

Expert comment

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It has become traditional in this column to use our final edition each year to take a look back on some of the key data protection developments in the year. The pace of developments has been steady across many spheres, with the emergence of guidance on the General Data Protection Regulation ('GDPR') at EU and local level and lots of significant new legislation. The Irish and European courts have also been busy.

It can be difficult for practitioners to keep on top of all the moving parts, so we have set out below a reminder of some of the main data protection developments that have happened in Ireland, the EU and further afield in the past 12 months as we take a breath before what is sure to be a tumultuous 2018. Such was the activity during the year that the below list is by no means exhaustive.

A stop/start year for e-Privacy

The draft e-Privacy Regulation was published by the European Commission in January 2017. Originally planned to be in place in time for GDPR commencement on 25th May 2018, it did not progress as intended.

In April, the Article 29 Working Party issued its Opinion on the proposed Regulation arguing that 'direct marketing' should include communications not only sent but presented to end-users such as targeted online advertisements. This change has caused concern to the online advertising industry but has since been incorporated into the most recent draft of the Regulation which was approved by the European Parliament in October. The draft Regulation is now being negotiated with the Member States leaving controllers and processors in a frustrating limbo as they assess GDPR compliance (where direct marketing is explicitly acknowledged as a legitimate interest) against an uncertain e-Privacy environment which has an emphasis on consent.

Early GDPR guidance

The initial tranche of GDPR related guidance emerged from the Article 29 Working Party during the year. The guidance included guidelines on the lead supervisory authority in April, and guidance on pro-

filing, automated decisions making and data breach notifications (all in October).

The guidelines provide useful insight into how the Data Protection Commissioner ('DPC') and other data protection authorities will interpret the GDPR and in many cases, such as breach notifications, they include some practical examples of how they see the legislation playing out in different scenarios.

In August, the Irish DPC issued guidance on appropriate qualifications for Data Protection Officers (see Volume 10, Issue 5 of *Data Protection Ireland*). That guidance noted that one size does not fit all, so where a data processing activity is particularly complex, or where a large volume or sensitive data is involved, the Data Protection Officer ('DPO') may need a higher level of expertise and support.

Throughout the year, the market for DPOs continued to heat up as those controllers and processors who are mandated to hire a DPO look for the right fit for their business.

New legislation

On 6th July, the Network and Information Systems (NIS) Directive was adopted by the European Parliament. It aims to harmonise cybersecurity standards and increase cooperation between Member States in relation to cyber-attacks.

The Directive applies to 'operators of essential services' (e.g. energy, transport, healthcare and banking) and 'digital service providers' (e.g. search engine operators, cloud computing services and e-commerce platforms). The Irish Department of Communications, Climate Action and Environment completed a public consultation on the legislation and a draft Bill is expected shortly.

While the NIS Directive will be of particular interest to digital service providers and utilities, of more general interest was the publication of the General Scheme of the Data Protection Bill 2017 which was published on 12th May. The Bill proper has yet to emerge and will need to be fast-tracked if Ireland is to fully transpose the GDPR in time for the 25th May deadline. Some areas, such as the digital age of consent for children being 13 appear to be settled. However, many other areas remain open, including for

example, the extent to which Ireland may narrow some of the data subject rights under Articles 15 – 22 GDPR.

Case law

Once again, 2017 was an active year in the Irish and European courts.

On 3rd October, Judge Costello gave her judgment in the case of *DPC v Facebook & Schrems* (the so-called ‘Schrems II’ case). The DPC had referred the case to the Irish High Court which confirmed the ‘well-founded concerns’ of the Commissioner and decided to refer the validity of Model Clauses to the Court of Justice of the European Union.

Another less commonly known development which also began its life in the ODPC’s Office was the opinion of Advocate General Kokott of 20th July 2017 in the case of *Nowak v DPC*. The Advocate General (‘AG’) concluded that ‘a hand-written examination script capable of being ascribed to an examination candidate, including any corrections made by examiners that it may contain, constitutes personal data’. This conclusion was based on the view that because exam scripts record the personal performance of an individual, they necessarily include personal information even where the exam script contains a pseudonymised identification number. Handwriting characteristics may also be used to indirectly identify an individual.

Notably, the Opinion states that the analysis of whether data constitutes personal data is separate to whether any rights attach to the personal data. While the nature of an AG’s Opinion is advisory and not binding upon the Court of Justice of the EU (‘CJEU’), in many cases the court adopts a very similar approach to the AG. The decision of the CJEU is eagerly awaited as it will have wider relevance to the scope of the term ‘personal data’.

Privacy in the workplace

On 8th June, the Article 29 Working Party issued an updated Opinion on data processing at work. This Opinion makes a new assessment of the balance between legitimate interests of

employers and the reasonable privacy expectations of employees by outlining the risks posed by new technologies, and undertaking a proportionality assessment of a number of scenarios in which they could be deployed. It notes that consent will rarely — if ever — be an appropriate lawful basis for data processing in the workplace.

The Opinion was followed by an interesting European Court of Human rights (‘ECHR’) decision on 5th September, *Bărbulescu v Romania*, where the Grand Chamber of the ECHR found the monitoring of Mr Bărbulescu’s messages amounted to a breach of his right to respect for private life and correspondence under Article 8 of the European Convention of Human Rights.

In reaching this conclusion, the Grand Chamber ruled that employees have a certain expectation of privacy in the workplace and that the Romanian courts had failed to properly consider amongst other things whether Mr Bărbulescu had received prior notice from his employer of the possibility that his communications might be monitored, particularly where the employer would have access to the content of these messages. The national courts also failed to determine the specific reasons justifying monitoring measures and whether less intrusive means may have been used.

Notwithstanding the status of the GDPR as a Regulation with direct effect across the EU, Article 88 of the GDPR permits Member States to provide for more specific data protection rules in respect of the processing of employees’ personal data in the employment context. It will be interesting to see in the coming years if Ireland and other Member States significantly diverge in relation to what levels of employee monitoring can be permitted.

Privacy Shield is Trump-proof

Despite nervousness that the Trump administration had failed to address some key components of the EU/US Privacy Shield, on 22nd September the Privacy Shield passed its first annual review with EU and US officials issuing a joint statement which out-

lined their support for the programme. This prompted a sigh of relief from the over 2,400 companies that have been certified under the Privacy Shield to date by the US Department of Commerce.

The Privacy Shield had been criticised earlier in the year by the European Data Protection Supervisor and by the Article 29 Working Party. The annual review included a number of specific recommendations from the EU Commission, including that the Trump administration address its ongoing failure to appoint a permanent privacy ombudsperson, as required by Privacy Shield agreement. Separately a number of interest groups are seeking to challenge the Shield before the European courts, including Digital Rights Ireland.

So, all told a busy year gone by and an even busier one ahead!

I would like to extend my thanks to my colleague Ciara Anderson for her assistance in preparing this comment.

We look forward to bringing you timely news updates in this journal throughout 2018.

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