

Data Protection Considerations Relating to Receivership



Introduction

When an individual enters into a mortgage agreement with a financial institution to purchase a property, both the individual and the financial institution have rights and obligations set out in the mortgage deed. This creates a legal relationship between the individual who purchased the property (the borrower) and the financial institution.

A primary obligation of the borrower contained within in the mortgage deed is to repay the mortgage in line with the terms agreed. Where the borrower fails to repay the mortgage as it falls due, the financial institution has the power to appoint a receiver over the property by issuing a 'Deed of Appointment of Receiver'.

On being appointed as a receiver, the receiver will have the name of the borrower and the address of the property in receivership, both of which constitute personal data. The financial institution has a lawful basis for providing this personal data to the receiver, as the provision of this personal data is necessary for the performance of a contract to which the borrower is a party. The **receiver will then process this personal data** during the running and management of the receivership.

This guidance sets out the general position of the Data Protection Commission (DPC) regarding data protection issues that may arise in the course of a receivership:

- the **identity of the receiver** and their **status as a controller or processor** of personal data, as well as the status of the **receiver's business**, whether it is a controller or processor;
- the **legal basis** for processing personal data in **opening a bank account** during the receivership;
- the **legal basis** for processing personal data in **effecting a policy of insurance** during the receivership process; and
- the **legal basis** for processing personal data in the payment of **Local Property Tax (LPT)**.

There are, of course, a wide range of [data protection obligations](#) which apply to the receiver, or any other controller or processor involved in the processing of personal data in the context of a receivership, in particular the obligation to comply with the [principles of data protection](#); however, this guidance is limited in scope to the considerations listed

above. The facts of a specific case may give rise to further or different considerations by the DPC.

Who is the Receiver?

A Deed of Appointment of Receiver will commonly use the following naming structure “*the bank does hereby appoint [individual name] of [address]*” as the receiver. The address given is commonly that of the place of business of the individual named, and includes the name of the business. The named individual is usually a director or a partner of the named business.

The **receiver is the named individual**. The named business is not the receiver.

It is **common** for the receiver to appoint the **named business to manage or assist** in the management of the receivership. This does not make the named business the receiver.

Example 1

The Deed of Appointment of Receiver states: “*the bank does hereby appoint John Fitz of KompanyX Ltd, 21 Fitzwilliam Square, Dublin 2 to be the receiver*”.

John Fitz then engages KompanyX Ltd to manage the receivership on behalf of the receiver. In this example, John Fitz is also a director of KompanyX Ltd.

John Fitz is the receiver. KompanyX Ltd is not the receiver.

The Receiver as a Controller

The ‘**controller**’ of personal data is the entity that **determines the ‘purposes and means’** of processing personal data – i.e. ‘**why**’ and ‘**how**’ the personal data is processed. Controllers have a range of obligations under data protection law. If two or more entities decide how and why personal data is processed, they may be ‘joint controllers’, and they would both share responsibility for the data processing obligations.

The **receiver is a controller** for the purpose of their processing of personal data in managing the receivership.

The receiver has the powers stated in the mortgage deed, and powers pursuant to statute.¹ The powers granted to the receiver in statute allows the receiver to make demands of the income of the property in the name of the borrower or the financial institution².

¹ For mortgages entered into after the 1 December 2009 the relevant legislation is the *Land and Conveyancing Law Reform Act, 2009*. For mortgages entered into before 1 December 2009 the relevant legislation is the *Conveyancing Act, 1881*

² Section 108(3) of the *Land and Conveyancing Reform Act, 2009* and section 24(3) of the *Conveyancing Act, 1881*

In relation to **determining the identity of controllers** of personal data, the High Court has stated the following:

It seems to me that very limited weight can be given to the provisions of intercompany agreements concerning who is to be designated “data controller”, or to assume sole and exclusive responsibility as such, unless that designation and characterisation are each entirely consistent with the answer to the question whether the relevant entity does indeed exercise sole and exclusive control of the contents and use of the personal data concerned. In other words, it is the position in fact that must prevail over any such contractual designation or characterisation.³

In assessing the status of a receiver, limited weight is given to intercompany agreements or whether a contract or other document refers to a person or entity as a ‘controller’, or ‘processor’, etc. Rather what **will be taken into account** is the **actual exercise of ‘control’** over the processing, by determining why and how personal data is processed.

A receiver has the power to demand sums in the name of the borrower or the financial institution, and has powers flowing from statute and the mortgage deed, which result in a receiver exercising control over the purposes and means of processing. The receiver is therefore a controller for this processing of personal data; the receiver does not act as a data processor on behalf of the financial institution.

The Receiver’s Named Business – a Controller or Processor?

The use of the receiver’s named business on the Deed of Appointment of Receiver does not grant this business any status in the receivership process. The fact that the named business is included on the Deed of Appointment of Receiver does not mean that this named business has been engaged to assist the running of the receivership. It is common practice for a receiver to **engage an entity to assist** with the running of the receivership, and commonly the receiver will appoint the entity of which they are a director or partner.

If the receiver’s named business is engaged by the receiver, this entity will manage or run the receivership pursuant to the powers of the receiver. This entity **may be a joint controller** with the receiver **or a processor**, processing on behalf of the receiver, **depending on the circumstances** of each individual receivership.

A **processor** is a legal or natural person, agency or other body which **processes personal data on behalf of the controller**. In order to assess whether an entity is a processor or controller it is required to assess to what level the entity determines the purposes and

³ *In the Matter for Mount Carmel Medical Group (South Dublin) Ltd (In Liquidation)* [2015] IEHC 450, para 53

means of processing. As discussed above, this amounts to determining the 'why' and 'how' of processing activities.

Some factors that assist in determining whether the named business is a processor or joint controller when it comes to processing activities carried out in the management of the receivership include the following:

- whether a contract exists between the receiver and the named business detailing the service the named business is to carry out;
- the level of control the named business is permitted to exercise while managing the receivership; and
- why the named business is processing and how the named business is processing the personal data.

In circumstances where the named business referenced in the Deed of Appointment of Receiver is a data processor, it is a data processor on behalf of the receiver, not a data processor on behalf of the financial institution. This is because it has obtained its authority and power to manage the receivership from the receiver engaging it, and not the financial institution, and as the High Court has stated *"it is the position in fact that must prevail over any such contractual designation or characterisation"*.

Example 2

Using the same facts from Example 1 above, John Fitz is appointed receiver by a bank. John Fitz appoints KompanyX Ltd to help manage the receivership.

In this example, a detailed contract exists between KompanyX and the receiver. This contract lists the activities that KompanyX is responsible for and that it must process personal data in line with this contract. Any decision regarding personal data or processing which KompanyX is not certain, it must request an instruction from the receiver.

As a result of the level of control the receiver exercises and the detailed contract in place, KompanyX is a processor for the receiver. KompanyX is not a processor for the bank.

Bank Account – Legal Basis

During the receivership process a bank account is usually opened by the receiver for the purposes of managing income relating to the receivership. This bank account may contain personal data of the borrower, including their name.

Processing of personal data is only lawful where one of the [legal bases for processing](#) personal data applies. It is the DPC's position that processing personal data in the opening

of a bank account will generally fall within the legitimate interest legal basis⁴ for the reasons outlined below.

The legitimate interest legal basis for this processing allows processing of personal data where such:

processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interest or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is the child

Controllers who seek to rely on the legitimate interest legal basis need to meet the three elements needed for this legal basis to apply:

- a) identifying a **legitimate interest** which they or a third party pursue;
- b) demonstrating that the intended processing of the data subject's personal data is **necessary to achieve** the legitimate interest; and
- c) **balancing** the legitimate interest against the **data subject's interests**, rights, and freedoms.

For the reasons outlined below, it is the DPC's position that, in general, the receiver acting as a controller for the processing of personal data related to the **opening of a bank account**, as part of the management of the receivership, **may be based on the legal basis of legitimate interests**.

Legitimate Interest

Opening a bank account is a reasonable measure to manage the income and expenditure (if any) related to property management, to manage the sale of a property in receivership, and is in pursuit of the receiver's **legitimate interest in effectively managing the income** from the property.

Processing Necessary for the Legitimate Interest

Necessity entails that processing should be a **reasonable and proportionate** method of achieving a given goal, and that personal data should not be processed where there is a more reasonable and proportionate, and less intrusive way to achieve a goal. In general, to satisfy the necessity test, there ought to be **no equally effective available alternative**.⁵

⁴ Article 6(1)(f) of the General Data Protection Regulation and section 2A(1)(d) of the Data Protection Acts 1988 and 2003 (as amended)

⁵ See CJEU, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk*, para 88

In assessing whether the processing is necessary, the first consideration is whether it is possible to **identify alternative measures** which would have **lesser impact** on the right to data protection, and where less intrusive measures can be identified, it is then required to consider whether such measures would contribute effectively to the legitimate interest at issue.

It is possible for a bank account to be opened for the purposes of the receivership without using the name of the borrower and instead use a different identifier. However, such account names could lead to confusion where a receiver oversees multiple receiverships relating to different borrowers, and result in income realised or expended during the receivership process being lodged or debited to the incorrect accounts.

The use of a borrower's name on a bank account **can therefore be considered necessary** to meet the legitimate interest of effectively managing the income from the property.

Balancing Test

The third limb of the test to assess whether processing can be based on the legitimate interest legal basis requires a **balancing exercise** between the **legitimate interest** of the data controller or third party and the **borrower's interests** and fundamental rights and freedoms.

The inclusion of the borrower's name on the account would make the borrower identifiable to individuals who had access to the bank account and to employees of the bank where the account was established. The name of the account could inform individuals with knowledge of the account name, to a limited degree, of the borrower's financial circumstances.

The receiver has a legitimate interest to ensure the receivership is carried out efficiently as possible. Carrying out the receivership efficiently would result in **better management** of the receivership process, and less of the income realised from the property being used on the administrative costs to manage the receivership. This would in turn would result in more of the loan owed to the financial institution being paid back, with the ultimate outcome being that the **borrower's debt** to the financial institution being **reduced**.

The borrower has interests, and fundamental rights and freedoms which need to be balanced with the legitimate interest, and on balance the **use of a borrower's name** on the bank account is **limited in nature** and does not infringe on the respect for their private life in these circumstances.

The account name would **identify the borrower to a limited number** of people with access to the account information. This is required to be balanced this against the

legitimate interest being pursued in these specific circumstances and how that legitimate interest could be of assistance in reducing the outstanding debt to the financial institution.

In these specific limited circumstances, the **borrower's interests**, and fundamental rights and freedoms **do not override** the legitimate interest pursued by the receiver.

Insurance Policy – Legal Basis

During the receivership process an **insurance policy may be effected** for the purposes of insuring the property in receivership. This insurance policy **may contain personal data** of the borrower, including their name.

As discussed above, controllers who seek to rely on the legitimate interest legal basis need to meet the three elements required for this legal basis to apply:

- a) identifying a **legitimate interest** which they or a third party pursue;
- b) demonstrating that the intended processing of the data subject's personal data is **necessary to achieve** the legitimate interest; and
- c) **balancing** the legitimate interest against the **data subject's interests**, rights, and freedoms.

For the reasons outlined below, it is the DPC's position that, in general, the receiver acting as a controller for the processing of personal data related to the **effecting of an insurance policy**, as part of the management of the receivership, **may be based on the legal basis of legitimate interests**.

Legitimate Interest

Taking out an insurance policy on a property in receivership is a **reasonable measure to ensure indemnification** for any loss or damage caused to the property, and effecting such a policy is in pursuit of the receiver's **legitimate interest in effectively managing the receivership**.

Processing Necessary for the Legitimate Interest

As discussed [above](#), in assessing whether the processing is necessary, the first consideration is whether it is possible to **identify alternative measures** which would have **lesser impact** on the right to data protection, and where less intrusive measures can be identified, it is then required to consider whether such measures would contribute effectively to the legitimate interest at issue.

While a property is in receivership the borrower remains the legal owner of the property. Providing information on the legal owner of the property and the fact that the property is in receivership is required to insure the property. There **does not appear to be a less intrusive measure** to insure the property while informing the insurance policy of the status of the property.

The processing of personal data can be considered necessary to obtaining an insurance policy and as such **necessary to pursue the receiver's legitimate interest** of ensuring indemnification for any loss or damage caused to the property.

Balancing Test

Processing may only take place if the legitimate interest pursued by the receiver is not overridden by the borrower's interests, or fundamental rights and freedoms. The borrower's fundamental right to data protection is not absolute and must be balanced with the processing taking place.

In considering the balancing test the DPC has taken account of the fact that the **borrower remains the owner** of the property during the receivership process and the receiver in effecting an **insurance policy is protecting the borrower's property as well as the receiver's legitimate interests**. As in the case of opening a bank account, a limited and proportionate amount of processing of personal data is undertaken for the purpose of pursuing these legitimate interests.

As such, the DPC is satisfied that a **borrower's interests**, and fundamental rights and freedoms **do not override** the legitimate interest pursued by the receiver in such circumstances.

Local Property Tax (LPT) – Legal Basis

It is common for a **receiver to pay the Local Property Tax (LPT)** for the property over which they have been appointed. As mentioned above, processing of personal data is only lawful where one of the legal bases for processing personal data applies.

It is the DPC's position that processing personal data in payment of the LPT will generally be **necessary for compliance with a legal obligation** to which the controller is subject.

A **receiver**, as the controller, has a **legal obligation to discharge all taxes** affecting the mortgaged property pursuant to Section 24(8) of the Conveyancing Act 1881 and section 109(1)(a) of the Land and Conveyancing Reform Act 2009.

Revenue allocates each property a '**Unique Property ID**' and a receiver can temporarily link to this Unique Property ID for the purpose of making the LPT payment. The only data

available to the receiver is the Unique Property ID and the tax liability for the property for the period of time in question. The receiver needs to process this personal data of the borrower in order to comply with their obligation to discharge all taxes.

The **receiver**, therefore, **may rely on** the legal basis of **compliance with a legal obligation** for the processing of personal data in discharging the LPT.