



---

## **AN BILLE UM CHOSAINT SONRAÍ (LEASÚ), 2002 DATA PROTECTION (AMENDMENT) BILL, 2002**

---

### **EXPLANATORY AND FINANCIAL MEMORANDUM**

---

#### **GENERAL**

The primary purpose of the Bill is to give effect to the provisions of Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Bill amends the Data Protection Act, 1988, by extending data protection rules to certain manual data relating to living individuals which is recorded as part of a relevant filing system. It sets out conditions for processing personal data, including more stringent conditions in relation to sensitive personal data, and strengthens data subjects' rights, in particular the right to be informed about the processing of data relating to them. The Bill also sets out new rules relating to transfers of data to countries outside the European Economic Area (EEA), i.e. EU Member States, Iceland, Norway and Liechtenstein. Finally, a number of amendments to provisions of the 1988 Act that are not directly related to the Directive, are intended to improve operation of the Act.

#### **DEFINITIONS AND SCOPE**

*Section 1* is a standard provision which defines some of the terms used in the Bill.

*Section 2* of the Bill extends the scope of the 1988 Act by adding new definitions, including "sensitive personal data", "automated data" and "manual data", and replacing certain existing definitions, including "personal data" and "processing", in section 1 of the Act.

This section also defines the scope of the Bill in accordance with the provisions of Article 4 of the Directive: the new *subsection (3B)(a)(i)* provides that the Act will apply to data controllers established in the State who process data in the context of that establishment, while *subsection (3B)(a)(ii)* provides that this Act will also apply to data controllers who are neither established in the State nor within the EEA, but who make use of equipment located in the State for processing purposes (unless that equipment is used solely for the purposes of transit through the State).

A new *subsection (3C)* provides for certain exemptions from data protection rules in the case of data processed solely for the purpose of historical research. In addition, while the 1988 Act did not apply to "personal data consisting of information that the person keeping the data is required by law to make available to the public", a new *subsection (5)* provides that where such data are processed for a purpose other than the purpose for which they were collected, the exemption will no longer apply.

The collection, processing, keeping, use and disclosure of personal data is dealt with in *section 3* of the Bill. It amends *section 2* of the 1988 Act by adding certain provisions relating to the lawfulness of processing as required by Article 6 of the Directive. A new text to replace the existing subsection (7) extends existing provisions in relation to direct marketing by allowing a data subject, in accordance with Article 14(b) of the Directive, to request a data controller, prior to processing, not to process personal data for the purpose of direct marketing.

Processing is dealt with in *Section 4* of the Bill. It provides for the addition of four new sections — 2A to 2D — to the 1988 Act.

The new *Section 2A* deals with the processing of personal data and takes account of the provisions of Article 7 of the Directive. It provides that in addition to satisfying the conditions which must be complied with in *section 2*, at least one of the listed conditions must also be satisfied, i.e.

- where the data subject has given his/her consent to the processing or in cases where the data subject is under age or incompetent, consent has been obtained from an appropriate person (*subsection 2A(1)(a)*);
- where processing is necessary for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject prior to entering into a contract or for compliance with a legal obligation to which the data controller is subject (*subsection 2A(1)(b)(i), (ii) and (iii)*);
- where processing is necessary to protect the vital interests of the data subject (*subsection 2A(1)(b)(iv)*);
- where the processing is necessary for the performance of a task carried out in the public interest (*subsection 2A(1)(c)*), or
- where processing is necessary for the purposes of the legitimate interests of the data controller or by the third party or parties to whom the data are disclosed (*subsection 2A(1)(d)*).

The new *Section 2B* relates to the processing of sensitive personal data and takes account of Article 8 of the Directive. It provides for a prohibition on the processing of sensitive personal data, unless in addition to satisfying the criteria set out in *sections 2* and *2A*, one of an additional set of listed conditions is also satisfied, i.e.

- where the data subject has given his/her consent to the processing unless prohibited by law (*subsection 2B(1)(b)(i)*);
- where processing is necessary for the carrying out of any right or obligation of the data controller in the area of employment law (*subsection 2B(1)(b)(ii)*);
- where processing is necessary to protect the vital interests of the data subject (*subsection 2B(1)(b)(iii)*);
- where processing is carried out by a non-profit making body with a political, philosophical, religious or trade union aim where such processing relates solely to its members (*subsection 2B(1)(b)(iv)*);
- where processing involves data which have already been made public by the data subject (*subsection 2B(1)(b)(v)*);
- where processing is necessary for the establishment, exercise or defence of legal claims (*subsection 2B(1)(b)(vi)*);

- where processing is necessary for medical purposes and is undertaken by a health professional or another person subject to an obligation of professional secrecy (*subsection 2B(1)(b)(vii)*);
- where processing is necessary for statistical purposes and subject to the Statistics Act, 1993 (*subsection 2B(1)(b)(viii)*);
- where processing is carried out in the course of electoral activities for the purpose of compiling data on people's political opinions (*subsection 2B(1)(b)(ix)*);
- where processing is authorised by regulation for reasons of substantial public interest (*subsection 2B(1)(b)(x)*);
- where processing is necessary in connection with taxes or duties (*subsection 2B(1)(b)(xi)*), or
- where processing is necessary in connection with a benefit, pension, allowance etc. (*subsection 2B(1)(b)(xii)*).

Definitions of the terms “health professional” and “medical purposes” are provided in *subsection (3)*.

The new *Section 2C* deals with security of processing and it provides, in accordance with Article 17 of the Directive, that data controllers must implement the most appropriate measures to protect personal data and that having regard to the cost of their implementation, such measures must ensure a level of security appropriate to the risks presented by the processing and the nature of the data to be protected. The data controller must also ensure that anyone in his/her employment or anyone else who has access to the workplace is aware of and complies with such security measures (*subsection (2)*). Where processing is carried out by a data processor on behalf of a data controller, such processing must be governed by a contract stating that the data processor must act only on the instructions of the data controller. The data controller must choose a data processor who provides sufficient guarantees in relation to technical security measures and must take reasonable steps to ensure compliance with those measures (*subsection (3)*).

*Section 2D* takes account of the provisions of Articles 10 and 11 of the Directive and provides that, for the purposes of subsection 2 (1)(a) of the Act, personal data will not be treated as processed fairly unless, when personal data are obtained, the data subject is provided with certain information. Where the data come from a source other than the data subject, such information should be given not later than the time when the data are first processed or, if disclosure to a third party is envisaged, not later than the time of first disclosure at the latest (*subsection (1)(b)*). The information to be given where data are obtained directly from the data subject is specified in *subsection (2)* and includes the identity of the data controller and the purposes for which the data will be processed. Where data are obtained from another source, the information to be given is specified in *subsection (3)* and includes the name of the original data controller. *Subsection (4)* states, however, that the obligation to inform does not apply when data are processed for statistical, historical or scientific purposes, where the provision of such information would involve disproportionate effort or where the information is required by law.

#### RIGHT OF ACCESS

*Section 5* amends the right of access provisions set out in section 4 of the 1988 Act. The existing text of subsection (1) is replaced by a new text that extends the provisions of the 1988 Act, in line with the terms of Article 12 of the Directive, by providing that where an

access request is made under the Act, the data subject must be provided with certain additional information.

New *subsections (9), (10) and (11)* provide that the obligation to inform the data subject will not apply where the supply of such information is not possible or involves disproportionate effort or unless a reasonable interval has elapsed. The new *subsection (12)* provides that, in accordance with the terms of the Directive and having regard to a decision based solely on automatic processing, the obligation to inform will not apply where the provision of such information would adversely affect trade secrets or intellectual property.

New *subsection (13)* prohibits a person, in connection with the employment of another person, the continued employment of another person or a contract for the provision of services to him or her by another person, from requiring that person to make an access request under section 4 of the 1988 Act, or from supplying him or her with personal data obtained on foot of such an access request. This amendment is intended to prevent abuses relating to rights of access.

#### RIGHT OF RECTIFICATION OR ERASURE

*Section 6* takes account of Article 12(c) of the Directive and amends section 6 of the 1988 Act in order to give data subjects the right to have incorrect or inaccurate data ‘blocked’, i.e. marked in such a way that it is not possible to process it for purposes in relation to which it is marked. This will supplement the existing rights to have data rectified or erased. The new text also provides that where data have been blocked, there is a requirement to notify any person to whom that data was disclosed in the previous 12 months unless such notification proves impossible or involves disproportionate effort.

#### CERTAIN RIGHTS OF DATA SUBJECTS

*Section 7* of the Bill adds two new sections — 6A and 6B — to the 1988 Act in order to take account of the terms of Articles 14 and 15 of the Directive.

*Section 6A* extends the data subject’s right to object to the processing of personal data relating to him or her where the processing of such data is considered necessary for the performance of a task carried out in the public interest or where the processing is for the purposes of the legitimate interests of the controller. The objection must be on compelling legitimate grounds. The right to object does not apply in certain circumstances — where the data subject has given consent to the processing or where the processing is necessary in the course of entering into or performance of a contract, for compliance with a legal obligation, to protect the vital interests of the data subject, or in certain cases in the course of electoral activities, or where specified by regulation.

*Section 6B* provides for a general ban on decision making based solely on automated processing of data intended to evaluate certain personal aspects where such a decision significantly affects the data subject. However, a data subject may be subject to such a decision in circumstances where the data subject has given his or her consent, where the decision is taken in the course of entering into or in the performance of a contract at the request of a data subject, or where such a decision has been authorised by law and suitable safeguards to protect the legitimate interests of the data subject are in place.

#### ADDITIONAL FUNCTIONS OF DATA PROTECTION COMMISSIONER

*Section 8* amends section 9 of the 1988 Act by the addition of four new subsections after *subsection (1)*. *Subsection (1A)* provides that

the Data Protection Commissioner will have a monitoring role for the purposes of Council Regulation 2725 of 2000 (Eurodac). *Subsection (1B)* provides for dissemination by the Data Protection Commissioner of a Community finding in relation to transfers of personal data outside the EEA, authorisations granted by the Commissioner in accordance with Article 26.2 of the Directive or of any Commission decision made in relation to an authorisation under Article 26.3 or in relation to standard contractual clauses under Article 26.4. *Subsection (1C)* provides that the Data Protection Commissioner will be the supervisory authority for the purposes of the Directive. *Subsection (1D)* allows the Data Protection Commissioner to perform any functions in relation to data protection that the Minister may confer on him or her and which would enable the Government to give effect to any international obligations of the State.

#### ENFORCEMENT OF DATA PROTECTION

*Section 9* amends section 10 of the 1988 Act. A new text of *subsection (1)(b)(ii)*, replacing the existing text, recognises that an amicable resolution to a complaint between the parties concerned may necessitate no further action by the Data Protection Commissioner. A new *subsection (1A)* takes account of Article 28.1 of the Directive and allows the Data Protection Commissioner to monitor the application of the Directive. A revised text of subsection (7) provides that where a data controller amends data following receipt of an enforcement notice, the requirement to notify such amendment to any person to whom that data was disclosed in the previous 12 months must be complied with unless such notification proves impossible or involves disproportionate effort.

#### RESTRICTION ON TRANSFER OF PERSONAL DATA OUTSIDE STATE

*Section 10* replaces the existing text of section 11 of the 1988 Act with a completely new text. It takes account of the provisions of Articles 25 and 26 of the Directive relating to the transfer of personal data to a country outside the EEA.

The revised text provides that a transfer of personal data to a country outside the EEA may only take place where an adequate level of protection is deemed to exist. The circumstances to be taken into account in any assessment of adequacy are listed (*subsection (1)*). These include the nature of the data, the purposes for which the data are processed, the country of origin, the country of final destination, the law in force in the country of destination, any relevant codes of conduct, any security measures taken and the international obligations of that country.

Where the European Commission makes a decision as to whether or not an adequate level of protection is provided by a country outside the European Economic Area, that decision will be complied with in relation to similar transfers (*subsection (2)*). The Data Protection Commissioner is required to inform the European Commission and other Member States of any case where he or she considers that a third country does not ensure an adequate level of protection (*subsection (3)*).

*Subsection (4)* lists the circumstances in which transfers of data to countries outside the European Economic Area can take place, i.e.

- where the transfer is provided for by law;
- where the data subject has given his or her consent;
- where the transfer is necessary for the performance of a contract or for the conclusion of a contract;

- for reasons of substantial public interest;
- for the establishment, exercise or defence of legal claims;
- to protect the vital interests of the data subject;
- where the transfer is from a register which is open to consultation by the public, or
- where the transfer has been authorised by the Data Protection Commissioner.

The Commissioner must inform the European Commission and other EEA States of any such authorisations (*subsection (4)(b)*) and must comply with any decision of the European Commission in relation to such authorisations and in relation to standard contractual clauses drawn up under Article 26.4 of the Directive (*subsection (4)(c)*).

*Subsection (6)* provides that, where a data controller considers that an adequate level of protection is provided by virtue of contractual clauses drawn up in accordance with Articles 26.2 or 26.4 of the Directive, a data subject can enforce the terms of that contract and have the same rights as if he or she were a party to it.

*Subsections (7) to (15)* are provisions of the existing text of section 11 of the 1988 Act and they allow the Data Protection Commissioner to prohibit a transfer of data to a place outside the State and set out the administrative procedures to be followed in such a situation.

#### PRIOR CHECKING OF PROCESSING BY COMMISSIONER

*Section 11* inserts a new section 12A into the 1988 Act. It takes account of Article 20 of the Directive and provides for a system of 'prior checking' by the Data Protection Commissioner of processing operations likely to present specific risks to data subjects. Where the Commissioner is of the opinion that a request warrants prior checking, prior checking must take place within the time limits specified. A processing operation which is the subject of a prior check may not take place until the checking procedure has been completed and any processing before such checking has been completed will constitute an offence. An appeal can be made against the result of any such prior check.

#### CODES OF PRACTICE

*Section 12* amends provisions in the 1988 Act relating to codes of practice. It takes account of Article 27 of the Directive by amending section 13 of the Act.

The revised text of *subsection (2)* allows the Data Protection Commissioner to consider draft codes of practice submitted to him or her, to approve the codes where appropriate and to provide for the dissemination of those codes following consultation, where relevant, with data subjects. A new *subsection (5)* allows the Commissioner to charge for services provided in relation to codes of practice while a new *subsection (6)* provides that approved codes may be taken into account by the courts in relation to the settlement of disputes.

Codes of practice approved under subsection 12(2) of the 1988 Act will continue in force as if approved under this Act.



*Section 13* amends section 14 of the 1988 Act and provides that for the purpose of the law of defamation, the annual report of the Commissioner shall be privileged.

#### REGISTRATION REQUIREMENTS

*Section 14* amends section 16 of the 1988 Act by substituting a revised text of subsection 1. This provides that registration requirements will apply, in accordance with Article 18 of the Directive, to *all* data controllers and data processors except

- those who carry out processing whose sole purpose is the keeping of a register which is open to consultation by the public;
- those who carry out processing of manual data unless provided for by regulation;
- processing by any non-profit making body in relation to the members of the body, and
- data controllers or data processors specifically excluded by regulation.

*Section 15* amends section 17 of the 1988 Act in relation to applications for registration. It provides, *inter alia*, that separate registrations must be made where the data controller intends to process data for one or more unrelated purposes, in accordance with Article 18.1 of the Directive. *Subsection (3)* relates to the registration of data controllers keeping sensitive personal data.

*Section 16* amends section 18 of the 1988 Act and provides that a second or subsequent registration will continue from the date of expiry of the previous registration.

*Section 17* takes account of Article 28.7 of the Directive and places a duty of confidentiality on the Data Protection Commissioner, and on staff of the Office of the Commissioner, with regard to confidential information obtained in the course of their duties.

#### JOURNALISM, LITERATURE AND ART

*Section 18* adds a new *section 22A* to the 1988 Act. It provides that data which is processed only for the purposes of journalism or artistic or literary purposes will be exempt from certain provisions of the Act once such processing is either undertaken solely with a view to the publication of any journalistic, literary or artistic material or the data controller believes that such publication would be in the public interest, and where the data controller believes that compliance with the particular provision would be incompatible with journalistic, artistic or literary purposes. The provisions referred to include those sections of the Act that deal with processing of personal data (*sections 2 and 2A*), processing of sensitive data (*section 2B*), fair processing of data (*section 2D*), the right of access (*sections 3 and 4*), the right to rectification (*section 6*), the right to object (*section 6A*) and restrictions on decisions based on automatic processing (*section 6B*). Codes of practice approved by the Data Protection Commissioner may be taken into account by data controllers with a view to determining whether publication would be in the public interest.

## REPEALS AND REVOCATION

*Section 19* provides for the repeal of section 23 and subsections (3), (4) and (5) of section 24, and the Third Schedule of the 1988 Act.

This section also revokes the European Communities (Data Protection) Regulations 2001 (S.I. No. 626 of 2001) which give effect to Articles 4, 17, 25 and 26 of the Directive, pending enactment of the Bill.

## SHORT TITLE, COLLECTIVE CITATION, CONSTRUCTION AND COMMENCEMENT

*Section 20* is standard and sets out the short title, commencement, collective citation and construction. The Act will come into operation on such day or days as may be appointed by the Minister.

In accordance with Article 32 of the Directive, automated data will be brought into conformity with the Act two months from the date of passing of the Act. Manual data will be brought into conformity with the Act at the same time, with the exception of manual data already held in filing systems which need not be brought into conformity with *sections 2, 2A and 2B* of the Act (Articles 6, 7 and 8 of the Directive) until 24 October 2007. However, the right of rectification, erasure or blocking of data which are incomplete, inaccurate or stored in a way which is incompatible with the legitimate purposes pursued by the data controller will apply progressively to such (manual) data as and when the files are used throughout that extended period, and in particular at the time of exercising the right of access.

## FINANCIAL IMPLICATIONS

The enhanced role of the Office of the Data Protection Commissioner will have implications for staffing levels, but registration fees resulting from extended registration requirements will help offset these additional costs. It is not anticipated that additional costs will arise for other public bodies.