

**Joint Committee on Justice**  
**Pre-legislative scrutiny of the general scheme of the Communications (Retention of Data) (Amendment) Bill 2022**  
**Opening Statement of the Data Protection Commission**  
**30 June 2022**

Good morning, Chair and members of the Committee. My name is Dale Sunderland, Deputy Commissioner at the Data Protection Commission (DPC). I am joined by Assistant Commissioner, Gary Russell. The DPC is pleased to assist the committee today in its pre-legislative scrutiny of the General Scheme of the Communications (Retention of Data) Amendment Bill 2022.

The timing of our contribution today is somewhat unusual given the General Scheme was published just 8 days ago and the formal invite to appear before the committee issued only yesterday. The timescales involved pose challenges for the DPC in terms of both our role in assisting this committee in pre-legislative scrutiny but also in terms of our role in being mandatorily consulted by the Minister for Justice under Section 84(12) of the Data Protection Act 2018 on any proposal for a legislative measure that relates to the processing of personal data.

On foot of the CJEU judgement in April, the DPC was informed by the Department of Justice in June that a General Scheme was in preparation as an interim amendment to the 2011 Data Retention Act (“the 2011 Act”), pending fuller scale reform. The Department indicated that the DPC would be consulted and, in fact, the DPC received the General Scheme only 8 days ago. The DPC has not yet returned its observations to the Department on the General Scheme as it was advised last week by the Department that significant data-protection relevant updates to the Scheme were being made which would be reflected in a new Bill. The DPC has only received a copy of that updated Bill in the last 24 hours and will now work to prepare its detailed observations for the Department of Justice.

In the meantime, the DPC is happy to share its preliminary observations on the published General Scheme with this Committee, while acknowledging that some of what we comment on may have been addressed in an updated version of the proposed legislation. The DPC’s remit relates to data-protection related rights and freedoms of individuals and our observations on the proposed Bill reflect the binding requirements in this regard set out by the CJEU.

Firstly, it is worth observing that under the current 2011 Act, the main oversight and monitoring functions are reserved for the “designated judge” as set out in Section 12 of

that Act, namely to ascertain whether the agencies prescribed to make disclosure requests are complying with the Act. However, section 11 (1A) of the Act provides that these judicial supervisory powers do not affect the functions of the Data Protection Commission. In addition, Section 4(2) of the 2011 Act - Data Security- assigns a specific role to the DPC where it is designated as the national supervisory authority. With these provisions in mind, the DPC carried out a series of audits to examine both the data security measures and the procedures and systems for processing disclosure requests by prescribed agencies. In addition, the DPC audited all Communication Service Providers (CSPs) processing such disclosure requests. General findings and recommendations arising from these audits are outlined in the DPC Annual Reports of 2016 and 2017.

In terms of the General Scheme, it clearly sets out to address the CJEU finding that mass and indiscriminate retention of electronic location and traffic data is not permitted for the purposes of combatting serious crime. In making this finding, the CJEU did however set out a number of more permissible targeted retention measures that could be deployed - subject to specific safeguards and limitations - by Member States for the purposes of fighting serious crime. In that respect, Head 5 provides for, subject to judicial authorisation and a transparency requirement to publish any order, retention of Schedule 2 data, where an existing or foreseeable national security issue is in play. It is the DPC's preliminary view that the arbitrary period of twelve months for retention is at odds with the CJEU's requirement for an assessment in each case of the period of time for which retention is actually necessary. The CJEU has made it clear that derogations to the prohibition of storage of traffic and location data may only be granted for a period of time that is strictly necessary to achieve the objective pursued.

The DPC notes the provisions that would allow by-passing of the advance judicial authorisation in the context of requiring disclosure of such Schedule 2 data, as set out under Head 9. However, it is not clear how such purportedly urgent exceptions would in the event be justified. Likewise, the means by which it will be clear a national security issue exists or is foreseen is not clear from the General Scheme. Further detail in this regard would assist the DPC's assessment of the measures.

Heads 12 – 15 give rise to concerns given the Court has said that the limited and targeted retention it sees as permissible for serious crime investigation must not be turned into mass and indiscriminate retention. In this regard, in respect of the specified bodies, themselves quite broad in range, which may access preservation or production orders for Schedule 2 data, the means by which objective targeting and limiting criteria will be established are not clear. In respect of justified urgent cases in Heads 14 and 15, the apparent lack of judicial oversight after the event is also of concern.

In light of the high risks to the rights and freedoms of data subjects inherent in the processing envisaged in the General Scheme, the DPC is of the view that the Department should have and should conduct a Data Protection Impact Assessment in relation to the processing and provisions proposed.

The DPC also notes that there is no provision in the General Scheme for the restriction of data subject rights. Such rights include access, rectification and erasure, and if restrictions are intended, we recommend these should be provided for in the Bill with a justification for why the restrictions are necessary and in what circumstances.

I hope these comments will be of assistance to the committee and I am very happy to answer the questions members may have.