

# Expert comment

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**I**t is become traditional in this column around this time of year to look back on notable data protection developments over the previous 12 months.

As everyone expected, 2018 was a tumultuous year for data protection professionals. The years of GDPR planning and preparation came to a head in the months leading up to May. The hype reached its height with the distribution of many millions of communications inviting people to opt in/opt out of marketing databases, in some cases followed by a second communication urging the recipients to change their minds. In addition, many organisations found they could wallpaper their offices with template data processing agreements, as a grand scale ‘battle of the forms’ game between controllers and processors played out, in an attempt to put contractual manners on service providers in time for them to meet the requirements of Article 28(3) of the GDPR.

The mild sense of panic was not confined to corporations. The Irish government found itself in a race against time to adopt the Data Protection Bill 2018 before the 25th May deadline. The government succeeded, distinguishing it from the majority of EU Member States, some of which may wish still to adopt local legislation to augment the GDPR on a national basis.

That is not to say that the legislative process has been without its hitches. Despite two consultations in relation to the digital age of consent for children, last minute amendments tabled by the opposition resulted in the hurried adoption of Section 30 in the final version of the Act. This purported to outlaw any micro targeting or direct marketing of children, and it dismissed the detailed pre-legislative consultation processes by adopting 16 years as a digital age of consent for Ireland (despite overwhelming support for 13 years at the consultation stage). With insufficient votes to reject the proposal, the government was forced to accept it. Unsurprisingly however, the advice of the Attorney General, Séamus Woulfe, quickly followed to confirm that the proposed measure was incompatible with the GDPR, and so the controversial section was never commenced.

Further measures in relation to children’s data protection are to be expected following the new Bill proposed by Fianna Fail on 29th November 2018, and the Data

Protection Commission (‘DPC’) is also undertaking consultations in this area. So we can watch this space for further developments in 2019.

Another less debated measure was the adoption in August of the Health Research Regulations (Data Protection Act 2018 (Section 36(2)) (Health Research) Regulations 2018), which will have a profound effect on those engaged in any research involving health data. In contrast to children’s issues, this measure appears to have been adopted with little industry consultation. Its ramifications for the Irish research community could be far more significant than may have been envisaged by the Department of Health, the Health Research Board and the DPC, in particular a legislative insistence that ‘explicit consent’ must underline all health research in the absence of a special committee declaration to the contrary. Whether the Regulations are even compatible with the research provisions in the GDPR itself is an open question.

While 2018 will always be remembered for the commencement of the GDPR and therefore a number of landmark ‘firsts’, it was also a year of ‘lasts’. For example, last month, the DPC issued its final annual report under the Data Protection Acts 1988 and 2003 (‘the DPAs’). In addition, the DPC has been actively closing off many of the outstanding complaints that were made to its office under the old regime.

The courts have also been busy in a number of firsts and lasts. In addition to landmark referrals to the European Court of Justice in relation to data transfers, we also saw a number of lay litigant (or ‘litigant in person’) cases before the Irish and EU courts. For example, the *Nowak v DPC* case finally resolved the issue that examination scripts could constitute personal data, while as recently as 30th November 2018, the Supreme Court gave its judgment in the case of *Murphy v Callinan & Others*.

The *Murphy* case related to a historic series of data protection complaints by a litigant in person dating back to 2006. The point of particular note was that the Supreme Court followed the *Collins v FBD* High Court decision from 2013, which had previously interpreted the scope of the duty of care owed under Section 7 of the DPAs. This meant that Mr Murphy failed in his action for damages against the State and several other

parties, because he had failed to demonstrate a breach of the applicable data protection legislation and a causative connection between the breach and a loss.

This case is likely to be seen as more of a 'last' than a 'first', as it was decided under the old legislation, and the Supreme Court was at pains to point out that the GDPR and Data Protection Act 2018 had no application. Similar cases in future are likely to be decided differently, as Article 82(1) GDPR provides a new right to receive compensation for material or non-material damage resulting from a GDPR infringement arising after 25th May 2018. This right is now also enshrined in Section 117(4) of the Data Protection Act 2018. So while plaintiffs will still have to establish a breach of data protection law to ground a civil action, and while they can assign their rights of action to non-profit privacy bodies, the hurdle of proving loss will be a low one under the new regime.

The second half of the year also saw controllers and processors endeavouring to 'operationalise' the GDPR in a real world environment. They did so against a backdrop of a very noticeable uptake in activity on the part of the DPC. With a headcount now approaching 130 and a budget of nearly €16 million, the visibility of the DPC in actively pursuing complaints and investigations under the new law has been obvious.

For many companies, their first exposure to the new regime was when they faced their first mandatory personal data breach reporting obligations under Article 33 of the GDPR. Several thousand data breach notices were reportedly filed in the first months of the new regime.

Internationally, attention continued to focus on the DPC, which has been actively publishing updates on its various investigations, while a number of complaints were lodged with the DPC and other EU supervisory authorities against the so-called GAFAM (Google, Apple, Facebook, Amazon and Microsoft) by various privacy interest groups. At the time of writing, we have yet to see the DPC's first administrative fine under the GDPR but, based on the public

comments of the DPC, we can expect that we won't be waiting much longer. There was the usual array of spectacular data breaches in 2018, but it was also a year where a lot of debate centred on the ethics of privacy. Suddenly data protection seemed to be at the heart of everything, from political interference in elections through to professional sports people choosing not to disclose details of their injuries.

2018 may well also prove to be the year where the world outside of the EU woke up to the importance of comprehensive data protection laws. It is remarkable to read of how many countries are now considering adopting comprehensive new data protection laws along the broad lines of the GDPR. For example, the decision of the State of California to adopt its Consumer Privacy Act of 2018 has prompted much speculation of a federal US privacy law, a notion that would have seemed fanciful at the commencement of the Trump administration only two years ago.

In November I chaired the 13th Annual Data Protection Practical Compliance Conference in Dublin, at which Helen Dixon was the Keynote Speaker. It was wonderful to see so many of you at the event, which sold out early this year. The dates for the 14th Annual Conference have been announced, which are the 14th and 15th November 2019. More information is available at [www.pdp.ie](http://www.pdp.ie)

2018 was undoubtedly a momentous year for privacy professionals, but history may well view it more broadly as the start of a global movement to put the human right to privacy at the heart of the global economy.

Best wishes to all of our readers for the festive season and for 2019.

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