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Legislation update

Data protection update

The General Data Protection Regulation (GDPR) came into force on 25 May 2018. Since then, a number of additional measures have been taken to ensure that the privacy rights of individuals are adequately protected.

Many of these steps have been taken by the regulator, the Data Protection Commission (DPC), using either its previously existing powers or newly enhanced powers under the GDPR and the Data Protection Act 2018. These actions and enforcement measures are summarised in its recently published annual report, which covers the period from 25 May 2018 to 31 December 2018.

Key figures in 2018:

- 56% increase in complaints received compared to 2017
- 70% increase in the number of data security breaches notified to the DPC

Key actions taken by the DPC:

- Opening inquiries into the use of technologies such as CCTV, body-worn cameras, automatic number-plate recognition systems and drones
- Opening investigations into the compliance of large technology companies with the GDPR
- Continuing its special investigation into the data protection issues associated with the Public Services Card

No-deal Brexit – Standard Contractual Clauses

In early 2019, the DPC published guidance on the transfer of data in the event of a no-deal Brexit. If the UK leaves the EU without a withdrawal agreement, the GDPR would no longer apply in the UK and the UK would be treated as a third-party country.

Many entities may be affected by a no-deal Brexit without realising it. In addition, many people may be affected if their personal data is transferred via the UK. For example, personal data could be transferred where HR or IT functions are outsourced to the UK, where pension scheme operators are based in the UK, or where personal data is stored on the cloud and the underlying servers are in the UK.

In a no-deal scenario, the DPC has recommended the use of Standard Contractual Clauses (SCCs). These are template terms and conditions that Irish and UK entities can sign, or incorporate into their existing contracts. They ensure that personal data transferred into the UK will have the same level of protections as personal data transferred within the EU.

However, the validity of using SCCs is currently being challenged in the Irish and European courts. In particular, Facebook's transfer of personal data from Ireland to the US using SCCs is being tested.

At present, judgment is awaited from the Irish Supreme Court on whether the case can progress to the European Court of Justice for a final decision. If SCCs are ultimately found to be non-compliant, there are major implications for the operations of many companies that transfer personal data from Ireland around the world.

Data Sharing and Governance Act 2019

Another recent development in data protection is the Data Sharing and Governance Act 2019, enacted on 4 March 2019 (although it is not yet in force).

The Act makes changes to how public bodies share personal data and information with one another.

Many public bodies are expressly allowed to share an individual's personal data with one another, under different pieces of legislation. The Act aims to address situations not covered by any previous legislation.

The Act does not generally apply to the sharing of "special categories of personal data", which continue to be protected by the heightened protections in the GDPR. The special categories are:

- Personal data revealing racial or ethnic origin
- Political opinions
- Religious or philosophical beliefs
- Trade union membership
- Genetic data and biometric data processed for the purpose of uniquely identifying a natural person
- Data concerning health
- Data concerning a natural person's sex life or sexual orientation

Under the Act, personal data can only be shared where:

- The data is shared to allow a public body to carry out a recognised function and purpose (such as verifying a person's identity and their entitlement to a public service, correcting incorrect information held, and reducing the burden of the same data being provided twice by the same person)
- The public bodies have a data sharing agreement
- The personal data was lawfully obtained and is lawfully held

Before public bodies can enter into data sharing agreements, they must publish the proposed agreement online, along with any data protection impact assessment that has been carried out. The draft agreement must include details of the purpose, function and legal basis for sharing and processing the data concerned. It must also cover what data is to be disclosed and how it will be processed.

Members of the public will be able to make submissions on the draft agreement. Submissions must then be considered by the public bodies and the final agreement must be published online. Data sharing agreements must also be regularly reviewed.

The provisions of the Act do not apply to data sharing in a number of areas, including:

- Investigation of criminal offences
- Prosecution of offenders
- Protection of state security
- International relations

The 2019 Act also provides for the establishment of a Data Governance Board, whose functions will include:

- Promoting compliance by public bodies
- Advising the relevant Minister in relation to the compliance and functions of public bodies under the Act
- Reviewing the data sharing agreements that public bodies are using

Guidelines on how public bodies are to conform with the Act will be prepared and issued to assist public bodies to comply with it.

Public service pensions data

An exception to the general rule that the Act does not apply to "special categories of personal data" can be found

in Part 5. This allows the Minister for Public Expenditure and Reform (or any other person or body specified by that Minister) to seek personal data relating to past or current members of public service pension schemes, for the purposes of:

- The operation of the Single Public Service Pension Scheme, which commenced on 1 January 2013 for new entrants to the public service
- The operation of any other public service pension scheme

The information which can be sought from almost all public bodies includes:

- Details of contributions paid
- Details of benefits received or accrued
- Details on a person's eligibility
- Other information necessary for the effective functioning of the public service pension scheme

This information may then be kept in a database maintained by the Minister.

The additional information which can be sought in relation to public service pension schemes other than the Single Public Service Pension Scheme includes:

- Details of any pensions related appeals
- Details of any adjustments to years of service
- Details of any pension transfers within the public service
- Details of any pension adjustment orders

Whether or not you are still entitled to a pension payment is irrelevant. Similarly, if the person entitled to the pension is deceased, information can be sought in relation to family members who are in receipt of the pension.

Other pension scheme information can also be sought by the Minister from public bodies, such as:

- Demographic information including the age, gender and disability status of public servants
- Employment information including contracts of employment, term at a particular grade and salary
- Any other information the Minister specifies

This information can be collected for the purposes of:

- Assessing the costs (present and future) of a public service pension scheme
- Assessing the staffing needs of a public service body
- Developing and analysing policies to combat discrimination, to secure equal treatment and to protect human rights
- Assessing the functioning of a public service body

Any information provided to the Minister must be anonymised so that it cannot readily identify a particular individual.

The Minister must provide the following details on a website they maintain:

- Why the personal data is being collected
- What the personal data will be used for
- How the personal data is being protected
- When any personal data will be destroyed

Transfer of business information

The Act also allows public bodies to transfer business information with one another, where the transfer is not covered by any other law. The information can only be shared where it is needed by a public body, such as the Revenue Commissioners, to carry out a recognised function and purpose. Examples include verifying a person's identity and their entitlement to a public service, correcting incorrect information held, and reducing the burden of the same data being provided twice by the same person.

The information which can be shared is wide-ranging and includes:

- Name, address and legal form of the business
- Any unique identifying number which that business has
- State in which the business is established
- Number of employees
- Turnover and net assets

Sole traders, partnerships, companies and other legal forms are all considered businesses under the Act.

Base registries

The Act allows the Minister to specify certain databases that are already held by public bodies as "base registries". Designating an existing database as a "base registry" means that it can be used as an authoritative source of information for the future. Other public bodies will be able to seek data from this authoritative source rather than using multiple sources.

The controllers of base registries will be responsible for keeping the data accurate and up to date. Controllers will be empowered to seek data from other public bodies, to ensure that the data in the base registry is correct and comprehensive.

Public consultation on the processing of children's personal data and the rights of children as data subjects under the GDPR

The GDPR introduced a particular emphasis on protecting the data protection rights of children. It recognises that due to their age, they may not be as aware of their rights and of the risks and consequences of sharing data.

In Ireland, for data protection purposes, a child is anyone under the age of 18. However, the Data Protection Act 2018 has set the age of digital consent at 16 years, which means that if an organisation is relying on consent as the legal basis (justification) for processing a child's personal data and the child is under 16, then consent must be given or authorised by the person who has parental responsibility for the child. A child aged between 16 and 18 can consent to the processing of their data without the involvement of any parent or guardian.

The DPC, in accordance with the GDPR, is planning to draft a number of codes of conduct and guidance documents on the protection of children's data protection rights.

The DPC recently ran a public consultation to get the views of all people affected, such as children, parents, organisations which process children's personal data, and child protection organisations. This consultation had two streams; the first gathered the views of adults and the second gathered the views of children.

The questions posed by the DPC included:

- How should information on how personal data is processed be conveyed to children?
- At what age and in what circumstances should a child be able to exercise their access and erasure rights independently of their parents or guardians?
- How should an organisation which processes children's personal data verify that a child is over the age of 16, if they are attempting to consent to the processing?
- How should an organisation which processes children's personal data verify that the person consenting on behalf of a child under 16 is that person's parent or guardian?
- How should children who are still under 16 but who consented to the processing of their personal data before the introduction of the new age of digital consent now be treated?
- How should international organisations deal with the fact that the age of digital consent for children varies in different countries?
- Should organisations be allowed to profile children for marketing purposes and, if they are, what protections should apply?
- Should any built-in privacy protections vary depending on a child's age?

Geo-blocking Regulation

The Geo-blocking Regulation (EU Regulation 2018/302) has applied across the EU since 3 December 2018. Its main aim is to ensure equal access to the digital market for consumers throughout the EU, regardless of country. Therefore, it aims to stop the practices of geo-blocking and geo-discrimination.

Geo-blocking is the practice of using technology to restrict access to online cross-border sales, based on the user's geographical location. An example is when a consumer in Ireland is prevented from accessing a company's French version of its website and is automatically re-directed to the Irish version, despite entering the correct web address for the French version.

Geo-discrimination is treating online consumers differently due to their location. An example is if an Irish consumer is allowed to view the French version of a company's website but not allowed to make purchases.

Geo-discrimination also covers in-person transactions where a consumer, although physically present in a country, is treated differently due to their nationality or residence. This may take the form of attempting to apply different terms and conditions or an outright refusal of sales. For example, an Irish family being told that family discounts only apply to Spanish families at the entrance to a Spanish theme park is geo-discrimination.

What businesses can no longer do within the EU

- Restrict access to a website that was intended for consumers within a particular geographic area
- Force a person to buy from a particular website intended for that country or group of countries alone
- Limit consumers to a particular website, even if they initially consent to being re-directed to that website
- Automatically redirect consumers to another website set up for that location
- Treat payment methods differently based on the consumer's location

What businesses can continue to do within the EU

- Have different websites for different countries and geographic areas
- Use different prices on those different websites
- Refuse to deliver to a particular part of the EU
- Refuse to accept a particular payment method, provided that refusal applies across the EU

The Regulation does not apply to differences in treatment which apply solely within countries. In addition, it does not apply to a number of different products and services, including:

- Transport services (existing EU non-discrimination legislation already applies)
- Retail financial services (some existing EU non-discrimination legislation already applies)
- Audio-visual services, such as streaming services and e-books

Traders which fail to comply with the Regulation are subject to criminal sanction in Ireland.

The Competition and Consumer Protection Commission is the Irish body responsible for ensuring that businesses comply with the Regulation. It has published a business guide *Geo-blocking: What you need to know* on its website, **ccpc.ie**.

The European Consumer Centre Ireland provides information to consumers about their rights under the Geo-blocking Regulation. It can also help consumers to settle disputes or provide information on the next steps if no settlement is reached. More information is available on **eccireland.ie**.

Civil Registration Bill 2019

The Civil Registration Bill 2019, if passed and commenced, will make a number of important changes to the recording of births and stillbirths.

Inclusion of "Parent" on birth certificates

Birth certificates currently only allow for the inclusion of details under the labels of "Mother" and "Father". The proposed changes will introduce a third category of "Parent".

At present, birth certificates issued in respect of donor-assisted children born to same-sex couples only allow for the recording of the mother's details. The Bill will allow people in a same-sex relationship to also be included as a "Parent".

Additionally, it will be open to any parent in a non-donor assisted birth to simply register as a "Parent" rather than "Mother" or "Father".

Changes to the presumption of paternity

The Civil Registration Bill 2019 also seeks to amend existing legislation to allow a mother to more easily rebut the presumption of paternity of her estranged husband. The Bill proposes that the mother can file a statutory declaration when registering the birth. Current legislation requires that the mother's husband appear before a Registrar and make a statutory declaration where he states that he is not the father. It is intended that the Bill will remove the need for contact with a woman's husband, particularly where there is estrangement or the separation may be acrimonious or have involved domestic violence.

Family assistance to the coroner

The Act will also give a greater role to family members, or other people with relevant knowledge, in relation to registering the details of death where a coroner is involved.

At present, the coroner prepares a certificate which is then provided to the Registrar of Births, Marriages and Deaths. Once the Act comes into force, the coroner will be able to consult with family members or other qualified informants to ensure greater accuracy in the details recorded on the death certificate.

Sharing of data to specified organisations

Finally, the Act seeks allow to certain historic records of births, deaths and marriages to be shared with certain bodies under the control of the Minister of Culture, Heritage and the Gaeltacht, such as the National Library and the National Archives.

Adoption update

Adoption (Amendment) Act 2017

The Adoption (Amendment) Act 2017 came into effect on 19 October 2017. It makes a number of important changes in relation to the eligibility of children for adoption, the eligibility of certain people as potential adopters, and the procedures and principles applying in adoption applications.

Best interests of the child

The Act enshrines the general principle that the best interests of the child is the paramount consideration when any aspect of adoption proceedings is before either the Adoption Authority of Ireland (AAI) or a court.

It goes on to list a number of factors and circumstances which the AAI or a court should refer to, when deciding what is in the best interests of the child. These are:

- The child's age and maturity
- The child's physical, psychological and emotional needs
- The likely effect of adoption on the child
- The child's views on their proposed adoption
- The child's social, intellectual and educational needs
- The child's upbringing and care
- The child's relationship with their parent, guardian or relative as the case may be
- Any other circumstances affecting the child

To the extent that a child can form their own views on any of the above, the AAI or a court must attempt to find out those views and give them due weight.

Eligibility of a child for adoption

Before 19 October 2017, a different regime applied to children who were under seven years old and children over seven. An adoption order could only be made in relation to a child over seven where the AAI accepted that certain exceptional circumstances applied. This difference in treatment has been ended and, as a result, all children under 18 are treated in the same manner for the purposes of adoption.

A further change is that children born to married couples can now be adopted. The Act also confirms that a child is eligible to be re-adopted, particularly where a child's initial adopter(s) has died before the child reaches 18.

Eligibility of various people as adopters

Married couples and individual applicants were the only two categories of people eligible to be adopters. However, the 2017 Act has broadened those eligible, to include:

- Couples in a civil partnership
- Cohabiting couples who have lived together for at least three years

A further change is that step-parents can now apply to adopt a child without the need for their partner, who may be the child's natural parent or adoptive parent, to also apply to adopt the child. Step-parents can generally apply to adopt after they have lived with the child and their partner for a continuous period of two years.

These new rules also apply to the recognition of adoptions involving civil partners or cohabiting couples which have happened outside of Ireland.

Enhanced rights of certain people

Currently, fathers who are not recognised as legal guardians of their children have a right to be consulted in relation to any proposed adoption and may apply to become a legal guardian in order to object to any proposed adoption. The 2017 Act extends this right to a number of other people, known as "relevant non-guardians", such as temporary guardians.

Where possible, Tusla – the Child and Family Agency now has an obligation to identify and inform any relevant non-guardian of the proposed adoption, the legal implications of adoption and the adoption procedures.

Revised criteria where a child's parents have failed in their duty to their child but refuse to consent to adoption

Where an application is made for an adoption and the parents of the child do not consent, the High Court can go ahead and make the adoption order. The 2017 Act revises the criteria which the High Court must be satisfied of before making an order in these cases. The revised criteria are:

- The child's parents must have failed in their duty towards the child for a continuous period of three years before the application.
- The parents' failure in duty has led to the safety or welfare of the child being prejudicially affected.
- There is no reasonable prospect of the parents' failure being corrected.
- The parents' failure amounts to an abandonment of all parental rights.
- The child has lived with the proposed adopters for a period of at least 18 months.

Informal Adoptions (Regularisation) Bill 2019

The Informal Adoptions (Regularisation) Bill 2019 has been proposed and seeks to amend the law to regularise the status of people who were informally or irregularly adopted in the past.

Informal adoptions arose in circumstances where children were adopted but were not subject to any formal adoption process. Rather, incorrect birth certificates were issued naming the adoptive parents as the child's birth parents. In many cases, the adopted children were viewed as birth children. This can lead to disputes in relation to inheritance entitlements. The Bill proposes two corrective measures.

Firstly, individuals, who have sufficient proof that their birth certificates wrongly record their adoptive parents as their birth parents, will be able to apply to the Circuit Court to:

- Legally recognise the fact that they were adopted
- Have an adoption order made, backdated to the date stated on their birth certificate
- State that named birth parents are in fact their adoptive parents

The Registrar of Births, Marriages and Deaths and the AAI will then be obliged to correct their own records to record these new facts.

Secondly, provision is made to protect people who may have been the subject of an illegal or informal adoption. The Bill will give authoritative status to their birth certificates so that those birth certificates cannot be challenged by another person as being invalid in any later court proceedings.

Adoption (Information and Tracing) Bill 2016

The Adoption (Information and Tracing) Bill 2016 seeks to improve the information available to:

- Adopted people
- People who have been the subject of an incorrect birth registration
- Birth parents of adopted people

The Bill seeks to balance a number of sensitive but conflicting rights, which has meant that it has faced opposition on a number of fronts.

The National Adoption Contact Preference Register – current process

Since 2005, the AAI has been responsible for the National Adoption Contact Preference Register. The present system is entirely voluntary and has no statutory basis. Adopted people, or members of an adopted person's birth family, can add their details to the Register.

People providing details on the Register can state:

- Whether they wish to have contact or none at all
- Who they would like to have contact with and the degree of contact
- Who they would like to share information with and what information they wish to share

There are five, distinct levels of contact:

1. Willing to meet
2. Exchange of letters or information, contact by telephone or email
3. No contact, but willing to share medical information
4. No contact, but willing to share background information
5. No contact at the moment

Once details have been entered, the Register can then be checked for any matching entries. If both parties have indicated their consent, the relevant information will be provided.

The Register of Adoption Contact Enquiries – proposed process

If the 2016 Bill is passed, the Register of Adoption Contact Enquiries will replace the existing National Adoption Contact Preference Register.

This new statutory register will be maintained by the AAI and will allow registration by adoptive parents and previous guardians of adopted people. As in the current situation, a person will be able to specify that they do not wish to be contacted and seek to have their details removed from the Register.

Holders of relevant information about adoptions will be required to provide all adoption records to the AAI. The Bill gives the AAI enhanced powers to ensure compliance with this obligation, including the power to enter and search premises, and to apply for a warrant from the District Court where necessary. It will be a criminal offence not to comply.

The AAI will be allowed to share any information it holds with Tusla and other relevant agencies, subject to appropriate data sharing agreements.

Tracing service

The Bill will give Tusla a statutory function in relation to tracing. Where someone states that they want contact or to share information, Tusla will be obligated to locate the person or people concerned. However, if Tusla locates them, they will not be forced to make contact with the person who has requested contact (although information may be shared).

A person who receives a request from Tusla to provide information for tracing purposes will be required to comply with that request. Guidelines will be published to facilitate this tracing service.

Disclosure of information to adopted people

An adopted person over 18 will be entitled to apply to Tusla for the following information, which may be held by the AAI:

a) Certain information on their birth parents (for example, their age at the date of birth, their civil status, the county in which they resided before birth and at the birth, their occupation, their pastimes and their physical appearance)
b) Certain information on their birth relatives (for example, whether they have a birth relative, their sex, and whether they are older or younger)
c) Certain information on the adopted person's early life, including:
    - Where they lived
    - Who made arrangements for their adoption
    - The date on which they were placed in foster care or with prospective adopters
d) Their own medical information before adoption
e) Medical information relating to a birth relative
f) Any documents relating to the adopted person, including letters and photographs
g) Birth certificate information, including their own forename and surname at the time of birth, the date of their birth, the place of birth, and the birth mother's forename and maiden name
h) The forename and surname of the birth father
i) A copy of any adoption order made
j) Any other relevant information

Information provided in (a)-(e) will not include the names or otherwise identify the birth parents or birth relatives. Tusla will be obliged to provide a statement outlining the information specified in items (a)-(e), as well as the documents mentioned in item (f).

The Citizens Information Board provides independent information, advice and advocacy on public and social services through citizensinformation.ie, the Citizens Information Phone Service and the network of Citizens Information Services. It is responsible for the Money Advice and Budgeting Service and provides advocacy services for people with disabilities

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Protection and procedures in relation to the naming of birth mothers and fathers

Birth certificate information, copies of adoption orders, and names of birth fathers will be provided where the applicant's birth mother or father is deceased or consents to disclosure.

Birth certificate information and copies of adoption orders may be provided only after notifying the birth mother or father, in the following situations:

- Where there is an entry in the Register in relation to the birth mother or father, or
- Where the adoption occurred after the Bill comes into effect

After receiving a notification, the birth mother or father will be able to object to any disclosure of the information sought. The AAI will then hear both sides before determining whether or not the information should be disclosed. The decision of the AAI can be appealed to the Circuit Court.

Similar information entitlements and procedures apply in relation to previous guardians of adopted people.

Disclosure of information to birth parents

The Bill also enhances the rights of birth parents and previous guardians to apply for information in relation to an adopted person.

The Bill proposes that when an adopted person is under 18, a birth parent or previous guardian can apply to Tusla for:

- Information about the adopted child's health, social and educational development and general well-being
- Letters, photographs or other mementos relating to the adopted child
- Any other information or items that an adoptive parent may wish to provide

Tusla will then contact the adoptive parent(s). However, there is no obligation on an adoptive parent to provide any of the information or items sought. Tusla cannot identify the adoptive parent(s) or disclose the child's new identity without the consent of the adoptive parents.

Once an adopted person reaches 18, the adopted person must personally consent to the disclosure of any information to a birth parent or previous guardian. If the adopted person cannot be located, the Minister for Children and Youth Affairs can authorise the disclosure.

Disclosure of information to adoptive parents

Similarly, when an adopted person is under 18, an adoptive parent can apply to Tusla for:

- Information about the adopted child's health, social and educational development and general well-being
- Letters, photographs or other mementos relating to the adopted child
- Any other information or items that a birth parent may wish to provide

Tusla will then contact the birth parent(s). However, there is no obligation on a birth parent to provide any of the information or items sought. Tusla cannot identify the birth parent(s) to the adoptive parents without their consent.

Disclosure of other information to adoptive parents

Adoptive parents of an adopted child will be provided with the information listed at (a)-(f) above if they apply to Tusla. Information given in (a)-(e) will not include the names or otherwise identify the birth parents or birth relatives.

Adoptive parents can also seek birth certificate information, a copy of the adoption order and details of the father's name, items (g)-(i). This information will be provided where:

- The birth mother or father, as appropriate, are deceased
- The birth mother or father, as appropriate, have consented
- The Minister has authorised the disclosure if the person who can consent cannot be located

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