Part 1: the GDPR, freedom of expression and a right to remember?

In the first of a three-part series on the GDPR's freedom of expression exemption, Hugh McCarthy, Associate with Arthur Cox, explores the parameters of the exemption under Irish law with a focus on recent caselaw on the 'right to be forgotten'

Hugh McCarthy is speaking on 'the Changing Face of Subject Rights under the GDPR' at the 13th Annual Data Protection Conference, taking place in Dublin on 15th & 16th November 2018 — see www.pdp.ie/conference

The General Data Protection Regulation ('GDPR') states that the processing of personal data should be designed to serve mankind. It follows then, that data protection is not an absolute right but rather — as the GDPR also states — one that "must be considered in relation to its function in society and be balanced against other fundamental rights". This exercise is to be undertaken "in accordance with the principle of proportionality", which necessitates a balancing of the competing rights.

This potential for conflicting fundamental rights is particularly acute at the intersection between privacy and freedom of expression ('FOE'). The GDPR recognises this, and Article 85 requires all EU Members States to adopt national rules to provide a legislative framework designed to mediate the inevitable conflict of these rights.

Member States must legislate

Article 85(1) of the GDPR states unequivocally that Member States "shall by law reconcile" the right to data protection pursuant to the GDPR with the right to FOE and information. Article 85(2) particularises this positive legislative obligation by requiring Member States to introduce specific exemptions or derogations for data processing "carried out for journalistic purposes or the purpose of academic, artistic or literary expression".

Pursuant to this requirement, section 43 of Ireland's Data Protection Act 2018 (the 'DPA 2018') provides for an exemption from certain provisions of the GDPR where "having regard to the importance of the right to freedom of expression and information in a democratic society", compliance with such provisions would be "incompatible with" the processing of personal data for the purposes of "exercising the right of freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression". Mirroring Article 85(2) of the GDPR, section 43 specifies the GDPR provisions from which Member States may derogate based on FOE grounds. These include:

- the Article 5 principles;
- the lawful bases under Article 6;
- restrictions on data transfers; and importantly
- the data subject rights contained in Articles 12 to 22 of the GDPR.

However, the scope of this exemption is far from clear. Whilst section 43(1) of the DPA 2018 confirms that regard shall be given to the importance of freedom of expression/information in a democratic society, section 43(5) merely states that such right shall be "interpreted in a broad manner". This is reiterated in Recital 153 to the GDPR, which clarifies that in respect of FOE, "it is necessary to interpret notions relating to that freedom, such as journalism, broadly".

Helpfully, section 43(3) sets down a procedural basis for the Data Protection Commission ('DPC') to refer, on its own initiative, any question of law relating the application of section 43 to the High Court. In light of the open-textured nature of section 43, this could yet become a well-worn path to the courts. The remaining sections of this article and series will consider the issues that factor most prominently in the application of the GDPR's FOE exemption.

FOE and the right to be forgotten

Article 17(3)(a) of the GDPR makes it clear that the right to erasure ('the right to be forgotten') shall not apply to the extent that data processing is necessary for exercising the right to FOE and information. Several recent high-profile right to be forgotten ('RTBF') cases under the Data Protection Directive 95/46/EC ('the Directive') shed light on how FOE might interact with Article 17 of the GDPR in future.

(An important preliminary point is that the GDPR's RTBF is much broader than *Google Spain*, and not restricted to search engine results based on data subjects' names. Indeed, subject to the criteria in Article 17(1), the RTBF is potentially available to data subjects

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against all data, and not just search engines.)

The starting point of this analysis is the Court of Justice of the European Union's ('CJEU') important ruling in *Google Spain v Gonzalez*, where the CJEU first established that a RTBF existed under the Directive. In that case, the CJEU emphasised on the one hand the "decisive role" search engines play in "the overall dissemination of data" and information in modern society in making such data accessible to all internet users, including those "who otherwise would not have found the web page on which those data are published". On the other hand, the CJEU characterized search engines as being responsible for the creation of "a more or less detailed profile of the data subject", with such activities being "liable to affect significantly" the data subject's fundamental privacy and data protection rights. In balancing these competing rights, the CJEU stated that as a "general rule", data subjects' rights would prevail over the interests of internet users in having access to the information contained in search results. Significantly, the CJEU did acknowledge that this balancing test may vary depending on factors such as:

- the nature of the published information;
- its sensitivity to the data subject's private life; and
- the public's interest in having access to the information, particularly where the data subject plays a role in public life.

These factors have since been applied in several recent English and Irish cases.

> ***"When considering the GDPR's RTBF, it is important to remember that like all rights, it is relative and must be considered in the context of other rights — most notably the right to FOE and information."***

Savage v the DPC

In February 2018, the Irish High Court handed down judgment in *Savage v. The Data Protection Commissioner* and upheld the DPC's initial decision in response to a complaint it received from an aspiring Dublin politician. The complainant had been described as "North County Dublin's Homophobic Candidate" in an online discussion forum with the same heading appearing in Google's search results when the individual's name was searched. Taking account of the Article 29 Working Party Guidance on the application of the *Google Spain* ruling, the DPC concluded that Google's processing of the complainant's personal data in the context of its search results was not "unwarranted by reason of prejudice" to either the complainant's fundamental rights or legitimate interests.

The DPC based its decision on the fact that the data subject had run for public office, meaning the data in question were relevant to the public interest and, in the DPC's view, the statement which was the subject of the complaint was accurate personal data insofar as that it accurately reflected an opinion expressed by a user of the discussion forum in respect of the data subject.

In reversing the earlier Circuit Court ruling and re-instating the DPC's initial decision, the High Court placed emphasis on this latter point. In particular, the High Court found that, in assessing a complaint in these particular circumstances, regard should be had to the underlying discussion forum thread, as well as the headlines appearing in the Google search results in ascertaining whether the data constituted fact or an expression of opinion. Taking this approach, the High Court found that the comment made in the discussion forum was clearly an expression of opinion rather than a statement of verified fact.

The High Court accordingly concluded that the Circuit Court had made an error in concluding that the statement was "inaccurate data and factually incorrect, or an appearance of fact". As to the accuracy point, the Circuit Court had suggested that Google might have included quotation marks or parenthesis around the quoted text in its search results, to make it clear that the original poster was expressing an opinion rather than a verified fact. The High Court sensibly rejected this approach as an overreach of the jurisdiction of the *Google Spain* ruling, and imposing an editorial function on search engines, which would be very difficult to operationalize in practice.

NT1 and NT2 v Google

In April 2018, the UK High Court handed down judgment in *NT1 and NT2 v Google and The Information Commissioner*: the first RTBF cases to reach the superior courts of England and Wales. The NT1 and NT2 cases involved two unconnected individuals who had separately been convicted of criminal conspiracy. Both sought orders based on *Google Spain* seeking removal from Google's search results of information relating to their "spent" criminal convictions.

The first case concerned NT1, a business man who had been convicted of conspiracy for his role in a property business which had defrauded members of the public. NT1 served a lengthy prison sentence but a period after his release, his conviction was deemed to be a "spent" conviction under the UK's Rehabilitation of Offenders Act 1974.

However, the media reporting of his convictions continued to appear in Google's search results. Although technically now spent, the Court rejected NT1's application to de-list the search results, referencing his convictions. The court considered that

details of the crime and conviction to be "essentially public in its character", because they concerned "information about business crime". In short, the court reasoned that it was "not information of a private nature", but instead related "to his business life, not his personal life."

The Court's conclusion was clearly influenced by NT1's character — the judgment expressly referred to "a long and dark shadow over" NT1's integrity, the fact of the crime being one of dishonesty, NT1's failure to plead guilty and subsequent lack of remorse, coupled with his continued, albeit more limited, role in public life. Based on these factors, the court reasoned that the information complained of "retains sufficient relevance today". In particular, the Court found that the information in the search results relates to "an untrustworthy businessman who poses some risk to the public" and that its continued availability in search results "serves the purpose of minimising the risk that he will continue to mislead, as he has in the past".

By contrast, the Court reached a different outcome in respect of NT2's application on the basis that NT2's crimes had not been ones of dishonesty per se, but ironically for invasion of privacy offences (unlawful phone tapping and computer hacking) from which the Court was satisfied that NT2 had not made any direct financial gain. Unlike NT1, he had pleaded guilty at an early stage before the need for a trial, and his ongoing business activities posed little risk to the public. The Court also took account of the impact of the search results on NT2's young children of school age. NT2's application for de-listing of certain information was granted on the basis of the Court's assessment that his "past offending is of little if any relevance to anybody's assessment of his suitability to engage in relevant business activity now, or in the future." Based on this analysis, the Court was satisfied that: "There is no real need for anybody to be warned about that activity".

Toward a GDPR right to remember?

The contrasting outcomes in *Savage*, and the respective NT1 and NT2 cases, places emphasis on the fact-specific nature of the balancing test to be undertaken in RTBF cases. It is clear that the section 43 of the DPA 2018 is sufficiently open-textured to incorporate the courts' analysis in both *Savage* and *NT1 and NT2* when applying the FOE exemption under Article 17 of the GDPR. In particular, *Savage* and *NT1 and NT2* indicate that, where the applicant/complainant is an individual who plays a role in public life, the applicable balancing test must afford significant weight to the public interest in having access to the relevant information.

It is also apparent from *NT1 and NT2* (and from *Google Spain*) that the term "public life" is not limited to political life, but may also encompass those engaging with the general public, for example, in a business capacity — as "consumers, customers or investors."

In considering RTBF applications under the GDPR for erasure of information relating to prior criminal convictions, supported by Ireland's Criminal Justice (Spent Convictions and Certain Disclosures) Act 2016 or the equivalent UK legislation, it seems sensible that data controller's and data protection regulators should undertake an analysis of the kind performed in *NT1 and NT2:* i.e. of the applicant's likelihood of recidivism and the public exposure to that risk. Having regard to "the importance of the right to freedom of expression and information in a democratic society", these are clearly relevant factors when balancing the public's interest in having access to the information. Accordingly, it appears likely that in certain circumstances, the GDPR will recognise the public's right to remember over a data subject's RTBF. While it is possible to distil these general principles from the recent RTBF caselaw, which should remain relevant to the application of section 43 of the DPA 2018 and Article 17(3)(a) of the GDPR, ultimately these cases will turn on their facts.

Anonymity and court proceedings

In *NT2 and NT2*, the UK High Court took the decision to maintain the anonymity of the claimants to the proceedings. This was to guard against the so-called 'Streisand effect', with the Court reasoning that this was necessary to ensure that the proceedings themselves did "not give the information at issue the very publicity which the claimants wish to limit".

Whilst at present, it does not appear that this approach will be routinely adopted in Ireland given the general constitutional requirement for the public administration of justice – as seen in the *McKeogh v Doe and others* – sections 158 and 159 of the DPA 2018 do provide some scope for the Irish courts to adopt specific procedural rules in data protection cases. It will interesting to see what, if any, measures are adopted.

Final remarks

The second article in this series will consider how the GDPR's FOE exemption potentially interacts with the important role played by journalists in FOE in the context of journalism, while the third article will survey the territorial reach of the RTBF and the FOE exemption, and consider its potential implications outside the EU. When considering the GDPR's RTBF, it should be remembered that like all rights, it is relative and must be considered in the context of other rights — most notably the right to FOE and information. As the *Savage* and *NT1* cases demonstrate, and depending on the particular factual matrix of a given case, balancing the RTBF with FOE can also safeguard the public's right to remember.

Hugh McCarthy
Arthur Cox
hugh.mccarthy@arthurcox.com