Over the last year and a half or so, it has been apparent that there has been a hardening of attitudes among European Union data protection regulators and Courts to the protection of personal data. This has been manifest by more aggressive regulatory policy and by the Courts focusing on data privacy as a fundamental right which effectively outweighs the right to freedom of expression and freedom of economic activity. This trend is illustrated by the following cases:

In April 2014, the Court of Justice held in the Digital Rights Ireland case (C-293/12) that the Data Retention Directive was invalid due to its lack of appropriate safeguards and its failure to provide for the retention of the data within the European Union with supervision by an independent authority in the manner required by Article 8(3) of the Charter of Fundamental Rights of the EU (“the Charter”).

In the Google Spain case in May 2014, the Court of Justice of the European Union, based on its interpretation of the Data Protection Directive in light of the fundamental freedoms granted by the Charter, recognised “the right to be forgotten.” Essentially, the Court held that the data subject was entitled to require that information be no longer made available to the general public by its inclusion in the list of search results, save where, “it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.”

In February 2015, the Belfast High Court in the case of CG v Facebook Ireland Limited and Joseph McCloskey awarded damages of £20,000 to the plaintiff, CG, a victim of a string of abusive comments, who brought a claim on the grounds of misuse of private information and harassment. The Judge found that it should have been apparent to the first defendant from the profile, which included location information, that there was an obvious risk of vigilante violence and that the first defendant misused private information in not deleting that information. The Judge also granted an injunction against the second defendant, the primary publisher, from harassing the Plaintiff.

In March 2015, the UK Court of Appeal in Vidal-Hall et al v Google Inc classified “the misuse of private information” as a tort. It also held that damages can be awarded under the UK Data Protection Act 1998 (“UK DPA”) where there had been no pecuniary loss and in doing so struck down the application of Section 13(2) of the UK DPA. The Court referred to Article 8 of the Charter (the right to the protection of personal data) and went on to state, “It would be strange if that fundamental right could be breached with relative impunity by a data controller, save in those rare cases where the data subject had suffered pecuniary loss as a result of the breach.”

This judgment is inconsistent with the position adopted by the Irish Courts and, in particular, the High Court decision of Judge Feeney in Collins v FBD Insurance plc which held that the Plaintiff was not entitled to general damages under the equivalent Irish section (Section 7 of the Irish DPA) in the absence of any actual financial loss. It is likely that, if the issue was to be decided again by the Irish High Court on appeal, the greater reliance placed by the UK Court of Appeal on the obligations imposed on member states by the Data Protection Directive, the EU Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms, might be found to be more persuasive.

Finally, in its judgment on 6 October 2015, the Court of Justice held in Schrems v Data Protection Commissioner that “Article 25(6) implements the express obligation laid down in Article 8(1) of the Charter to protect personal data” and “the term "adequate level of protection" [which a third country must provide if it is to be considered a "safe harbour"] must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by Directive 95/46.” As we know, Decision 2000/520 of the European Commission (the “Safe Harbour Decision”) was struck down by the Court.

In essence, there has been a significant swing in judicial attitude to the protection of personal data, in which the fundamental right to the privacy of personal information is given preeminent importance, over and above not only technical legal arguments but also over other stated rights. In practical terms, this puts a defendant on the back foot if it seeks to defend a claim on technical grounds. An argument based on a nuanced interpretation of a statutory provision can seem lacklustre when stacked against a claim based on fundamental rights.