

Information note on EU Data Protection Reform

Following several years of intense negotiations, the General Data Protection Regulation (GDPR) was agreed in early 2016 and will take effect from 25 May 2018. Its purpose is to update and streamline EU data protection law across the EU. Broadly speaking, the GDPR strengthens the data protection rights of individuals (data subjects), clarifies the obligations on bodies that process personal data in both the public and private sectors, and greatly expands the functions and powers of the Data Protection Authorities, including a power to impose substantial administrative fines for infringements of data protection law.

Adoption of the GDPR has been accompanied by adoption of a law enforcement Directive; it contains rules that will govern the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. This Directive needs to be transposed into national law by May 2018.

While an EU Regulation is a directly-applicable legal instrument and does not normally require any national law to give it legal effect, the GDPR contains a number of provisions which allow Member States a limited margin of flexibility. For example, it recognises that reconciling the right to protection of personal data with the right to freedom of expression and information is a matter for national law. The same applies to reconciliation of the right of access to public documents (freedom of information) with the right to protection of personal data.

The Government has recently approved the drafting of a Data Protection Bill and the draft has now been forwarded to the Joint Committee on Justice and Equality for pre-legislative examination. It is a lengthy text (about 95 sections) and contains provisions which are intended to:

- (a) give further effect to the GDPR in areas in which Member States retain some flexibility (see above);
- (b) transpose the law enforcement Directive into national law;

(c) equip the Data Protection Authority with effective mechanisms and procedural safeguards in order to perform the expanded range of tasks and exercise the enhanced powers set out in the GDPR and the law enforcement Directive.

Transparency and lawfulness of data processing

The GDPR emphasizes the need for greater transparency in relation to the processing of personal data; Article 5.1(a) provides that personal data must be processed lawfully, fairly and in a transparent manner. Article 26 goes on to provide that where two or more bodies are involved in determining the purposes of processing, they become joint controllers and they are required to determine their responsibilities for compliance with GDPR obligations in a transparent manner.

Provisions in the proposed Data Sharing and Governance Bill will help to promote greater transparency and ensure that individuals are aware of sharing arrangements between public authorities and bodies. This will help to facilitate effective exercise of their data protection rights.

Data processing by public authorities and bodies is normally undertaken on the basis of one of the following:

- (a) processing is necessary for compliance with a legal obligation to which the controller is subject (Article 6.1(c);
- (b) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (Article 6.1(e).

Article 6.3 of the GDPR requires that this basis must be laid down in EU law or national law. It can be expected that the provisions of the Bill will promote consistency of approach and coherence in respect of data sharing across the entire public sector.

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