

## **Joint Committee on Justice - 27 April 2021**

### **General Data Protection Regulation**

#### **Opening Statement from Fred Logue**

Mr Chairperson, members of the committee

Thank you for the invitation to present evidence this evening. My name is Fred Logue and I am principle solicitor in FP Logue which has a specialist information law practice.

I am happy to share my experience dealing with data protection issues of a more routine nature compared with the international issues that Mr Schrems and ICCL are concerned with. Nonetheless these issues have huge importance for individuals and their daily lives, for example:

- Dealings with vulture funds
- Secret workplace surveillance
- Data retention by telephone companies
- Adoptees' birth and early life
- Social welfare issues
- Police records
- Disclosure to the police
- Loss of very sensitive medical records
- Use of facial recognition and other biometric technologies
- Access to testimony given to enquiries
- Access to information about secret medical trials on children

In my view, it is through the lens of ordinary individuals with ordinary issues that you get to see how the enforcement of data protection law really works.

Data Protection Rights are radical because they create a legal relationship between a data controller and a data subject simply because the former processes the personal data of the latter. This legal relationship exists irrespective of any other legal relationship such as contract, statute, common law etc and applies more or less equally irrespective of whether the controller is a public or private. Merely processing the information automatically gives rise to this legal relationship.

The GDPR and Law Enforcement Directive are the primary EU law measures which give effect to this. They do so by imposing obligations on data controllers, by giving data subjects rights and by providing enforcement mechanisms.

The Data Protection Commission has the primary responsibility for enforcement and is tasked with resolving disputes between data subjects and controllers over the processing of personal data and compliance with data subject rights. It is given extensive powers for this purpose.

Overall my experience is that compliance, particularly with access requests, is poor and that the GDPR is poorly understood by those tasked with implementing it in many organisations public and private. Few public

authorities seem to be aware that they have a responsibility under EU law to ensure its effectiveness and cannot hide behind conflicting national law to make decisions that are not permitted under EU law.

In a similar vein I think compliance is poor because enforcement is ineffective and virtually consequence free. The possibility of a DPC complaint does not seem to be something which motivates many controllers to comply with their obligations.

I would echo the submission from Mr Schrems that complaints are taking too long, are costly in time and money, there are no documented procedures, what procedures there are, are overly complex and do not lead to efficient or fair complaint handling. In fairness to the DPC, final decisions, while rare, are generally of good quality but the procedure to get there is tortuous to the extent that it often serves no real purpose. By the time the decision is made the purpose of the complaint has more often than not evaporated.

The DPC might be excused for taking more time with large complex cases involving cross border issues but my experience is that the delays and procedural issues apply across the board even to the most routine complaints which indicates that there is a systemic issue that needs to be fixed.

I also think that the procedures for complaint handling need to be reviewed particularly in light of the recent Zaleski judgment of the Supreme Court which looked at the procedures of the Workplace Relations Commission. I don't think the DPC's current complaint handling procedures are compatible with the right to fair procedures in a quasi-judicial process. I think it is only a matter of time before decisions begin to be overturned because of procedural unfairness.

Because of the very different skill sets required, at the very least there should be some form of functional separation between the DPC's administrative and quasi-judicial functions with the latter managed by qualified lawyers or even someone with judicial experience.

I am also very uncomfortable with the informal engagement between DPC and controllers where DPC staff even appear to be helping design products and services that they may be called on to investigate. A good example of this is the National Smart Meter Program which entails the building of a huge national database of everyone's half-hourly electricity usage stored for seven years. It seems that the DPC has since 2012 been involved in the design of this project<sup>1</sup> but at the same time it is now being called upon to investigate the lawfulness of this processing<sup>2</sup>.

At the end of the day, we need well-functioning institutions such as the DPC to maintain our democracy and the rule of law. The DPC needs to be trusted and respected by the public (including in this case the European public). Secrecy, delay, unfairness, inefficiency, perceived conflicts of interest and the failure to serve the needs of the public will inevitably lead to failure.

The DPC also needs to be trusted and respected by other public institutions. In that vein I am deeply uncomfortable with the way other public sector bodies (which it must be remembered have a duty to ensure

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<sup>1</sup> "Since 2012, the CRU has been working closely with market participants and has engaged with the Data Protection Commission ('DPC') to design the technical and organisational implementation of the NSMP and to address data protection and security concerns." ([https://www.cru.ie/wp-content/uploads/2020/12/201012-CRU-Data-Access-Paper\\_CRU20111.pdf](https://www.cru.ie/wp-content/uploads/2020/12/201012-CRU-Data-Access-Paper_CRU20111.pdf))

<sup>2</sup> <https://www.independent.ie/irish-news/news/data-protection-commissioner-is-asked-to-investigate-esb-smart-meters-40289903.html>

the effectiveness of EU law) behave towards the DPC which is reflected in the degree of litigation against the DPC by these bodies arguing for narrow and restrictive interpretation of the law. This sets a poor example for private controllers.

Finally I think more use needs to be made of fines and compensation as a matter of routine to discourage the routine flouting of basic data protection procedures (e.g. delays, ignoring requests). If a traffic warden can give me a ticket for overstaying my parking why can't the DPC automatically fine a controller for routine or seemingly minor breaches of data protection rules or even introduce automatic compensation for per-se breaches such as delays. It is this type of incentive rather than the headline fines that would have the biggest effect in my view.

To summarise I think we are at a cross-roads, the eyes of the world are on us and we have a choice to make about delivering a world class enforcement system that serves individuals.

**Yours sincerely**

**Fred Logue**

**22 April 2021**