the point that you've got to be able to provide that information to data subjects. And then the Austrian's again, had a enforcement action in September, this time against an Austrian credit information agency and an energy company where the energy company had been unlawfully using fully automated decision making, using the credit information to deny energy supply services to customers. So again, sort of looking at where has that automated decision making been used, what is the impact of that? And there was a fine and enforcement action against both parties there. And then even more recently we had the Hamburg DPA, fining a financial services company for using, again, credit rating information. That's definitely the flavour of the month for enforcement at the moment. They're using credit rating information on applications and even though people had a good credit rating, customers were being rejected using that automated decision making. And indeed, when those customers asked for justification around that rejection, the company was not able or didn't at least sufficiently fulfil its information and disclosure obligations. So I think we're starting to really see some of those use cases being tested and challenged a little bit by the

	regulators to ensure that where AI or automated decision making, because I think, you know, they are different, but often one often involves the other. You know, they are really being tested now in that in the deployer setting, not just the big tech side of things.
Cindy Knott	Conversely, in the UK, the ICO continues to limit its formal enforcement actions, with the only examples really being Snap, which resulted in no enforcement action despite the notice of intent to do so, and Serco, where facial recognition is being used for employee monitoring.
Rebecca Cousin	Though of course, enforcement action is only one option available to the regulators and I think the ICO we have seen them choose to take a slightly different path, as you say. I think one area where we have seen them taking action, but not enforcement action is around consensual audits, where they did a big sweep of the market around the use of AI in recruitment, and did a lot of consensual audits of organisations, both companies and recruitment agencies in that space. Rather than taking enforcement action in respect of the areas they considered to be non-compliant, the ICO decided to issue a report setting out over 300 recommendations of what organisations should be doing in the ICO's view in this area. So you know it was some form of action, but it wasn't formal enforcement action, and it ultimately resulted in effectively guidance.
Cindy Knott	And I mean, guidance is helpful, of course, but is that what we want to see here? Is that the outcome that we want? I mean, that constant sort of debate between to enforce and not to enforce or what do you think, Rebecca?
Rebecca Cousin	I mean, look, it's difficult. Guidance is incredibly helpful. And so I wouldn't want to take anything away from the ICO's impressive range of guidance that it has spent a lot of time doing. But I think if we just take stock a little bit personally, I don't think guidance gets us all the way there. I think enforcement plays a part. I suppose it's a bit of a carrot and stick type approach to things because to my mind, if we really, as a country, want to foster responsible AI and support innovation, I would say we need more appropriately targeted enforcement. So not, you know, enforcement in all cases, but just really thinking carefully about what enforcement it is that we should be taking. At the end of the day, businesses make risk based decisions on how they're going to operate. And if there's little risk of enforcement, how are they going to justify using resources for compliance? Or indeed, why would they wish to ensure that businesses AI usage is the right side of the line from a privacy perspective, why not let the business continue doing what it wants to do without putting those guardrails around it? So I think, you know, we need to be able to provide some enforcement action as an incentive in many ways to persuade businesses to make those right decisions.
Cindy Knott	I can completely see that. But at the same time, the ICO have a fairly difficult path to tread, I think. I think there's still a lot of unknowns around AI and exactly how, the GDPR and other regulations apply to it. Now, I think there's still a little bit of work to be done there. We also know that the Data and Access Act (DUA) imposes new duties on the ICO to promote

	innovation and competition. So they have that pull there and that's also reflected, you know, across the various sort of innovation services at the ICO has set up to help businesses. So it's not just guidance is also all of that support available as well. But ultimately they have to prioritise where they take regulatory action. I heard them speak the other day at a conference in relation to AI, to a case study. And that was exactly their answer. You know, they have limited resources, they have to consider a whole range of factors. They have to decide what shape the action takes. And I think we've mentioned that already. You know, it's not sometimes it's not just the fines, there's other types of enforcement action and there's guidance as well, you know, and they are continuing. I think we've mentioned guidance quite a lot today. And they are, continuing to publish guidance in this space. And they publish their biometrics strategy in the summer. How that was highlighting their next areas of focus. And as we mentioned earlier, agentic AI unsurprisingly on the list. And we've been promised a tech futures report, on that. We also expecting a statutory code of practice on AI, but we've heard from the AI say that that isn't really imminent, not least, because it requires secondary legislation first. And then overlaying that. I mean, it's not just the ICO publishing guidance, given the UK sectoral approach to AI, we have other regulators at very active like the FCA, and been great to see, the FCA and the ICO collaborating and also collaborating through the Digital Regulation Cooperation Forum. They've done a lot of work there around AI. They've received some extra funding and that will help them consolidate some of the guidance is being published by all these regulators across sectors, into a sort of one stop shop digital library for innovators, so that that may help to some extent as well.
Rebecca Cousin	Yeah. And as I said, I think the guidance is really important. I think one of the challenges is at the moment, the amount of it it's good that we have so much, but for any tech, any SME, it's going to be very challenging to get their at their heads around it. So I think some of that consolidation work that's been going on is going to be really valuable. As I just go back to the fact that I think, you know, you need a bit of carrot and stick, you need to show people the way with the guidance. But then also, if people are not complying with that guidance and are not following the guidance, then, you know, I think we just do need some enforcement action around it. And I know what you say about, innovation and, and the government's focus on that and the duties in the DUA Act. Now, I would say that I don't think having appropriately targeted pragmatic enforcement is contrary to that. I think it can help support that. It makes it clear which people know what they should do, and certainty can be incredibly helpful.
Cindy Knott	Now, what a powerful message as well for, the data protection officers and data protection leads out there to be able to take to their board and actually look at this enforcement action that the ICO has just done and how that can then help them.

	We know from our conversations with them, they all over they've all their roles have changed, expanded. And actually something like that could be really helpful.
Rebecca Cousin	And interestingly, going forward, that the information commissioner only has one year, just over one year left in his term now. So I think the future direction of the enforcement under the ICO and their approach to AI is going to be really interesting. And let's see who the next information commissioner is, or indeed will be the chair of the information commission at that point in time, given the changes to the to the structure. So I think when we see who that next appointee is, that will give us a really interesting steer on what that direction of travel might be.
Cindy Knott	Agreed. Thank you, Rebecca. Thanks everyone for listening and we hope you found this discussion helpful. Of course, please do also, feel free to get in touch with us to discuss any of the specific topics raised in this podcast.