

CIPL Response to the Irish Data Protection Commission Regulatory Strategy Consultation - April 2021

CIPL welcomes the Consultation on the Regulatory Strategy for 2021-2026 (the Strategy). We appreciate the thoughtful and thorough approach the Data Protection Commissioner (DPC) has taken to the development of the Strategy, undertaking Round 1 of the public consultation on Target Outcomes followed by stakeholder engagement across a range of sectors.

CIPL recognizes that, as the Lead Supervisory Authority (LSA) in the European Union (EU) for many of the main actors in the digital environment, the DPC has an important role in fostering compliance with the General Data Protection Regulation (GDPR). CIPL also appreciates the challenges this role can entail. We consider that clarity and transparency in setting out how the DPC will approach its regulatory role is extremely helpful. Given the DPC's crucial role as LSA, we hope that the regulatory strategy sets a precedent for others supervisory authorities (SAs) and reaffirms the DPC's leadership as a modern, fair and effective data protection regulator.

1. Overall Approach

CIPL supports the DPC's willingness to take account of emerging work on effective regulation and behavioural economics which is flagged in the Foreword of the Strategy. Effective regulation and behavioural economics are also important for the discussion on fines and other ways of influencing behaviour under Section 5 of the Strategy "Support organisations and drive compliance." CIPL would welcome further elaboration on this topic to demonstrate explicitly how the DPC anchors its strategic thinking in this approach.

CIPL shares the commitment to a risk-based approach which was envisioned when the GDPR was being developed and underpins its application. CIPL agrees that a risk-based approach to the regulatory work of the DPC is essential. We would welcome a more explicit statement for the need to always take into account and develop further the GDPR's risk-based approach, both by regulators in their supervision and enforcement roles and by organisations when building accountable privacy management programs. We would also welcome the addition of references to the importance of the regulatory approach being evidence-based and results-focused. CIPL appreciates that this may seem a statement of the obvious. However, while CIPL and more sophisticated and mature organisations are well aware of the careful and thorough approach of the DPC to its investigatory work, the Strategy will have a wider audience and it may be useful to reinforce the point. In the same vein we would welcome a reference to the importance of the principle of proportionality in framing appropriate regulatory responses.

2. Strategic Goals

CIPL notes that the "Strategic Goals" and "Desired Outcomes" of the Strategy are derived from the work carried out in the first round of the consultation process. We would suggest that it be made clear that (1) the goals are not listed in order of importance but are all equally important and (2) that the goals are linked to one another and inter-dependent (for example promoting awareness of individuals will also

benefit businesses). Lastly, it might add clarity if the Goals were specifically linked to the relevant stakeholder community, for example the Goal “5. Support organisations and drive compliance” might usefully be linked to controllers and processors as the main stakeholders.

3. Regulate consistently and effectively

While CIPL recognizes that this may be primarily a matter for the Irish Government, and indeed the EU Commission, we would raise the importance of clarity and consistency between data protection and other regulatory developments. Organisations are increasingly subject to multiple regulations in the digital area (both nationally and at EU level) and face concerns that different regulatory approaches may impose competing requirements. We would urge the DPC to also consider consistency with other applicable regulatory regimes and possibly to aim to establish liaison relationships with other national regulators operating in the same space or in tangent areas.

CIPL supports the need for the DPC to have adequate resources to carry out its work. This is particularly important given the central role the DPC plays in the implementation of the GDPR acting as a LSA. If the DPC is starved of resources to undertake the complex and difficult work involved in its regulatory role, it raises the risk of reputational damage to Ireland.

In relation to the proposed areas of activity to achieve the targeted outcomes, CIPL would urge the inclusion of reference to the use of settlements to set expectations for stakeholders, including how and when settlement may be considered or agreed. We support the development of case studies which can illustrate how the law is applied and would particularly encourage the inclusion of case studies on international aspects including how matters may be determined between CSAs and the LSA. It would be ideal if such case studies could be worked through with other SAs. The theme of cooperation and communication with peer SAs also resonates with CIPL. The aim of regulators in this field should be to avoid the creation of a “splinternet” form of regulation where different regulators have different standards and expectations. By the same token, CIPL and our members would welcome further specific information being included on the plans to seek clarification and consistency on procedures under the One Stop Shop mechanism and work with the EDPB on international transfers.

4. Safeguard individuals and promote data protection awareness

CIPL supports the DPC’s continuing work on sectoral codes of conduct and certifications to help develop best practices to foster trust and assurance. This is one of the areas where the GDPR that has not been fully utilised and developed, and CIPL would like to see all SAs take a more proactive, encouraging and enabling role to get industry to develop and adhere to codes and certifications.

While accepting that it is important to resolve issues for individuals, CIPL also recognises the importance of a regulator taking a strategic, overall approach, rather than being always driven by individual complaints. CIPL is aware of the lessons to be learnt in this area from other regulatory regimes where a focus on individual complaints has sometimes obscured the bigger, long-term strategic challenges with

accompanying negative consequences.¹ A focus on complaints may also be perceived as a fairly common response by regulators to assert their powers, but may result in a failure to address strategic issues. Nevertheless, CIPL would like to see more details on how the DPC proposes to tackle this change in direction and looks forward to doing so.

CIPL recommends giving consideration to procedures adopted in other jurisdictions which require complainants to seek redress from the responsible organisation and use other reasonably available avenues to raise their complaint before asking the DPC to intervene. It also recognises that some complaints are at best peripheral to data protection and at worst verging on vexatious, where the real issue of complaint is customer service. CIPL would welcome guidance on how such matters will be handled.

In relation to the aim of working with peer SAs to introduce consistent and consolidated enforcement across the EU, this would be warmly welcomed and supported by CIPL and many multinational organisations. However, it is not apparent how it is to be achieved, or how conflicts between jurisdictions are to be resolved. Potentially, this may be an opportunity to call on the EU Commission to intervene and take on its role as the guardian and arbiter of the EU regulations.

Finally, CIPL members would be interested in working with the DPC to find ways to voluntarily address complaints and resolve issues for individuals without the need to burden the DPC, for example developing “sandboxes” to understand and find solutions to common complaints. Complaint handling is also an element of organisational accountability and more can be done to emphasise the expectations of organisations to respond and deal with the complaints in the first instance.

5. Prioritise the protection of children and other vulnerable groups

CIPL broadly supports this desired outcome. Some further understanding of the nature of other groups regarded as being vulnerable would be useful and we look forward to seeing this in due course. CIPL also supports the DPC work on the “Fundamentals for Children” and looks forward to further developments in this area.

6. Bring clarity to stakeholders

CIPL welcome these proposals. However CIPL would also ask the DPC to include further transparency material covering:

- The internal complaint handling processes and procedures for investigations and audits; and
- Guidance on the fines structure to be adopted including aggravating and mitigation factors to be taken into account.

¹ [See the review of financial regulation in the UK following the financial crisis](https://assets.publishing.service.gov.uk)
[https://assets.publishing.service.gov.uk – A new approach to financial regulation.](https://assets.publishing.service.gov.uk)

30 June 2021

A further suggestion is to work towards developing a mechanism to measure successful compliance interventions, including those which do not require regulatory action, such as assessing the number of matters which were resolved by businesses following DPC compliance advice, warnings or notices.

The proposed collective approach to investigating systemic issues raises an interesting new option and CIPL welcomes further elaboration on the specifics of this part of the proposal.

7. Support organisations and drive compliance

Please see our comments under “Overall approach” earlier in respect of the material on methods of effective regulation.

Specifically, we would welcome a stronger emphasis on organisational accountability and what the DPC can do to encourage and reward those organisations that are investing in their privacy programs and trying to do the right thing, sometimes even beyond legal requirements. Organisations face competing priorities and regulatory recognition of the “return on investment” for privacy commitments would be a potent measure in evangelising accountability across all sectors, types and sizes of organisations. Specifically referring to organisational accountability as a factor in determining the nature of enforcement action or the application of mitigation measures would be helpful to organisations.

In view of the importance of the One Stop Shop mechanism and its regulatory effectiveness, CIPL would welcome further discussion around Article 60 operations and how a cooperative approach can be fostered among peer SAs.

Further elaboration of the DPC approach by providing examples of regulatory events and corresponding likely corrective measures could be added to the actions as could more detail on engaging with SAs outside the EEA.

Conclusion

CIPL considers this proposed Strategy to build effectively on previous work and looks forward to the next stage. It reiterates the importance of adopting a risk-based approach to regulation and a proportional and consistent response.

CIPL is grateful for the opportunity to provide recommendations on the DPC’s Consultation on the Regulatory Strategy for 2021-2026. If you would like to discuss these recommendations or require additional information, contact Bojana Bellamy, bbellamy@huntonAK.com, or Nathalie Laneret, nlaneret@huntonAK.com.