Part 2: From Fourth Estate to 4G — Journalism and the GDPR

In the second of a three-part series on the GDPR's freedom of expression exemption, Hugh McCarthy, Associate with Arthur Cox, explores the parameters of this exemption under Irish law with a focus on journalism, social media expression and protection of journalists' sources

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') imposes a near impossible legislative task on the EU Member States via Article 85, which requires them to introduce national laws to reconcile two fundamental rights: the GDPR's right to data protection, and the human right to freedom of expression and information ('FOE'). Section 43 of Ireland's Data Protection Act 2018 ('DPA 2018') endeavours to do so by providing for an exemption from certain GDPR provisions where compliance would be incompatible with FOE. This article considers how this balance might be struck where personal data are processed for journalistic purposes.

More liberal journalistic exemption under GDPR?

Whilst Irish data protection law contained an FOE exemption pre-GDPR, it appears that section 43 sets a lower threshold for the exemption to be engaged. Section 22A of the (now largely repealed) Data Protection Acts 1988 to 2003 contained an exemption where personal data were processed 'only for' journalistic purposes and 'undertaken solely with a view to the publication of any journalistic… materials'. This combined with a double subjective test requiring the data controller to reasonably consider:

- the processing to be in the public interest; and
- that compliance would be incompatible with the journalistic purpose.

In contrast, section 43 provides for a more general FOE-based exemption, subject to the single precondition that compliance with the applicable GDPR provision(s) would be incompatible with FOE. Section 43 does not expressly contain a subjective test, and dispenses with the requirement that the relevant data processing be undertaken 'solely' for journalistic purposes.

What are journalistic purposes?

Helpfully there is a well-developed body of Irish and European case-law addressing what is meant by the term 'journalistic purposes'. In its Satamedia ruling (full title C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16th December 2008) the Court of Justice of European Union ('CJEU') stated the broad principle that activities will constitute journalistic activities if "their object is the disclosure to the public of information, opinions or ideas". The CJEU wisely stated that the medium used to transmit personal data – "whether it be classic in nature, such as paper or radio waves, or electronic, such as the internet" — is not determinative as to whether an activity is undertaken for journalistic purposes. Rather, the key factors will be the content and purpose of the expression. In the CJEU's view, journalistic activities can also be undertaken for profit-making purposes.

Under Irish law, the High Court's 2012 ruling in *Cornec v Morrice* centred on Article 40.6.1 of the Constitution, which refers to 'the education of public opinion' as a matter of 'grave import to the common good'. Relying on this clause of the Constitution, Hogan J expanded media expression beyond its traditional confines to protect internet bloggers, which the Court considered "may just as readily constitute an organ of public opinion" as those which existed in 1937, which are mentioned by way of example in Article 40.6.1, "namely, the radio, the press and the cinema".

In the earlier Supreme Court ruling in *Mahon v Post Communications* – an application by the Mahon Tribunal to restrain the *Sunday Business Post* from publishing confidential tribunal materials – Fennelly J confirmed that "the right of a free press to communicate information without let or restraint is intrinsic to a free and democratic society". To fully capture the essence of the right to media expression, Fennelly J quoted a passage from the 1994 judgment of Lord Hoffman in *Central Independent Television*, which is worth repeating in full:

"Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress nd damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no

freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."

These rulings confirm that the media of the masses can also avail of the FOE protections long been enjoyed by traditional media outlets. However, where such rights conflict with data protection rights, the relative weight of FOE will ultimately depend on the content, purpose and public interest in such expression.

Balancing the competing rights

In this context, the GDPR acknowledges that data protection must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. Thus, when data protection rights conflict with the fundamental right to FOE, it is necessary to mediate the competing rights through a balancing test. While the particular facts of each case will ultimately determine the weight attached to each right, the following principles distilled from European and Irish law help to frame this analysis.

The CJEU's approach

Google Spain provides some (limited) guidance on how to balance these competing rights. Here, the CJEU concluded that as a general rule, because of the potential impact on the data subject's rights, a data subject's rights override the interest of internet users in having access to the relevant information through search engine results. The Court was careful to leave itself sufficient flexibility to recalibrate the balancing test to reach different outcomes in future cases, by taking account of factors such as:

- the nature of the information in question;
- its sensitivity for the data subject's private life;
- the public interest in having access to the information; and significantly
- the role played by the data subject in public life.

The CJEU also explained that the balancing test would not necessarily apply to publishers in the same way as internet search engines. As explained in the first article in this series, the balancing tests applied by the Irish and English courts in the respective *Savage* and *NT1 and NT2* cases produced different outcomes by affording significant weight to the 'public life' element of the test, and the corresponding public interest in having access to certain information.

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The Convention framework

Article 10 of the European Convention of Human Rights (the 'Convention') also enshrines FOE and the Irish courts are obliged to interpret the GDPR and the DPA 2018 in a manner compatible with the State's obligations under the Convention. In doing so, they must take due account of relevant decisions of the European Court of Human Rights ('ECtHR'), which has developed a sophisticated approach to mediating conflicts between privacy and FOE, as follows:

Prescribed law: Any interference with the right to FOE can be considered to be prescribed by law because the GDPR together with the DPA 2018 provide a clear legislative basis for the exercise of data protection rights which could potentially interfere with FOE.

Legitimate aim: The protection of an individual's data protection rights under the GDPR is a legitimate aim.

Necessary in a democratic society: The crucial question for present purposes is whether such an interference with the right to FOE can be said to be 'necessary in a democratic society...for the protection...of the rights of others', specifically the protection of their personal data. The ECtHR has frequently reiterated that FOE constitutes "one of the essential foundations of a democratic society and that...the safeguards guaranteed to the press are particularly important", because of the "public watchdog role" it plays. The Supreme Court's analysis in its important *Mahon v Keena* ruling reduced this test to an enquiry as to whether there is "a pressing social need for the imposition of the restriction" on the media's FOE. No such need was found in that case.

Must publication be in the public interest?

In the 2007 case of *Mahon v Post Communications*, the Supreme Court stated the general principle that the media is not "required to justify publication by reference to any public interest other than that of freedom of expression itself". It follows that the media is "free to publish material which is not in the public interest". However, where the media's exercise of FOE impinges on the rights of others, thus necessi-

(Continued on page 6)

(Continued from page 5)

tating a balancing test, the relative public interest in the media's publication becomes important.

In the *Von Hannover v Germany* decisions concerning the media's FOE right to publish paparazzi photographs of certain royals while on holiday, the ECtHR made clear that the following criteria should be considered in balancing the media's FOE against the privacy rights of individuals:

- the contribution made by the material to debate of general interest;
- the individual's public profile;
- the prior conduct of the individual concerned;
- the content, tone and consequences of the relevant publication; and
- the circumstances in which the material (in this instance, photographs) is obtained — in particular, whether the specific context enhance or diminish the individual's legitimate expectation of privacy.

These considerations are indirectly subsumed into the equivalent journalism exemption under the UK's Data Protection Act 2018, which requires that, for the purpose of determining whether it is reasonable to believe that publication would be in the public interest, the controller must have regard to the BBC Editorial Guidelines, Ofcom's Broadcasting Code or the Editors' Code of Practice, as relevant to the medium of publication. This legislation offers a basic yardstick against which controllers can assess whether publication is in the public interest.

The BBC's Guidelines in particular capture the proportionality element of the balancing test: "When using the public interest to justify an intrusion, consideration should be given to proportionality; the greater the intrusion, the greater the public interest required to justify it."

Irish controllers would also be well advised to have regard to these principles prior to publication of personal data for journalistic purposes.

Journalist's sources

With regard to the protection of journalistic sources, the ECtHR established the important principle in the 1996 case of *Goodwin v UK* which has since been upheld in a long line of case law, including by the Supreme Court in *Mahon v Keena*, that any order requiring disclosure of a journalist's source "cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest". This threshold is elevated in light of the potential chilling effect if anonymous sources could be routinely unmasked before the courts.

However, so-called 'journalistic privilege' is not a carte-blanche for journalists, and the ECtHR has emphasized that the media's exercise of FOE also carries with it duties and responsibilities — namely to act in good faith in providing accurate and reliable information in accordance with the ethics of journalism. To justify disclosure of a journalistic source thus requires a very strong grounds to outweigh the broad public interest in the protection of such sources.

The relevant GDPR rights

It is worth considering how the balancing test might be applied in relation the particular GDPR provisions which are most likely to come into conflict with FOE when exercised for journalistic purposes:

Transparency — Articles 5 and 12,13 and 14: It is foreseeable that the GDPR requirement to collect and process personal data in a transparent manner by providing the information required by Articles 13 and 14 might pose an obstacle to journalistic expression.

For example, in cases of an undercover investigation or deep background research, compliance with these GDPR provisions would, for obvious reasons, be incompatible with journalistic purposes. Depending on the particular context, it appears that — applying the balancing test above — section 43 may exempt controllers from complying with the GDPR's transparency requirements in a journalistic context.

Lawful bases (and special categories of data) — Articles 6, 9 and 10: Much processing of personal data for journalistic purposes will be based on the legitimate interests of the controller (likely the publisher), which already requires that the legitimate interests and the rights/freedoms of the affected data subjects be balanced against one another.

While the Article 6(1)(f) balancing test in many ways pre-empts the form of proportionality assessment where FOE conflicts with protection, where controllers publish or otherwise process special categories of personal data or data on criminal convictions/offences, reliance on the FOE exemption under section 43 will likely be of greater importance given the absence of obvious alternative lawful bases under Articles 9 and 10 of the GDPR.

Given the heightened sensitivity and protection afforded to special categories of personal data, processing and publication of such personal data for journalistic purposes will require a more compelling public interest than is the case for publication of ordinary personal data. In this context, controllers in the media sector should be mindful of the proportionality principle: the greater the intrusion to the individual's data protection rights, the greater the public interest required to justify such intrusion.

Right of access – Article 15: The GDPR's right of access is perhaps most likely to come into direct conflict with FOE. Article 15 affords individuals a right to obtain various information from controllers, including:

- the purposes of the processing;
- the categories of personal data concerned; and
- of particular significance in the context of journalism, "any available information as to the source where the personal data are not collected from the data subject".

Based on the *Mahon v Keena* ruling and the ECtHR's case law emanating from *Goodwin*, there are strong grounds for controllers to refuse to disclose the sources of personal data based on so-called 'journalistic privilege' where disclosure could be incompatible with the exercise of FOE for journalistic purposes.

Rectification, erasure and objection — Articles 16, 17 and 21

The GDPR's right to rectification potentially presents an interesting antidote to fake news. Taking into account the purposes of the processing, Article 16 provides individuals with 'the right to have incomplete personal data completed, including by means of providing a supplementary statement'. It is conceivable that individuals will request corrections by way of a supplementary statement where they feel their data have been published in a misleading or incomplete manner.

The rights to erasure and objection under Articles 17 and 21 respectively are also potentially incompatible with the exercise of the FOE for journalistic purposes. Recital 65 of the GDPR makes clear that the further retention of the personal data 'should be lawful where it is necessary, for exercising the right of [FOE] and information'.

Similarly, processing of personal data for journalistic purposes potentially allows for continuation of such processing even after a data subjects has objected, by reference to the controller's 'overriding legitimate grounds' pursuant to Article 21(2) GDPR. While each objection would have to be assessed on its merits taking account of the data subject's 'particular situation', and the countervailing FOE rights, the GDPR at least provides a framework for this analysis to take place.

Role of the DPC and the Courts

Mahon v Keena made it clear that the courts "cannot and should not abdicate their responsibility to decide when a journalist is obliged to disclose his or her source" and emphasized that it is the role of the courts, and not controllers (or individual journalists) to "adjudicate and decide" on how the balance is to be struck between competing rights. In this regard, it is notable that section 43 of the DPA 2018 provides a basis for the Data Protection Commission ('DPC') to refer to the High Court, on its own volition, any question on the application of the FOE exemption. Given the engagement of constitutional and other rights, beyond the DPC's data protection bailiwick, it would appear sensible for it to invite the courts to set down the guiding principles for the application of section 43, which can then form the basis of future decisions in respect of the FOE exemption.

Final remarks

Given the inherently fact-specific nature of the balancing test at the intersection of FOE and data protection rights, in applying section 43 and attempting to balance these competing interests, controllers and journalists, should be wary of applying broad generations. As John Maynard Keynes' put it: "When the facts change, so do I. What do you do, sir?"

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