

# THE IRISH ADAPTATION OF THE GDPR: THE IRISH DATA PROTECTION ACT 2018



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As the Irish Data Protection Bill was published just 114 days before the General Data Protection Regulation (GDPR) commencement date, the Bill moved through the various legislative stages of the Oireachtas (Irish legislative branch) at an accelerated pace.<sup>1</sup> In spite of the rapid rate of the passage of the law through the Oireachtas, multiple amendments were tabled throughout the process, including notable contributions by Senator Alice Mary Higgins.<sup>2</sup> In addition to implementing necessary elements of the GDPR into Irish law, the Irish Data Protection Act 2018 (DPA 2018) also transposed the Law Enforcement Directive.<sup>3</sup> The Data Protection Acts 1988 and 2003 had previously provided the legal framework for data protection in Ireland. The Data Protection Act 1988 was initially designed to implement the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention No. 108). Further to the adoption of the Data Protection Directive 95/46/EC, Ireland amended the 1988 law and passed the Data Protection (Amendment) Act 2003. While the majority of the pre-existing data protection rules were repealed by the DPA 2018, in certain limited circumstances the older Acts will retain legal force.<sup>4</sup>

1 Indeed, an early signature motion was agreed in order to meet the deadline. Irish Constitution, art 25.2.2; Corbet R., Expert Comment, Data Protection Ireland (2018) 11(1) 2; As pointed out by Hutchinson, much of the content of the Bill was outlined in the General Scheme of Data Protection Bill 2017 which was published in May 2017. Hutchinson B., 'Editorial' Commercial Law Practitioner (2018) 25(2) 26-27.

2 O'Halloran M., 'Data Protection Bill passed after Seanad accepts 105 amendments from Dáil' (Irish Times, 22 May 2018) <https://www.irishtimes.com/news/politics/oireachtas/data-protection-bill-passed-after-seanad-accepts-105-amendments-from-dail-1.3504878>

3 TJ McIntyre criticised this decision in the Oireachtas, arguing that the perceived overlap and similar language used in implementing both instruments risks confusion. Joint Committee on Justice and Equality Deb 5 July 2017 [https://www.oireachtas.ie/en/debates/debate/joint\\_committee\\_on\\_justice\\_and\\_equality/2017-07-05/2/](https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2017-07-05/2/).

4 Section 8 states that the 1988 Data Protection Act will 'cease to apply to the processing of personal data' other than '(a) the processing of such data for the purposes of safeguarding the security of the State, the defence of the State or the international

The DPA 2018 is comprised of eight parts and numbers 182 pages (including three schedules). Part 1 contains preliminary and general provisions including an interpretation section; Part 2 provides for the establishment of the new supervisory authority and sets out its structure and functions; Part 3 gives further effect to the GDPR in a number of areas where a margin of flexibility has been given to the member states; Part 4 provides for practical matters – such as the transfer of rights and liabilities – arising out of the replacement of the Data Protection Commissioner with the Data Protection Commission; Part 5 transposes the Law Enforcement Directive; Part 6 sets out provisions concerning the enforcement of data protection law; Part 7 is comprised of miscellaneous provisions including the application of data protection rules to the courts; Part 8 sets out the consequential amendments to existing legislation. Within its 182 pages, the Act also makes provision for the adoption of secondary legislation in a number of instances.<sup>5</sup> Completing the picture, the domestic law will, of course, have to be read in light of the GDPR itself. This chapter considers some of the most notable adaptations of the GDPR by the DPA 2018. Due to the prominent role Ireland plays in the supervision of compliance with the GDPR by large internet companies based in the jurisdiction, the chapter begins with a discussion of the choices

relations of the State, or (b) the processing of such data under the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 or the Vehicle Registration Data (Automated Searching and Exchange) Act 2018 to the extent that the Act of 1988 is applied in those Acts. The decision to retain the existing rules – albeit in limited circumstances – is a disappointment from the perspective of clarity. Moreover, the old laws will continue to apply to complaints made, contraventions committed, and investigations begun before the commencement of the DPA 2018.

<sup>5</sup> Section 51 of the DPA 2018, for example, provides that secondary legislation may be made authorising the processing, where necessary for reasons of substantial public interest, of special categories of personal data, and/or Article 10 GDPR data. DPA 2018, s 51(3). Thus far, the only statutory instrument made under the Act (apart from the establishment order) has been the Data Protection Act 2018 (Section 36(2)) (Health Research) Regulations 2018 (SI No 314 of 2018)

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made by the DPA 2018 in relation to supervision and enforcement of data protection law.

#### I-DATA PROTECTION ENFORCEMENT UNDER IRISH LAW

The Irish data protection supervisory authority has been the subject of much scrutiny in recent years. As the supervisory authority for many global internet companies – including Facebook and LinkedIn – the Irish Data Protection Commission (DPC)<sup>6</sup> has a significant role to play in the protection of personal data of individuals throughout Europe. The office has not been immune from criticism, perhaps most notably from Max Schrems who famously took the DPC to court for refusing to investigate his complaint against Facebook on the grounds that the Safe Harbor agreement was clear law.<sup>7</sup> In a widely reported decision, the Court of Justice of the European Union subsequently found that the Safe Harbor agreement was no longer valid.<sup>8</sup> Following this decision, the DPC has sought clarity from the CJEU on the status of other international data transfer mechanisms.<sup>9</sup> In recent years, funding for the DPC has increased markedly and a Dublin office has been established in addition to the decentralised office based in Portlarcourt – the location and size of which had previously been ridiculed.<sup>10</sup> While the DPC

6 Prior to the Data Protection Act 2018, the supervisory authority was the Data Protection Commissioner.

7 The DPC had initially declined to investigate on the grounds that the complaint was ‘frivolous and vexatious’. Under Irish law, this legal term is not used in a pejorative sense. As explained in *O’N v McD*, the term means ‘that the plaintiff has no reasonable chance of succeeding and that, because there is no reasonable chance of success, it is frivolous to bring the case’. [2013] IEHC 135. *Schrems v Data Protection Commissioner* [2014] IEHC 310.

8 *Schrems (Judgment)* [2015] EUECJ C-362/14.

9 *Data Protection Commissioner v Facebook Ireland Limited* [2017] IEHC 545. It should be noted that Facebook has undertaken an unprecedented appeal against the referral to the Supreme Court. Carolan M., ‘Facebook’s court appeal over data transfer case set for January’ (Irish Times, 1 November 2018) <https://www.irishtimes.com/business/technology/facebook-s-court-appeal-over-data-transfer-case-set-for-january-1.3683038>

10 Mirani L., ‘How a bureaucrat in a struggling country at the edge of Europe found himself safeguarding the world’s data’ (Quartz, 7 January 2014) <https://qz.com/162791/how-a-bureaucrat-in-a-struggling-country-at-the-edge-of-europe-found-himself-safeguarding-the-worlds-data/>; McAleer M., ‘Data Protection Commissioner gets extra €1.2m funding’ (Irish Times, 15 October 2015) <https://www.irishtimes.com/business/technology/data-protection-commissioner-gets-extra-1-2m-funding-1.2393311>;

There have been a series of funding increases with the 2019 Budget providing for a further increase of funding of €3.5 million allowing for the recruitment of 40 additional staff. ‘Funding increase of €3.5m for Data Protection Commission in Budget 2019’ (Irish Examiner, 9 October 2018) <https://www.irishexaminer.com/breakingnews/business/funding-increase-of-35m-for-data-protection-commission-in-budget-2019-874736.html>; Weckler A.,

has been an important protector of data protection in Ireland, the independence of the body has also been challenged.<sup>11</sup>

The DPA 2018 established the Data Protection Commission to replace the Office of the Data Protection Commissioner.<sup>12</sup> While the former Data Protection Commissioner, Helen Dixon, remains as the head of the DPC, the change in the office is more than simply nominal. One structural change is that the Commission may now be led by up to three Data Protection Commissioners – although Helen Dixon remains as the sole Commissioner for now.<sup>13</sup> If an additional Commissioner is appointed, one of the Commissioners will be appointed as chairperson with a casting vote in the case of decisions to be taken by the Commission in the event of a tied vote.<sup>14</sup> Some commentators have criticised the DPC for being overly business-friendly in its approach and toothless from an enforcement perspective.<sup>15</sup> While the DPA 2018 continues to support the facilitation of amicable resolutions between parties, it also provides the new DPC with more robust supervision and enforcement powers, ‘greatly exceeding those of the Commissioner, including the power to publish details of convictions and sanctions imposed’.<sup>16</sup> It is hoped that the perception of the DPC’s enforcement effectiveness can be improved with the additional corrective powers granted under the DPA 2018.

#### II-FINES AND THE PUBLIC BODY EXEMPTION

While the increased thresholds of administrative fines has attracted significant popular attention throughout Europe, the change is particularly noteworthy in the Irish context where under the previous regime the DPC did not have the capacity to directly issue fines. While not a new power in the majority of member

‘German jeers at Irish data privacy may help us’ (Irish Independent, 31 May 2015) <https://www.independent.ie/business/technology/news/german-jeers-at-irish-data-privacy-may-help-us-31266778.html>

11 Edwards E., ‘Independence of Data Protection Commissioner questioned’ (Irish Times, 28 January 2016) <https://www.irishtimes.com/business/technology/independence-of-data-protection-commissioner-questioned-1.2513682>.

12 Section 14 DPA 2018 provides that all functions that before the establishment day were vested in the Data Protection Commissioner are transferred to the Commission. DPA 2018, s 14.

13 DPA 2018, s 15.

14 DPA 2018, s 16.

15 Robinson D., ‘US Tech Groups Spawn a Fight between Europe’s Data Regulators’ (Financial Times, 28 April 2015) <https://www.ft.com/content/99eea7a2-e282-11e4-aa1d-00144feab7de>; Kennedy R. and M.H. Murphy, *Information and Communications Technology Law in Ireland* (Clarus 2017) 103.

16 Hutchinson B., ‘Editorial’ *Commercial Law Practitioner* (2018) 25(2) 26-27.

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states, it is significant that the Irish Supervisory Authority now has, for the first time, the power to impose administrative fines. Under the DPA 2018, administrative fines can be appealed in the courts by the subject of the decision.<sup>17</sup> Where the administrative fine does not exceed €75,000, the appeal will be to the Circuit Court. Where the administrative fine exceeds that threshold, the appeal will be to the High Court.<sup>18</sup> The court has the power to

- (a) confirm the decision the subject of the appeal,
- (b) replace the decision with such other decision as the court considers just and appropriate, including a decision to impose a different fine or no fine, or
- (c) annul the decision.

In a much criticised early position, the Data Protection Bill exempted public bodies from administrative fines.<sup>19</sup> This position was defended on the grounds that Article 83 GDPR states that ‘each member state may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that member state’.<sup>20</sup> During the pre-legislative scrutiny stage of the DPA 2018, the Data Protection Commissioner, Helen Dixon, had argued that the exemption was a ‘serious matter of concern’ as the

*purpose of the punitive fines provided for in the new law is to act as a deterrent to all types of organisations, and we see no basis upon which public authorities would be excluded, particularly given that arguably higher standards in the protection of fundamental rights are demanded of those entities.*<sup>21</sup>

In spite of this clear statement from the head of the supervisory authority, section 136(3) of the Bill as originally published stated that the DPC ‘may decide to impose an administrative fine on a controller or processor that is a public authority or body only where the authority or body acts as an undertaking within

the meaning of the Competition Act 2002’.<sup>22</sup> While the Minister for Justice, Charlie Flanagan asserted that he believed it to be ‘important in the context of public and State involvement that we lead by example here and that the State, all the public bodies and agencies attached thereto, would be fully compliant’; the decision to exempt public bodies suggested a lack of confidence in existing government compliance.<sup>23</sup> Following much criticism and opposition in parliament, the provisions on fining public bodies were amended and a limited fining regime was provided for in the context of public bodies. Under Section 141(4) DPA 2018, where the DPC decides to impose a fine on a public authority or a public body, the amount of the administrative fine concerned shall not exceed €1,000,000.<sup>24</sup>

The increased enforcement power of the GDPR is not only contained in the possibility of large fines, but also under the Article 82 GDPR right to seek compensation. This is further supported by the fact that Article 80 GDPR also provides for a limited right to engage in class actions. The issue of the public body fine exemption was not the only minimalist adaptation of the GDPR to be reconsidered in the course of the Irish parliamentary process. While section 115 of the initial version of the Data Protection Bill permitted a data subject to mandate a not-for-profit ‘body, organisation or association’ to exercise the rights of the data subject to pursue a remedy on his or her behalf, section 123(7) of the Data Protection Bill stated that where a court action has been brought on behalf of a data subject by such a body, compensation for material or non-material damage suffered shall not be awarded.<sup>25</sup> Even though injunctive relief would still have been possible under the initial draft, the removal of the threat of damages where actions are taken on behalf of data subjects would clearly have hindered the enforcement power of the Irish law. It is positive, therefore, that legislative debates led to a change in the final Act. Under section 117 DPA 2018, where the action of a data subject is being brought by a not-for-profit body, the court shall have the power to grant to the relevant data subject one or more of the following reliefs:

- (a) relief by way of injunction or declaration; or
- (b) compensation for damage suffered by the

<sup>17</sup> DPA 2018, s 142.

<sup>18</sup> DPA 2018, s 142(6).

<sup>19</sup> Data Protection Bill 2018 (as initiated), s 136(3).

<sup>20</sup> GDPR, art 83(7).

<sup>21</sup> Edwards E., ‘Public bodies not subject to fines under new Data Protection Bill Minister for Justice says he expects State bodies to be “fully compliant” with new EU law’ (Irish Times, 1 February 2018) <https://www.irishtimes.com/news/crime-and-law/public-bodies-not-subject-to-fines-under-new-data-protection-bill-1.3377063>

<sup>22</sup> Data Protection Bill 2018 (as initiated), s 136.

<sup>23</sup> Edwards E., ‘Public bodies not subject to fines under new Data Protection Bill Minister for Justice says he expects State bodies to be “fully compliant” with new EU law’ (Irish Times, 1 February 2018) <https://www.irishtimes.com/news/crime-and-law/public-bodies-not-subject-to-fines-under-new-data-protection-bill-1.3377063>

<sup>24</sup> The limit does not apply where the public body is operating in competition with a private entity offering similar services.

<sup>25</sup> Data Protection Bill 2018 (as initiated), s 123(7).

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plaintiff as a result of the infringement of the relevant enactment.

This was a welcome amendment that should enhance the ability of individuals to vindicate their data protection rights under Irish law.

#### III-CHILDREN AND THE IRISH DATA PROTECTION ACT

In the debates concerning the DPA 2018, there was significant political interest in providing a number of enhanced protections for the data of children. At times in the public discussion, however, the issue of data protection for children appeared to be conflated with the related but different matter of protecting children online generally. For the purposes of the application of the GDPR in Ireland, a reference to 'child' in the Regulation is taken to be a reference to a person under the age of 18 years.<sup>26</sup> One example of an attempt to provide additional protection for the data of children is found in section 32. This section provides for the drawing up of codes of conduct intended to contribute to the proper application of the Data Protection Regulation with regard to—

- (a) the protection of children,
- (b) the information to be provided by a controller to children,
- (c) the manner in which the consent of the holders of parental responsibility over a child is to be obtained for the purposes of Article 8,
- (d) integrating the necessary safeguards into processing in order to protect the rights of children in an age-appropriate manner for the purpose of Article 25, and
- (e) the processing of the personal data of children for the purposes of direct marketing and creating personality and user profiles.<sup>27</sup>

Under the DPA 2018, the DPC will have a role in considering whether a draft code of conduct or an extension or amendment to an existing code of conduct provides appropriate safeguards.<sup>28</sup> When assessing

a code of conduct concerning children, the DPC may consult with such persons as it considers appropriate including—

- (a) children and bodies who appear to the Commission to represent the interests of children,
- (b) the holders of parental responsibility over children, and
- (c) the Ombudsman for Children.<sup>29</sup>

As in other jurisdictions, the age of consent in relation to information society services was the subject of much debate in Ireland. On the introduction of the Bill, the government had set the age of consent in relation to information society services at the minimum age of 13.<sup>30</sup> This decision was supported by the Ombudsman for Children, the Joint Oireachtas Committee on Justice and Equality, several child-focused charities, and a range of academics.<sup>31</sup> The age of 13 was retained as the threshold until the report stage of the Bill where the proposals of opposition parties led to the relevant digital age of consent being specified as the maximum age of 16 years.<sup>32</sup>

#### [ta-and-rights-children](#)

29 DPA 2018, s 32(2).

30 Data Protection Bill 2018 (as initiated), s 29.

31 Statement: Ombudsman for Children, Dr Niall Muldoon, expresses concern about a potential amendment to the proposed digital age of consent (1 May 2018) <https://www.oco.ie/ga/news/ombudsman-for-children-dr-niall-muldoon-expresses-concern-about-a-potential-amendment-to-the-proposed-digital-age-of-consent/>; Joint Committee on Justice and Equality Report on pre-legislative scrutiny of the General Scheme of the Data Protection Bill 2017 (November 2017) [https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint-committee-on-justice-and-equality/reports/2017/2017-11-23-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-data-protection-bill-2017\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint-committee-on-justice-and-equality/reports/2017/2017-11-23-report-on-pre-legislative-scrutiny-of-the-general-scheme-of-the-data-protection-bill-2017_en.pdf); Fitzgerald C., 'Children's rights groups angry at Dáil vote setting digital age of consent at 16 (they wanted it to be 13)' (The Journal, 16 May 2018) <https://www.thejournal.ie/digital-age-of-consent-3-4017307-May2018/>; Mc Mahon C., 'Open Letter on the Digital Age of Consent' (Medium, 1 May 2018) <https://medium.com/@CJAMcMahon/open-letter-on-the-digital-age-of-consent-223696b317b0>. See also, many of the responses to the Government Consultation on Data protection safeguards for children ('digital age of consent') [www.justice.ie/en/JELR/Pages/Consultation-on-Data-protection-safeguards-for-children-Digital-Age-of-Consent](http://www.justice.ie/en/JELR/Pages/Consultation-on-Data-protection-safeguards-for-children-Digital-Age-of-Consent). Alternative perspectives that were prominent in the public debate included those of academics Mary Aiken and Barry O'Sullivan, Aiken M. and B. O'Sullivan, 'We need to talk about the Irish "digital age of consent"' (Irish Times, 13 July 2017) <https://www.irishtimes.com/opinion/we-need-to-talk-about-the-irish-digital-age-of-consent-1.3152388>

32 O'Halloran M., 'Government loses vote as Dáil backs 16 as age of digital consent' (Irish Times, 16 May 2018) <https://www.irishtimes.com/news/politics/oireachtas/government-loses-vote-as-dail-backs-16-as-age-of-digital-consent-1.3497921>. Section 31(2) further specifies that the term 'information society services' does not include a

26 DPA 2018, s 29.

27 DPA 2018, s 32(1). This section is said to operate 'without prejudice' to the generality of Article 40 GDPR.

28 The issues that arose in the Oireachtas debates concerning the data protection rights of children are set to be further examined following the DPC's launch of a consultation on the subject. 'Public Consultation on the Processing of Children's Personal Data and the Rights of Children as Data Subjects under the GDPR' (DPC, 19 December 2018) <https://www.dataprotection.ie/en/news-media/latest-news/public-consultation-processing-childrens-personal-da->

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The influence of opposition parties in the legislative debates was enhanced by the current political situation in Ireland which sees the minority Irish government led by Fine Gael often supported by the existence of a 'confidence and supply' arrangement with Fianna Fáil. TDs (Members of the Irish lower house of parliament, Dáil Éireann) from Fianna Fáil, the Social Democrats, Labour, and Sinn Féin opposed setting the digital age of consent at 13. This revised position was successful on a vote and the government accepted the position of the lower house. Representatives from other opposition parties – including Independent Senator Lynn Ruane – continued to note their objection to the increased threshold at the final report stage in Seanad Éireann (upper house).<sup>33</sup> As pointed out by the Minister for Justice, Charles Flanagan, the section 31 review mechanism – initially introduced in response to worries expressed in the Seanad regarding the setting of 13 years of age as the threshold – will now review the suitability of 16 years rather than 13 years. The DPA 2018 requires this review to take place no later than three years after the section's operation and the review should be completed within one year.<sup>34</sup>

An ill-fated attempted at enhanced protection for the data of children would appear to be found in section 30 of DPA 2018 which was successfully introduced at the later stages of the Oireachtas debates by opposition politicians. Section 30 states that:

It shall be an offence under this Act for any company or corporate body to process the personal data of a child as defined by section 29 for the purposes of direct marketing, profiling or micro-targeting.<sup>35</sup>

The DPA 2018 provides that an offence under section 30 shall be punishable by an administrative

fine.<sup>36</sup> Explaining the decision to defer or delay the commencement of section 30, the Minister for Justice stated that the Office of the Attorney General has advised that section 30 appears to go beyond the margin of discretion afforded to member states in giving further effect to the GDPR and would conflict with Article 6(1)(f) GDPR when read in conjunction with Recital 47 GDPR.<sup>37</sup> As this advice indicates that the commencement of section 30 could result in a risk of infringement proceedings against Ireland, the Department of Justice is seeking clarity on the matter before considering commencement.<sup>38</sup> Corbet suggests that this 'leaves Ireland in the curious position of having introduced a last minute offence into section 30 of the Act which seems destined never to become law'.<sup>39</sup>

#### IV- FREEDOM OF EXPRESSION EXEMPTION

Responding to its duty to reconcile the right to data protection with the right to freedom of expression, the Irish legislature provided for a broad freedom of expression exemption in DPA 2018.<sup>40</sup> The freedom of expression exemption formerly in place was contained in section 22A of the Data Protection Acts 1988 to 2003. This was a structured exemption that applied to personal data processed 'only for' journalistic, artistic or literary purposes and 'undertaken solely with a view to the publication of any journalistic, literary or artistic material'. The now repealed Section 22A exemption also required the data controller to reasonably believe that the processing was 'in the public interest' and that 'compliance with that provision would be incompatible with journalistic, artistic or literary purposes'.<sup>41</sup> The DPA 2018 exemption is of broader application, designed to apply to the processing of personal data that is 'for the purpose of exercising the right to freedom of expression and information, including processing for journalistic purposes or for the purposes of academic, artistic or literary expression'.<sup>42</sup> Section 43 DPA 2018 states that such processing shall be exempt from compliance with aspects of the Data Protection Regulation – including

reference to preventative or counselling services in the Irish context.

<sup>33</sup> Minister for Justice Charles Flanagan stated that he acknowledged 'the will and wish of Dáil Éireann as far as this issue is concerned' and that while he did not 'agree' with the majority view of the House, he had no 'intention to revisit the debate' in the Seanad. Seanad Deb 22 May 2018, Data Protection Bill 2018: [Seanad Bill amended by the Dáil] Report and Final Stages <https://www.oireachtas.ie/en/debates/debate/seanad/2018-05-22/11/?highlight%5B0%5D=data&highlight%5B1%5D=bill&highlight%5B2%5D=2018&highlight%5B3%5D=bill>

<sup>34</sup> DPA 2018, s 31(3). Seanad Deb 22 May 2018, Data Protection Bill 2018: [Seanad Bill amended by the Dáil] Report and Final Stages <https://www.oireachtas.ie/en/debates/debate/seanad/2018-05-22/11/?highlight%5B0%5D=data&highlight%5B1%5D=bill&highlight%5B2%5D=2018&highlight%5B3%5D=bill>

<sup>35</sup> DPA 2018, s 30.

<sup>36</sup> See DPA 2018, s 141.

<sup>37</sup> Some, including Senator Alice Mary Higgins, contested this interpretation. Seanad Deb 22 May 2018, Data Protection Bill 2018: [Seanad Bill amended by the Dáil] Report and Final Stages <https://www.oireachtas.ie/en/debates/debate/seanad/2018-05-22/11/?highlight%5B0%5D=data&highlight%5B1%5D=bill&highlight%5B2%5D=2018&highlight%5B3%5D=bill>

<sup>38</sup> Dáil Deb 12 June 2018, Written answers (Question to Justice) 524 <https://www.oireachtas.ie/en/debates/question/2018-06-12/524/#pq-answers-524>

<sup>39</sup> Corbet R., Expert Comment, Data Protection Ireland (2018) 11(3) 2.

<sup>40</sup> See GDPR, art 85.

<sup>41</sup> Data Protection Acts 1988 to 2003, s 22A.

<sup>42</sup> DPA 2018, s 43(1).



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from certain aspects of Chapter II and Chapter III GDPR.<sup>43</sup> In order to be eligible for this exemption, compliance with the relevant data protection provision would have to be deemed to be incompatible with freedom of expression. In conducting this unstructured compatibility test, the DPA 2018 requires regard to be had to 'the importance of the right of freedom of expression and information in a democratic society'.<sup>44</sup> The section further states that in order 'to take account of the importance of the right to freedom of expression and information in a democratic society that right shall be interpreted in a broad manner'.<sup>45</sup> Clearly, section 43 of the DPA 2018 contains a challenging test to apply in practice and provides little guidance to those wishing to avail of the exemption. Cases – before the DPC and the courts – are likely to play a significant role in the formulation of more detailed guidelines on the operation of the exemption in Irish law. Notably, the DPA 2018 explicitly provides for the DPC to be able to refer to the High Court 'any question of law which involves consideration of whether processing of personal data is exempt' on freedom of expression grounds.<sup>46</sup>

#### V-POLITICS AND DATA PROTECTION

Another area of significant public discussion in Ireland was the special provision for data processing carried out in the context of electoral activities. It is unsurprising that legislators often seek to make provision for their own practices when legislating. For example, section 39 of the DPA 2018 provides that:

A specified person may, in the course of that person's electoral activities in the State, use the personal data of a data subject for the purpose of communicating in writing (including by way of newsletter or circular) with the data subject.<sup>47</sup>

Moreover, the section goes on to state that: 'Communicating in accordance with subsection (1)

shall, for the purposes of Article 6(1)(e), be considered to be the performance of a task carried out in the public interest'.<sup>48</sup> Accordingly, the DPA 2018 provides an extremely broad 'public interest' ground for such communications that negates consideration of other lawful grounds such as consent. Additional electoral activity carve outs are contained in sections 40, 58, and 59. Corbet suggests that the decision of the body politic to exempt itself from certain data protection requirements occurs in spite of '(or perhaps because of) a number of previous cases investigated by the DPC relating to political canvassing'.<sup>49</sup>

The topic of the Cambridge Analytica scandal arose frequently in the course of the DPA 2018 debates, unsurprisingly considering the timing of the stepping forward of the whistleblower, Christopher Wylie, just shortly after the initiation of the Data Protection Bill in the Oireachtas.<sup>50</sup> In the wake of the Cambridge Analytica scandal, section 43 of the sixth of March version of the Bill (as amended in Seanad Committee) drew widespread criticism. At that time, the Bill stated that

the processing of personal data revealing political opinions shall be lawful where the processing is carried out in the course of election activities for the purpose of compiling data on peoples' political opinions by—

- (a) a political party,
- (b) a body established by or under an enactment (...), or
- (c) a candidate for election to, or a holder of, elective political office.<sup>51</sup>

This very broad assertion of lawfulness regarding the processing personal data in the course of 'electoral

43 Article 43(2) DPA 2018 states that the 'provisions of the Data Protection Regulation specified for the purposes of subsection (1) are Chapter II (principles), other than Article 5(1)(f), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries and international organisations), Chapter VI (independent supervisory authorities) and Chapter VII (cooperation and consistency)'.  
44 DPA 2018, s 43(1).  
45 DPA 2018, s 43(5).  
46 A right to appeal a determination from the High Court to the Court of Appeal is explicitly affirmed in DPA 2018, s 43(4).  
47 DPA 2018, s 39(1). A 'specified person' is defined to mean: a political party, a member of either House of the Oireachtas, the European Parliament or a local authority, or a candidate for election to the office of President of Ireland or for membership of either House of the Oireachtas, the European Parliament or a local authority. DPA 2018, s 39(3).

48 DPA 2018, s 39(2).

49 Corbet R., Expert Comment, Data Protection Ireland (2018) 11(3) 2.

50 Cadwalladr C. and E. Graham-Harrison, 'Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach' (The Guardian, 17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>. Reporting on the Cambridge Analytica scandal had of course occurred prior to Wylie's stepping forward, Cadwalladr C., 'The great British Brexit robbery: how our democracy was hijacked' (The Guardian, 7 May 2017) <https://www.theguardian.com/technology/2017/may/07/the-great-british-brexite-robbery-hijacked-democracy>. Minister for Justice Charles Flanagan introduced the Bill for the Second Stage reading on 17 April 2018.

51 Subject to suitable and specific measures being taken to safeguard the fundamental rights and freedoms of data subjects. Data Protection Bill 2018 (As amended in Committee [Seanad Éireann]), s 43.

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activities' sparked criticism – particularly in light of the fact that personal data 'revealing political opinions' constitutes special category data under Article 9 GDPR. In defending the Bill, the Department of Justice argued that the provision should be read in light of section 33 which set out 'suitable and specific measures for processing'.<sup>52</sup>

While the final version of the provision on personal data and electoral activities closely resembles the criticised text, section 48 DPA 2018 does contain some amendments:

Subject to suitable and specific measures being taken to safeguard the fundamental rights and freedoms of data subjects, the processing of personal data revealing political opinions shall be lawful where the processing is carried out—

(a) in the course of electoral activities in the State for the purpose of compiling data on peoples' political opinions by—

(i) a political party, or

(ii) a candidate for election to, or a holder of, elective political office in the State,

and

(b) by the Referendum Commission in the performance of its functions.<sup>53</sup>

A key point of contention regarding the original exemption was the absence of a definition of the term 'electoral activities'. In an article by Elaine Edwards, Daragh O'Brien<sup>54</sup> is quoted as saying that the failure to define the term supported the creation of a 'free-for-all for organisations like Cambridge Analytica to set up shop here and influence voters and elections anywhere in the world with impunity and no possibility of sanction'.<sup>55</sup> While the enacted version of the legislation states that the term 'electoral activities' 'includes the dissemination of information, including information as to a person's activities and policies, that

might reasonably be of interest to electors', a clear and limited definition of the term would have been desirable in order to better ensure the appropriate and purpose-bound use of such information.<sup>56</sup> A notable change in the final text of the DPA 2018 is the limitation requiring that such processing be carried out in the course of electoral activities 'in the State'. This should act as some bulwark against the threat of Ireland becoming a 'global capital of election manipulation' as warned against by O'Brien.<sup>57</sup> Notwithstanding this improvement, stronger protection of personal data in the context of electoral processing would have put Irish democracy in better stead to withstand the threat of electoral manipulation. Moreover, questions remain as to whether the broad scope of processing activities liable to be caught by the electoral exemption can be considered to be necessary and proportionate for reasons of a substantial public interest.<sup>58</sup>

### VI-CONCLUSION

In the final report of the Data Protection Commissioner, Helen Dixon looks forward to a 'new era of the DPC with increased powers and a new legal framework'.<sup>59</sup> The report notes that a consultation regarding the regulatory strategy for the DPC under the GDPR will be launched in order to 'provide a sustainable and transparent underpinning for what are inevitable resource deployment options and choices'.<sup>60</sup> In light of increased awareness and stricter GDPR notification requirements, it is unsurprising that there has been a significant increase in the reporting of data breaches to the DPC since the passage of the DPA 2018.<sup>61</sup> The regulation of large internet companies is likely to remain a key area of focus for Irish data protection

52 Edwards, E. 'Data Bill would "create free-for-all" for harvesting data on political views' (Irish Times, 20 March 2018) <https://www.irishtimes.com/news/ireland/irish-news/data-bill-would-create-free-for-all-for-harvesting-data-on-political-views-1.3432975>

53 DPA 2018, s 48.

54 O'Brien is a data ethics expert and the CEO of Castlebridge, a data privacy and governance consultancy <https://www.castlebridge.ie/what-we-do/>

55 Edwards, E. 'Data Bill would "create free-for-all" for harvesting data on political views' (Irish Times, 20 March 2018) <https://www.irishtimes.com/news/ireland/irish-news/data-bill-would-create-free-for-all-for-harvesting-data-on-political-views-1.3432975>

56 DPA 2018, s 39(4).

57 Edwards, E. 'Data Bill would "create free-for-all" for harvesting data on political views' (Irish Times, 20 March 2018) <https://www.irishtimes.com/news/ireland/irish-news/data-bill-would-create-free-for-all-for-harvesting-data-on-political-views-1.3432975>

58 GDPR, art 9(g).

59 Among several guidance documents released concerning the application of the GDPR, the DPC has released preliminary guidance addressing the consequences of a 'no deal' UK exit from the EU for any Irish entities that transfer personal data to the UK. 'DPC issues important message on personal data transfers to and from the UK in event of a "no deal" Brexit' (DPC, 21 December 2018) <https://www.dataprotection.ie/en/news-media/latest-news/dpc-issues-important-message-personal-data-transfers-and-uk-event-no-deal>

60 Data Protection Commissioner, 'Final Report 1 January - 24 May 2018: Presented to each of the Houses of the Oireachtas, pursuant to Section 66(4) of the Data Protection Act 2018' (December 2018) 6 [https://www.dataprotection.ie/sites/default/files/uploads/2018-11/DPC%20annual%20Report%202018\\_0.pdf](https://www.dataprotection.ie/sites/default/files/uploads/2018-11/DPC%20annual%20Report%202018_0.pdf)

61 Edwards E., 'DPC receives over 1,100 reports of data breaches since start of GDPR rules' (Irish Times, 30 July 2018) <https://www.irishtimes.com/business/technology/dpc-receives-over-1-100-reports-of-data-breaches-since-start-of-gdpr-rules-1.3580240>

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law. By way of example, since 25 May 2018, the DPC has opened statutory inquiries into the compliance of both Twitter and Facebook with the GDPR following receipt of a number of breach notifications.<sup>62</sup>

The DPA 2018 was enacted following a vibrant legislative debate that demonstrated the power of opposition parties in times of minority government. In spite of the efforts of several legislators, the debate was unfortunately truncated due to the immense time constraints surrounding the passage of the legislation. The limited review and discussion possible was particularly problematic due to the complex nature of the legislation. Not only did the Irish government choose to both adapt the GDPR and implement the Law Enforcement Directive in one Bill, but other aspects of the Data Protection Bill – including a reliance on cross-referencing – further hindered cogent debate in an already technical and challenging area of law. The 2018 DPA also makes substantial provision for the use of secondary legislation which means that the governing law will continue to evolve as regulations are promulgated. There is scope for abuse of some of these powers, including under the broadly drafted section 38 which allows regulations to be made allowing for the ‘processing of personal data which is necessary for the performance of a task carried out in the public interest by a controller or which is necessary in the exercise of official authority vested in a controller’. While some protective measures were introduced to oversee the production of secondary legislation, doubts as to the effectiveness of the constraints remain.<sup>63</sup> It is clear that a full picture of the new data protection landscape in Ireland will take time to develop and a vigilant watch for secondary legislation and DPC action will be necessary in the interim.

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62 ‘Data Protection Commission announces statutory inquiry into Twitter’ (DPC, 19 December 2018) <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-statutory-inquiry-twitter>; ‘Data Protection Commission announces statutory inquiry into Facebook’ (DPC, 17 December 2018) <https://www.dataprotection.ie/en/news-media/press-releases/data-protection-commission-announces-statutory-inquiry-facebook>

63 In addition to provision made in section 38 requiring consultation with the DPC and others (s 38(4)-(7)), other constraints include the requirement of DPC consultation in other areas (such as creating regulations limiting access rights) and straitened Oireachtas approval requirements applicable to regulations made under sections 51, 60 or 73. DPA 2018, s 60(10); DPA 2018, s 6(5).