

Lucid folks -

Last week I had the pleasure of a two hour breakfast in Dublin with the leads of the DPC's tech practice. We talked about their enforcement priorities in the coming months, provided general information about how marketing tech operates, discussed Legitimate Interest in depth, and shared views about the broader impact of our work together.

Below, please find detailed notes from our conversation.

If you have any questions or would like a personal de-brief, please let us know.

All the best,

Colin

Dublin, March 13, 2019

Attending:

- Colin O'Malley, Lucid Privacy
- Dale Sunderland, Deputy Commissioner at Data Protection Commission, Ireland
- Dee McGoldrick, Lead Investigator, Data Protection Commission
- Nicola Bayly, Assistant Commissioner at the Data Protection Commission

Debrief on ICO adtech forum from the previous week:

- Very complementary to the ICO for convening such a strong group and getting different sides to engage in a discussion
- Remarkable to have Google and other parties submitting complaints against Google, engaging directly in a point/counter point at the forum
- Chatham House Rules kept comments relatively open
- Disappointing to hear so little from industry .. where were they?

On programmatic:

- Lots of questions about technical mechanics ...
- Review of the steps (syncing, bid requests, bid win, campaign analytics/attribution)
- Conceded that this is hard for them to keep track of
 - *This where industry (relative) silence is tough. Advocates are filling in the void and taking disproportionate air time, using it to form views and shading practices towards more alarmist interpretations. DPC and ICO can see this happening, but are feeling underequipped to substantively counter advocate portrayals.*
- Went through the basic concepts of data minimization in a sample adtech DPIA (data minimization, no connections to real world identity, short retention periods, data subject access/control, etc.)
 - They largely bought into this conceptually
 - Articulated places of specific concern:
 - **When the data bridges online/offline** .. this is really unexpected for the user .. significantly raises the bar for consent specificity and makes a legitimate interest extremely hard to argue for 3rd parties
 - **Companies listening to bid requests and building profiles without buying ads.**

- We went through the history of how this has happened and efforts the industry has undertaken to address. But there is still work to be done here.
- **Companies sending personal data downstream to partners without knowing/caring/checking on their legal basis**
 - Contracts will not be enough here going forward

What can industry do collectively?

- They urged the industry to show responsiveness to criticism to date. What can we do to show that we are addressing substantive gaps to compliance and personal data protection?
 - Can we show that we are finding and dealing with vendors/CMPs that are not following the rules?
 - How can we provide comfort that bid requests are not being harvested? Are exchanges enforcing here?
 - **Why do we have RTB specs that provide all of these sensitive data categories?**
 - I explained that specs are global in nature and that sensitive data categories are not illegal per se, just require a higher bar for compliance.
 - They accepted this, but would like to see something at least at the policy level to control distribution/protect this data if it IS available in the EU or be clear about it's non-availability in the EU, if appropriate

On fingerprinting:

- **DPC had technical questions about how this happens and what is involved**
 - Explained the difference between 'active' and 'passive' fingerprinting, and how 'active' is generally seen to be irresponsible by the industry, while 'passive' uses basic elements any web service receives from a browser and has legitimate use cases. This was all surprisingly new to the DPC and they seemed to buy into this logical separation.
 - They raised Google proposing that finger printing should all be done away with at the ICO event and I noted that no other company took them up on this and we should be careful how one party could influence the competitive landscape by forcing consolidation around their technology. *Nodding ...*

Super cookies:

- DPC had technical questions

I emphasized the importance of sensitivity to privacy enforcement actively contributing to market consolidation, with significant social and economic consequences, including negative privacy outcomes.

- They agreed with this point, but also expressed their obligation to enforce the law.
- **They value the free internet and want to protect it, including it's business model, if they can.**
- **We both lamented that this balance is perhaps the hardest part of their job with GDPR.**

On legal basis

- We started the conversation on Legitimate Interest for basic ad targeting and they sounded very skeptical ... challenging the industry to demonstrate they could meet the tests
- Referenced ICO materials to model the appropriate tests as 'very helpful'
- **Towards the end of the conversation, we came back to this, and particularly the likely macro impact of everyone gathering consent on every site and consent fatigue .. are**

consumers actually reading these notices? What's packed into that consent? Will the platforms have carte Blanche?

- **They were extremely sympathetic to this argument, and for the first time seemed open to the LI actually being (potentially) more appropriate for the company and in the better interests of the consumer.**
- The key is for companies to be able to demonstrate that they meet the appropriate tests
- I expressed concern that companies were operating in good faith and it would be helpful if we could have clarity without fear of being enforced upon to settle the matter.
- **DPC was open to working with companies on a limited basis to review their tests and provide feedback. A process like this would be iterative and informal, but would provide more certainty for the company and help establish a legal basis framework that the whole ecosystem could refer to**
 - **It would also likely trigger broader, EDPB discussions and frameworks**
- *Key risk to companies: if the regulator ultimately says your purposes do not qualify for LI, you will need to be prepared to roll over to consent.*

On controllers/processors:

- They were surprised that anyone in adtech is a processor
 - I explained several use cases at a high level, where the key is data segregation across clients and no independent data collection used for their own data product .. they bought this ... but said, **'but then it better be purely true.'**
 - If you are a processor, it is very important to have a pure and strong case. Having a complicated or blurry processor argument is a liability. Also - if the model initially 'smells' like a controller model, this might also be a liability.

For brands:

- Explained that brands are turning into broad marketing organizations, using signals from a wide array of sources, including CDP's and other enablement partners.
 - Raised geo targeting for retail, loyalty programs, B2B lead generation, etc.
 - Eyes raised on the geo targeting use case
- DPC once again emphasized the importance of expectation for the consumer, *especially for LI legal basis*, as well as consumer control.
- DPC once again touched on the sensitivity of online/offline data combinations ... Dale mentioned a personal example of being targeted offline after a web search ... Dee mentioned the recent ICO case of election targeting using pregnancy data collected from an unexpected source
- We both discussed a multi-touch model as making the most sense for brands, where consent is used for unexpected/out of context marketing and transparency is generally provided across as many contextual touchpoints as possible (privacy policy, additional terms on sign up form, ad icon, etc., etc.)

DPC priorities:

- They are actively reviewing the complaints they have received from advocates
- **Suggested that they will be public in the marketing tech space in the first half of the year**
- Will want to coordinate their positions with EDPB wherever possible

Next steps:

- Conversation will be ongoing ... they are in SF in a few weeks
- These folks are leading Helen Dixon and her senior team at the DPC on a tour of events and client visits in the Bay Area:
- <https://www.mccannfitzgerald.com>

- They are very open to engaging on the LI balancing tests with a handful of companies ... i think this is an excellent opportunity, especially if you view the DPC to be your principle regulator and you value clarity and can accept flipping to consent if necessary