

LAW SOCIETY SUBMISSION



**SUBMISSION TO THE DATA PROTECTION COMMISSION'S
CONSULTATION ON THE DRAFT REGULATORY STRATEGY FOR
2021-2026**

JULY 2021

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

1 Introduction

- 1.1 The Law Society of Ireland ('the **Society**') is pleased to respond to this consultation by the Data Protection Commission ('the **DPC**') on its Draft Regulatory Strategy for 2021-2026 ('the **Strategy**').
- 1.2 The Society is the representative organisation for the solicitors' profession in the Republic of Ireland. Our members provide legal advice in respect of data protection law to data subjects, data controllers and data processors in Ireland. Our members represent clients in their dealings with the DPC, including data subjects who lodge complaints with the DPC and controllers/processors who are required to comply with the General Data Protection Regulation ('the **GDPR**') and related Irish laws, some of whom are under investigation by the DPC. As such, the Society provides a broad perspective in reflecting the experience of this diverse stakeholder group.
- 1.3 The Society recognises that the DPC performs a hugely important role both at a national and European level. The DPC has an onerous and expanding caseload and has to make decisions on how best to allocate resources in light of that challenge. The Society considers it essential that the Government continues to increase the level of funding made available to the DPC as a rapid expansion of regulatory capacity will be required in order for the DPC to deliver impactful regulation with the requisite levels of consistency, across the board.
- 1.4 The DPC needs to remain competitive in recruiting data protection lawyers and other experts and, where necessary, should receive sanction from Government in relation to salary thresholds to recruit appropriately. Investment in the structures, processes, people and systems used to support the DPC is incredibly important.
- 1.5 The Society supports the DPC's Draft Regulatory Strategy for 2021-2026 and believes that it represents a strong, ambitious and coherent vision for the future of data protection regulation in the State.
- 1.6 Building on that vision, the Society recommends six areas for consideration by the DPC in devising its strategy for the relevant period. They are:
 1. Publishing more wide-ranging and comprehensive guidance and compliance supports in key areas;
 2. Adapting the amicable resolution procedure;
 3. Managing systemic and non-systemic complaints;
 4. The proposed "collective approach" to investigating systemic issues;
 5. The procedure for statutory inquiries; and
 6. Participation at the European Data Protection Board (EDPB) and internationally.

2 Publishing more wide-ranging and comprehensive guidance and compliance supports in key areas

- 2.1 The GDPR is an example of principles-based legislation, meaning that controllers/processors must interpret and apply the principles set out in the GDPR to the circumstances of their processing operations. Large organisations have the resources and capabilities to perform this task, but many small to medium enterprises do not, and notwithstanding that the GDPR is now over three years in operation, these businesses continue to struggle to come to terms with the GDPR.
- 2.2 The Society acknowledges that the DPC has invested significant resources in developing and publishing guidance on the interpretation and application of different aspects of the GDPR since enactment. However, the Society believes that the DPC should increase the volume and detail of compliance supports which are offered on commonplace and timely issues faced by organisations, while taking into account that guidance on particular matters may instead be published by the EDPB. In addition to publishing guidance, compliance supports could also be offered through information portals, interactive training and the continued development of the DPO network.
- 2.3 An example of where guidance is needed as a priority is the handling of employee subject access requests. Many employers regularly receive subject access requests from employees or former employees. Whilst the DPC has published general guidance on subject access requests, considerable uncertainty remains among organisations, data subjects and their legal advisers about matters such as: (i) what records constitute the personal data of employees; (ii) the extent of searches that a controller/employer is obliged to conduct; (iii) how the exceptions to subject access requests apply in an employment context; and (iv) the circumstances where a request may reasonably be regarded as “manifestly unfounded or excessive”. Clear and comprehensive guidance on these issues would benefit data subjects and controllers alike. The employment relationship is the subject of a number of significant treatments in the Data Protection Act 2018 and, as such, regulatory guidance is appropriate.
- 2.4 In this regard, the Society commends the DPC's timely publication of guidance on data protection issues arising during the course of the Covid-19 pandemic.
- 2.5 New data protection issues and challenges constantly arise in modern society in respect of which organisations would gladly receive guidance from the DPC to assist them in meeting their compliance obligations. As part of its policy focus, we believe that the DPC should engage and consult with those involved in new developments (in areas such as processing, technology and markets). To achieve that end, investment in forensic and technological knowledge must continue to be a focus.
- 2.6 We are also of the view that the Strategy should deal with both the compliance supports which are required to be put in place and adequate communication of the availability of same. The Society agrees that vulnerable groups or those who may have less economic power (such as children and the general public) should continue to be the focus of specific policy activities over the coming five year period.

3 Adapting the amicable resolution procedure

- 3.1 The "amicable resolution" procedure, which existed under the Data Protection Acts 1988 and 2003, has been applied to GDPR complaints handling under Section 109(2) of the Data Protection Act 2018. Section 109(2) permits the DPC to "*take steps as it considers appropriate to arrange or facilitate*" the amicable resolution of a complaint which has been lodged with the DPC, where the DPC deems that to be appropriate.
- 3.2 The Society recognises that the DPC invests substantial resources in the amicable resolution procedure which often leads to a successful regulatory outcome i.e. where both the data subject and controller reach an accommodation without the need for further regulatory action. In some cases, a controller can address a data subject's concerns by providing additional information and/or a clear explanation and in others, a controller will change its decision to refuse a data subject's request as a result of instigation (by the DPC) of the amicable resolution procedure.
- 3.3 However, it appears that the amicable resolution procedure could be operated without drawing quite so heavily on the DPC's regulatory resources. For example, the DPC could follow the approach of other data protection authorities by directing a controller/processor to respond directly to a data subject's complaint before the DPC will intervene in the complaint. Only where the data subject remains dissatisfied with the controller's/processor's response would the DPC need to intervene, either by mediating the complaint or taking regulatory action if the DPC determined that there was no reasonable prospect of an amicable resolution.

4 Managing systemic and non-systemic complaints

- 4.1 The Society supports the DPC's proposal to prioritise the allocation of its resources to the "*cases that are likely to have the greatest systemic impact for the widest number of people over the longer term.*"
- 4.2 This is a sensible approach which best protects the rights of data subjects as a whole. The DPC is an independent expert body which sits within the wider EU data protection regulatory framework. It is well-positioned to identify which issues are of the greatest concern and significance to data subjects. The criteria used to select cases to prioritise should be transparent and a mechanism which would allow organisations/data subjects to apply to have cases prioritised would also be helpful.
- 4.3 Of course, the prioritisation of resources for systemic cases ought not to lead to any neglect of non-systemic complaints, which are nonetheless important to the individual data subjects concerned. These should also be dealt with in a timely manner.
- 4.4 All data subjects have a right to lodge a complaint and to have it handled in accordance with the provisions of the Data Protection Act 2018 and the GDPR. However, for non-systemic cases, the DPC has powers under Section 109(5) of the Data Protection Act 2018 to take action without undertaking an extensive investigation. Where the DPC examines the facts and finds an infringement (or not as the case may be), it should use these summary statutory powers as it deems appropriate.

5 Proposed "collective approach" to investigating systemic issues

- 5.1 The Society notes, with interest, the DPC's proposal to take a "collective approach" to investigating systemic issues. The DPC has not, however, outlined the proposed procedure for a collective approach nor has it identified the relevant statutory basis for such an approach.
- 5.2 If a collective approach to investigations is to be taken by the DPC, the Society encourages publication of a draft outline of the proposed procedure for further consultation.
- 5.3 Whilst the lack of information in respect of the proposed procedure limits what can be said at this juncture, the Society would make the general observation that the right of a data subject to seek the vindication of his/her rights is a cornerstone of both the GDPR and Irish law. Accordingly, any collective procedure will have to take account of the rights of individual data subjects and access to an enforcement procedure. Similarly, controllers and processors have individual rights to fair procedures as well as rights to expect that the DPC will follow the processes prescribed by applicable laws. Confidentiality will also have to be respected in any collective procedure.

6 Procedure for statutory inquiries

- 6.1 At the end of 2020, the DPC had 83 open statutory inquiries, 27 of which related to cross-border processing where the DPC was acting as lead supervisory authority under the GDPR (per the DPC's 2020 Annual Report). These inquiries are often highly complex in nature and the Society recognises that the DPC cannot simply dispose of same through a speedy process.
- 6.2 The Society believes that the DPC should be commended for resisting public pressure to simply expedite matters – it is far more important that decisions are reached after all relevant facts are gathered and examined, that the parties are heard and that matters arising are thoroughly assessed. It is only through a deliberative process that a real and lasting vindication of a data subject's rights will be attained.
- 6.3 Nonetheless, the Society proposes the following in order to improve the efficiency of statutory inquiries conducted by the DPC under the GDPR's one-stop-shop mechanism:
- 6.3.1 The DPC should consult with the controller, concerned EU data protection authorities and any other relevant third party (e.g. processor or data subject complainant) before framing the terms of reference of a statutory inquiry under Section 110 of the Data Protection Act 2018. An initial framing of the issues, before the investigation has commenced, may lead to more targeted terms of reference and ultimately, a more focused inquiry.
- 6.3.2 The DPC's standard process for statutory inquiries is to issue Requests for Information (RFI) and to invite responses from the controller/processor. This can be a labour intensive, iterative and long drawn-out procedure. An alternative (and perhaps more efficient) approach would be to invite the controller/processor which is being investigated to make preliminary

submissions based on the terms of reference of the inquiry. Upon receipt of this preliminary submission, the DPC could then probe the controller / processor to seek further information/documentation as may be required. A similar opportunity to make preliminary submissions could be extended to a complainant in the case of a complaints-based inquiry under Section 110 of the Data Protection Act 2018, with a right of reply for the controller.

- 6.3.3 The DPC's standard process for statutory inquiries is entirely paper-based. Undoubtedly, this form of written exchange is a necessary feature of any statutory inquiry. However, the DPC should also be open to in-person meetings/examinations in which controllers/processors who are being investigated are invited, on a voluntary basis, to make an oral, technical demonstration or visual presentation and to be subjected to examination by the authorised officer. It can be incredibly difficult to convey complex technical information without the benefit of visual aids and an examination procedure. Given that Section 12(8) of the Data Protection Act 2018 grants the DPC the discretion to determine its own procedures, the Society believes that it should be possible for the DPC to receive oral/visual presentations as it conducts statutory inquiries (otherwise than by way of a formal oral hearing under Section 138/Schedule 3 of the Data Protection Act 2018).

7 Participation at EDPB and Internationally

The Society supports the DPC's proposal to actively participate at EDPB level.

The Society also appreciates the role played by the DPC when participating in dialogue outside Europe. The DPC plays a leading role in supervising and enforcing the GDPR in the interests of data subjects across the EU.

Commensurate with the significance of the DPC's role, the Society believes that the DPC should be a strong voice at the EDPB, and on the international stage, advocating for the rights of data subjects, being a thought leader on issues such as children's data, and defending the GDPR's one-stop-shop mechanism.

8 Conclusion

The Society hopes that the DPC finds this commentary and our recommendations to be useful and will be glad to engage further on any of the matters raised.

For further information please contact:

Fiona Cullen
Public and Government Affairs Manager
Law Society of Ireland
Blackhall Place
Dublin 7

Tel: 01 672 4800
Email: f.cullen@lawsociety.ie