

TRAINING & DEVELOPMENT PROGRAMME

Knowledge Network

Webinar Series

Data Protection Disputes – A New Frontier?

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2 December 2020

Doug McMahon and Amy Brick



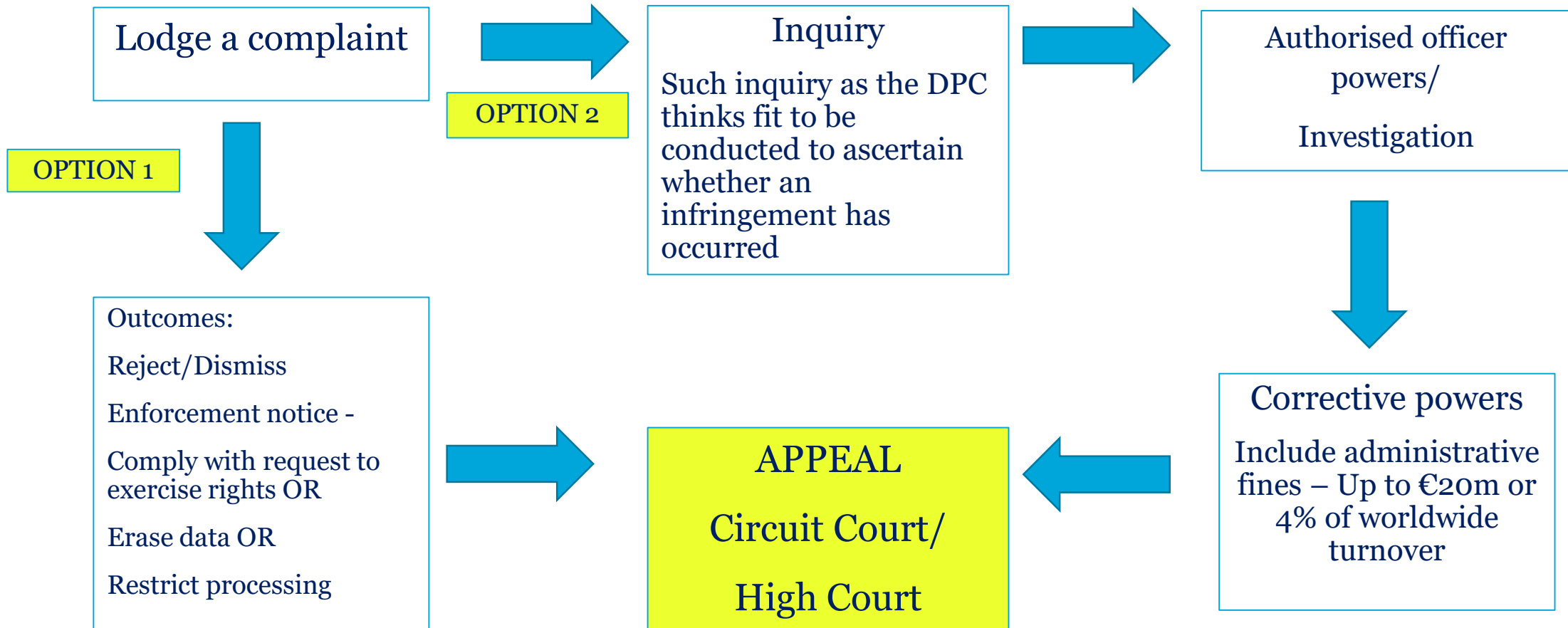
Introduction

- Overview
- What has changed as a result of the GDPR?
- Some common data protection breaches:
 - Personal data breaches (e.g. unauthorised disclosures)
 - Failure to respond to data subject rights requests
 - Processing of personal data without a lawful basis
 - Failure to provide a transparency notice
- Sources of claims
 - Satellite disputes
 - Employment cases
 - Activists

Compliance with GDPR

- Achieved through a combination of public and private enforcement, allowing for public fines and private damages
- Where a data subject is of the view that his rights have been breached the data subject may:
 - Complain to the Data Protection Commission
 - and/or
 - Bring a civil action

Complaint to the DPC where processing of your personal data infringes a relevant enactment



Section 117 DPA 2018

- Judicial remedy for infringement of relevant enactment

Without prejudice to any other remedy, including the right to lodge a complaint, a data subject may bring a data protection action against a controller or processor where his or her rights under a relevant enactment have been infringed as a result of the processing of his or her personal data in a manner that fails to comply with a relevant enactment

Jurisdiction

- Article 79(2)

Data subject has the choice to issue proceedings in either:

- The place of establishment of the controller or processor; or
 - The place of habitual residence of the data subject – except where the controller or processor is a public authority acting in exercise of its public powers
-
- In Ireland, the Circuit Court and High Court have concurrent jurisdiction
-
- Data protection action is a tort: limitation period of 6 years

Section 117 DPA 2018

- Remedies:
 - An injunction or declaration; and/or
 - Compensation for damage suffered by the plaintiff as a result of the infringement of a relevant enactment
- Damage is defined as including material and non-material damage

GDPR Concept of damage

- Recital 146:

“The concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation.”
- AG Wahl in Petillo (Case C371/12)

“By non-material damage I refer, generally speaking, to losses which do not relate to a person’s assets, wealth or income and, as such, cannot be quantified in an objective manner by reference to a market price or value.”
- Examples cited in the GDPR Recitals include reputational damage, having your beliefs revealed, being prevented from exercising control over your personal data

Damage - Position pre-GDPR

- Article 23 of Directive 95/46/EC
- Section 7 of the Data Protection Acts 1988 and 2003
- *Collins v FBD Insurance Plc* [2013] IEHC 137
- Judge Feeney: “*...for me to interpret section 7 of the Data Protection Acts as enabling a claimant to benefit from an award of damages for non-pecuniary loss, would be for me to expand the scope of section 7 beyond that provided for in the Act for required by the Directive*”
- Upheld in the Supreme Court in *Murphy v Callinan* [2018] IESC 59
- UK Court of Appeal refused to follow it in *Vidal-Hall v Google*

Non-material damage – Lessons from Germany

- A mere GDPR infringement does not automatically justify a damage claim – Need to show objectively significant and noticeable social or personal disadvantages, e.g.
 - public exposure or humiliation
 - mere fear of disadvantages not enough
 - uneasy feeling that one's personal data could be used by third parties without authorization as a result of a data breach
- Compensation claims based on infringements of data subject's rights under Art. 15-22 GDPR have a higher chance of success
 - €5,000 for responding to an employment related access request 5 months late and inadequately

Non-material damage – Lessons from Austria

- Austrian Supreme Court affirmed that principles for ascertaining damages under the local Member State law apply
- The mere assertion of the claimant that he or she has allegedly suffered damage as a result of a data protection violation is not sufficient
- Austrian Postal Case
 - Claimed €2,500, awarded €800
 - Award overturned on appeal as there was no evidence of the disadvantage suffered by the claimant

Non-material damage – Lessons from the UK

- UK – Lloyd v Google – Court of Appeal held a person’s BGI has economic value: for example, it can be sold to advertisers ... *“That confirms that such data, and its consent to its use, has economic value”* therefore *“control over data is an asset that has value”*
- The Court of Appeal emphasised the need to set in place a “threshold of seriousness” when determining the extent of the “damages” and explained that this threshold would “undoubtedly exclude, for example, a claim for damages for an accidental one-off data breach that was quickly remedied.”
- Question on appeal to the Supreme Court in Lloyd v Google as to whether a non-trivial infringement of the DPA which does not cause any material damage or distress can amount to “uniform per capita” damages being awarded for “loss of control” of personal data.

Non-material damage – Lessons from cases against the EU Institutions

- EU case law in relation to the data protection obligations of EU institutions, bodies and agencies
- Non-material damage has been considered a number of times:
 - Case T-259/03 - Nikolaou v. Commission (€3,000)
 - F-30/08 - Nanopoulos v. Commission (on appeal, Case T-308/10) (€60,000)
 - Case T-48/05 - Franchet v Commission (€56,000)

Representative actions

- Article 80 GDPR
 - Member states must allow a data subject to mandate a non-profit to lodge a complaint or seek a judicial remedy against a controller or processor on its behalf (opt-in style process)
 - Member states may provide that a non-profit can do so independently of a data subject's mandate (opt-out style process)
 - Member states may provide that a non-profit can receive damages on behalf of a data subject (“*where provided for by member state law*”)

Representative Actions in Ireland

- Section 117(7) DPA 2018:
“A data protection action may be brought on behalf of a data subject by a not-for-profit body, organisation or association to which Article 80(1) applies that has been mandated by the data subject to do so.”
- Section 117(8) 2018 – where an action is brought by a not-for-profit body, the Court shall have the power to grant relief by way of injunction or declaration or compensation for damage suffered by the plaintiff as a result of the infringement of the relevant enactment
- Note – the Bill as initiated expressly precluded the award of compensation where a not-for-profit body brought such an action

Multi-party litigation in Ireland

- Order 15 rule 9 RSC – Representative actions (cannot award damages)
- Test cases at the discretion of the Court
- Reform is often discussed, but has yet to happen...
 - Law Reform Commission in 2005 – recommended that a formal procedural structure be set out in the Rules of Court to deal with multi-party litigation
 - Multi-Party Actions Bill 2017
- Litigation funding also an issue

Collective Redress Directive

- Agreement reached with the European Parliament in June 2020, EU Council has adopted its position at first reading
- Will require member states to put in place a system of representative actions for the protection of consumers' collective interests against infringements of Union law. It covers actions for both injunctions and compensation.
- Will cover infringement of EU legal acts set out in the annex to the Directive. These legal acts cover areas such as financial services, travel and tourism, energy, health, telecommunications and data protection

Collective Redress Directive *contd.*

- Distinguishes between qualified entities who can bring domestic representative actions and those that can bring cross border actions
- Includes safeguards against abusive litigation (e.g. allocation of costs on a loser pays principle)
- Transparency obligations for qualified entities, including regarding funding.
- Likely to be adopted this year, with 24 month deadline to transpose for member states and an additional 6 months to start applying the provisions

Questions?



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