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GDPR – an unintended obstacle to anti-bribery laws?

By Paul Lavery and Ruth Hughes May 16, 2019

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Significant opportunity for Ireland to attract FDI, while strengthening anti-bribery protection

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Almost one year on from GDPR, its impact has been felt across a wide range of sectors. One area in which the GDPR has presented significant (and arguably unintended) challenges is that of anti-bribery and anti-corruption due diligence. Almost all multinational companies are exposed to anti-bribery laws, violation of which could result in significant fines or prison terms for senior executives. However, GDPR's prohibition on the processing of personal data relating to criminal convictions and offences without an express legislative basis poses a major obstacle for companies undertaking due diligence on current and prospective intermediaries in their supply chains and sales channels. If this issue is not resolved in the short term, it could be a significant deterrent for multinationals considering the location of their main establishment within the EU, entering into a particular market or participating in a particular transaction.

In the absence of an EU-wide solution to this problem, it is hoped that the Irish government will address this issue in national legislation as a matter of priority.

All EU member states have made binding commitments to fight cross-border corruption under a number of international anti-bribery conventions. In addition, other countries around the world have put in place their own anti-bribery and anti-corruption laws, such as the US Foreign Corrupt Practices Act, which can significantly affect companies operating in Ireland.

A core element to all of these conventions and other major anti-bribery laws is the principle of third party liability, under which corporates may be held liable for corruption offences committed by their staff, agents or subsidiaries.

In an Irish context, the Criminal Justice (Corruption Offences) Act 2018 states that a company may be held strictly liable for certain actions of its officers, employees or agents, unless it can prove that it took all reasonable steps and exercised all due diligence to avoid the commission of the relevant offence.

In order to avoid potential criminal liability for the actions of their intermediaries, minimising the risk of corruption by vetting relevant representatives, agents and suppliers and undertaking extensive due diligence is a key component in companies' compliance regimes. This necessarily involves the processing of personal data, typically about the financial interests and connections of the owners of a company's intermediaries, its directors, officers, key employees and any related government officials. Anti-bribery due diligence also necessitates investigating the background of relevant individuals for any reputational and criminal history issues.

However, in seeking to comply with anti-bribery laws, companies undertaking anti-bribery due diligence must also ensure compliance with data protection law. Under the GDPR the processing of personal data relating to criminal convictions and offences, for any purpose, is prohibited unless “carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects”.

Accordingly, without a clear legal basis authorising this processing the GDPR represents a significant obstacle for companies undertaking anti-bribery and anti-corruption due diligence in the EU. If corporate efforts to comply with anti-bribery laws expose companies to potentially significant liability under the GDPR, this arguably forces companies to choose between anti-bribery due diligence and GDPR-compliance, creating confusion and potentially discouraging companies from fully committing their compliance efforts to either one.

This potential conflict of laws has not gone unnoticed by the Irish legislator. The Data Protection Act 2018 allows for regulations to be made permitting the processing of criminal conviction and offences data where the processing is necessary and proportionate to, amongst other things, “assess the risk of bribery or corruption, or both, or to prevent bribery or corruption, or both”.

While this provision goes some way to addressing the problem, it is disappointing that almost one year on from the application of the GDPR, these regulations have not yet been put in place.

In addition, under the Data Protection Act, it is an offence to process criminal conviction and offence data in Ireland without a legal basis. There is therefore a risk that conducting anti-bribery due diligence in Ireland to avoid the commission of a corruption offence via acts by third parties may itself constitute a criminal offence.

At present the ability of companies in Ireland to carry out appropriate anti-bribery and anti-corruption due diligence is therefore severely restricted.

In the absence of an EU-wide approach to this tension between the GDPR and anti-bribery due diligence, there is a unique opportunity for Ireland to provide a solution by implementing regulations, thereby promoting Ireland as an attractive place to do business, as well as further highlighting Ireland as a country which takes its anti-bribery and anti-corruption commitments seriously.

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