**Dealing from bottom of the deck on the Public Services Card**

**The government is clinging to its legal advice on the PSC data fiasco. It needs to admit it was wrong and change course immediately**

By **Eoin O’Dell**

Last Friday, the Convention Centre in Dublin was heaving with the great and the good of the international tech industry. It was the location for the government’s Digital Summit. Opening the event, the Taoiseach extolled the virtues of the digital revolution. In the first keynote, Kent Walker, a Vice President at Google, commended what he called the Government’s tremendous leadership on digital policy. And a full plenary panel saw international experts debate the future of data protection.

But there was a ghost at the banquet. It was the government’s response to the report, published this week, in which the Data Protection Commission (DPC) found that the government’s implementation of the Public Services’ Card (PSC) infringed data protection legislation.

Rather than accepting that it was a fair cop, the government has refused to comply with the Commissioner’s findings. Worse, it has doubled down, asserting that it has robust legal advice in support of its position. Indeed, it has gone so far as to claim that it would unlawful for the Department to reduce the use of the PSC in line with the DPC’s recommendations.

This approach is indefensible. No doubt it has that legal advice. But that is all it is – advice. The department doesn’t have to follow it. And it shouldn’t. Instead, it should accept that most of the current purported uses for the PSC do not have a valid legal basis. The DPC’s report is very clear; its fundamental conclusions will undoubtedly survive legal challenge; and the government will eventually be as surely taken to task in the courts in Dublin and Luxembourg as it has been his week in the court of public opinion.

The government’s misguided approach has the capacity to do great damage to Ireland’s reputation as a good location in which international tech companies can establish their European headquarters. A government in such open conflict with the DPC can have no credibility in seeking to ensure that such companies comply with the Commission’s decisions. Worse, it risks fostering the view that a company unhappy with an unfavourable DPC decision could seek government help to resist that decision.

There had, for a while, been a perception that a small, under-resourced DPC was the US tech giants’ favourite EU regulator. That has changed: the commission moved into new Dublin headquarters in 2017; its annual budget has grown from €1.9m in 2014 to €15.2m. Over the same period, its staff numbers have grown from 31 to 180. More is required; but enough had been done to demonstrate the government’s ongoing commitment to the proper enforcement of data protection law. Now all that good work is at grave risk.

And for what? Some short-term political gain from kicking this particular can down the road? If so, it is a very short-sighted calculation. The government seems to think that the fact that they’ve already spent €60m on the PSC justifies its intransigence. But doing so will not just throw good money after bad, it will also inevitable incur additional data protection liabilities, and further imperil our international reputation for credible tech and data regulation.

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This is not the first time that government departments have run afoul of data protection laws. In 2011, the commission found that blood samples from babies’ heel prick tests were being unlawfully retained, but in 2013 the Minister for Health ordered the HSE not to comply with the commission’s determination. The Department of Education has continued with its controversial plans, unveiled in 2014, to collect extensive profiles of all children in education and store that data until they turn 30, notwithstanding the commission’s misgivings.

Nor is this the first time that the Department for Employment Affairs and Social Protection, which is responsible for the PSC, has run afoul of data protection laws. In another recent case, the DPC found that the department had breached data protection law in its processing of child benefit data; and the department is currently challenging that decision in court. Separately, the DPC is currently investigating whether that department infringed upon the statutorily independent role of its data protection officer.

There is a fundamental cultural problem in such departments; and, rather than ignoring it, defending it, or encouraging it, the government needs to acknowledge the problem, and seek to solve it. It must get its own house in order in this way if it is to be able, with credibility, to face down tech companies unhappy with DPC decisions.

At the Digital Summit on Friday, Jules Polonetsky, chief executive of the Future of Privacy Forum, a Washington, DC-based NGO, commended the DPC for standing up to the government on the PSC issue. It is plainly a good thing that the commission is demonstrating its independence in this way. But it is not a good thing that it has had to do so. And it is plainly a bad thing that the Government is showing it such disrespect.

This is not good for the reputation of Ireland, Inc. The sooner the government realizes this, and takes a different tack, the better.