

## CHECK AGAINST DELIVERY

I thank the committee for hearing this extremely important matter – not just for Ireland but also for the whole European Union.

### **[Problem]**

When I first travelled to Ireland, I found the DPC above a little Centra supermarket in Portarlington with 20 employees.

Since then we not only won two very public cases against the DPC before the Court of Justice, but the Irish Government has also reacted and devoted a lot of resources to the DPC – which was well received in the EU and globally; but despite providing about 20 Million Euros a year to this Institution, the DPC has very little results to show:

In the DPC's written submission to this Committee, the lack of enforcement is openly acknowledged (even when in rather diplomatic language).

The DPC describes that:

- it receives more than 10.000 complaints per year,
- that it handles about 4.700 of them (it is unclear what happens with the other 53%) and
- that it only opens a handful of investigations per year.

In a recent statement to Reuters, the DPC is claiming to “*build momentum*” as it plans to deliver 6 or 7 decisions in 2021. This means that even with “*momentum*” 99.93% of all complaints do not see a decision.

In comparison: In Austria (not really the center of “big tech”) the DPA issued 852 decisions, started 154 own investigations and issued 142 fines at about 15% of the DPC's annual budget. Spain so far issued almost 700 decisions under the GDPR and the French DPA issued record fined of € 50 Mio.

When considering that 99.93% of all complaints are not seeing a decision at the DPC is important to stress that we are talking about a fundamental right - equal to the right to the right to freedom of expression or the right to vote.

Nevertheless, the DPC, as the guardian of this fundamental right explicitly says in its submissions to this Committee, that most complaints “*may be of immediate relevance to a given individual, but the resolution of that issue will not necessarily improve conditions of others*”, to justify that only a tiny fraction of complaints will lead to an inquiry.

After years of restraint, the German Data Protection Authority recently highlighted in a letter to the European Parliament that:

- It alone has sent more than 50 cases on a messaging service to the DPC – and has not heard back for years, and
- that the DPC now stands “isolated” among its European Counterparts.

Many other European authorities informally voice similar concerns when we have talks with them.

### ***[Fear of the Law]***

The DPC is rather open in the submission to this Committee that “*the principle-based nature of the GDPR means that ... there is no fixed template to delineate compliant and non-compliant behavior*” and that “*enforcement notices ... all too often give rise to challenges*”.

In plain English: The DPC has a hard time applying the GDPR and withstanding challenges, despite being a body whose sole purpose is enforcement of the GDPR.

The main problem in my experience is that the DPC has an extremely poor understanding of the material law provisions of the GDPR and in addition makes about every procedural mistake you can think of.

The most recent litigation we were involved in was pending for about 8 years and likely cost the Irish taxpayer upwards of 6 Million Euros - after losing at the Court of Justice twice – and this is a case where the DPC has not even taken a formal decision yet.

Instead of enforcement, the DPC now takes an approach of “micro debating” complaints and “negotiating” compliance with the law instead of enforcing it, which is openly described in the DPC’s submissions.

Once business understands that, companies will be even more reluctant to comply initially – creating a spiral of more and more unresolved complaints.

### ***[Immanent Future]***

It is foreseeable that this situation cannot be ignored further:

- The Courts will likely overturn the DPC's decisions (or the lack thereof)
- other authorities and litigants already bypass the DPC whenever possible, for example by using civil litigation instead,
- there is a live debate about changing European law
- the European Parliament will pass resolution even calling for an infringement procedure against Ireland yesterday.

### ***[Solution]***

At the same time, there seem to be some simple and obvious steps that politics in Ireland could take, instead of pumping more and more money into an inefficient structure:

- The DPC is a regulatory body, with the sole role of enforcing the law, but obviously lacks the capacity in this respect.  
It would be logical to fill the two vacant seats of the Commission with respected experts on material and procedural law to massively improve the quality of decisions.
- There is clearly a need for reform of the DPC's procedures, which currently makes challenges very easy.  
While more procedural certainty in the Irish Data Protection Act would be ideal, a first step may be for the DPC to issue its own clear procedural rules, after multi-stakeholder engagement. Criticism of procedures could then be taken on board before cases hit the Courts.
- Finally the DPC fears litigation - likely also because of the high cost of litigation in Ireland.  
At the same time, the GDPR allows for Millions and Billions in fines. It would be logical to re-allocate some of these foreseeable funds to ensure that the DPC can litigate its cases, instead of incising the annual budget.