

Balance of Competences – Information Rights: Submission of the Liberal Democrats' Home Affairs, Justice and Equalities Parliamentary Party Committee

The term 'Information Rights' covers a wide range of issues including information sharing, privacy, security, intellectual property and open data. It covers everyone and is hugely valuable in both the public and private sectors. The question of how we manage these rights and how we best make use of them within a human rights based system has long existed; however, technological progress and globalisation has profoundly changed the way the data is collected, accessed and used. The Data Protection Directive, 1995 (DPD) no longer lives up to the claim that it is the "gold standard or reference model for personal data protection in Europe and beyond."¹

Nevertheless, for both the public and private sector, information is often an organisation's most valuable asset; therefore, the Committee strongly believes the EU has an important role to play in Information Rights management and should reassert, through its re-vamping of the DPD and other associated directives, regulations and guidelines, its position as leader in this field.

Harmonisation

The importance of harmonised rules across the EU's 28 member states cannot be understated: they are both necessary for the effective functioning of the single market and for the protection of personal data across member state borders. Moreover, the provisions for adequate level of data protection in any recipient countries outside the European Union should, in principle at least, offer confidence to citizens of the EU that their personal information continues to be protected in a globalised world of international data flows.

The dual purpose of the DPD is to ensure a high level of data protection for all individuals in the EU and to achieve an equivalent level of data protection in all Member States to ensure the free flow of information within the internal market. These are valid goals which the Committee fully supports; however these "have only been partially achieved under the current legal framework" as noted by the Commission's own working paper.² The Snowden revelations clearly demonstrated gaps and loopholes in the level of privacy afforded to our citizens which can be partly attributed to the fact that the EU legislation covering this area had not been updated despite the huge technological leaps forward that have happened over the last two decades.

Moreover, the wide divergences in the way Member States have transposed and enforced the Directive has caused problems. The legal fragmentation that has resulted has

¹ http://www.hideproject.org/downloads/references/review_of_eu_dp_directive.pdf, p. ii

² http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_en.pdf, p.10

undermined the effectiveness of the internal market and therefore one of the key purposes of the DPD.

David Smith, Deputy Information Commissioner said his office hoped to “see a new and sensible framework emerge” and our Committee welcomes efforts by the Commission to propose comprehensive reform of data protection rules.³ Moreover, the European Parliament's position on the draft Regulation of March 2014 is a significant improvement on the Commission's proposed text and we hope that the Council will soon agree a common position allowing negotiations to proceed.

This Committee hopes that in doing so the lack of enforcement and effective remedies for breaches is addressed and a new structure with penalties is created. With just over a quarter of social network users (26%) and even fewer online shoppers (18%) feeling in complete control of their personal data there is a clear need to bolster confidence in the system.⁴

Key changes being made are ambitious - for example bringing in a single set of rules on data protection across the EU - but they are desperately needed. Interpretation, implementation and enforcement of the DPD is not helped by the multiple relevant rules creating legal uncertainty and additional administrative burdens. Administrative costs of this fragmentation are estimated at €3 billion per year which is shouldered by European businesses, including those operating in the UK.⁵ To put this into context, this makes up about half of the overall administrative burden linked to the Directive.⁶ The regulation currently being debated would result in savings of almost €2 billion a year. It would also create a level-playing field within the Union – something that the Committee believes would be welcomed by the business community.

This Committee believes that a reformed DPD would stimulate more cross border investment and make EU businesses more competitive internationally. Therefore this Committee is strongly in favour of harmonisation as long as standards are raised and properly implemented and enforced across the 28 member states.

Open Data

The EU institutions, much like the Government and Whitehall, produce and collect an enormous amount of statistical data. From a philosophical perspective liberating this data by placing it in the public sphere is a great liberal thing to do and one which this Committee supports.

³ <http://ico.org.uk/news/blog/2013/eu-data-protection-reforms-the-latest-news-from-brussels>

⁴ Special Eurobarometer 359, *Attitudes on Data Protection and Electronic Identity in the European Union, June 2011*

⁵ http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_en.pdf, p.11

⁶ Ibid, p.20

Public data has significant potential for re-use. For example, at the end of last year the Commission granted free, full and open access to a wealth of important environmental data gathered by Copernicus, Europe's Earth observation system. The new open data dissemination regime will help citizens, businesses, researchers and policy makers to integrate an environmental dimension into all their activities and decision-making procedures.⁷

The current untapped potential for re-use to innovate, create new products and services and help policy makers make better decisions is unparalleled. The overall economic gains from opening up this resource could amount to €40 billion a year in the EU.⁸

Britain recognises the benefits open data brings. The 2009 Digital Britain Report described data as "*an innovation currency*" and "*the lifeblood of the knowledge economy*".⁹ We should therefore be supportive of the drive to open up public data at all levels of government including from EU institutions.

The right to access documents from the EU institutions is also vital in creating a transparent and accountable system which this Committee believes is necessary for the building of trust amongst citizens of the EU. The Liberal Democrat Constitution calls for the promotion of "open government" this is clearly applicable to all institutions that impact citizen's daily life and most certainly includes the institutions of the European Union.

Privacy

In the Commission's own words: "today technology allows individuals to share information about their behaviour and preferences easily and make it publicly and globally available on an unprecedented scale. Social networking sites, with hundreds of millions of members spread across the globe, are perhaps the most obvious, but not the only, example of this phenomenon."¹⁰ Citizens must know that this data is protected and is not accessed or used without their explicit consent.

This principle has been bolstered and has received a new impetus under the Lisbon Treaty. Article 16 of the Lisbon Treaty coupled with Article 8 (2) of the Charter of Fundamental Rights of the European Union firmly embeds data protection as a fundamental right. The Commission has taken this aboard and stated unequivocally that "the objective of the rules in the current EU data protection instruments is to protect the fundamental rights of natural persons and in particular their right to protection of personal data, in line with the EU Charter of Fundamental Rights".¹¹

⁷ http://europa.eu/rapid/press-release_IP-13-1067_en.htm

⁸ <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:2011:0882:FIN:EN:PDF>

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228844/7650.pdf

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0609&from=EN>, p.2

¹¹ See European Court of Justice, Cases C-101/01, 'Bodil Lindqvist', ECR [2003], I-1297, 96, 97, and C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, ECR [2008] I-271. See also the

This Committee is of the opinion that the EU cannot simply look at information rights from a single market paradigm. A human rights based approach must be used and this triggers the need for the EU to take into account privacy concerns even if this means creating a new legal base.

A recent landmark rulings handed down by the Court of Justice of the European Union in the field of data protection is emblematic of the strong link between what the single market needs and the privacy issues it triggers.

In [Joined Cases-C293/12 and C-594/12](#)¹² the Court declared that the Data Retention Directive was invalid. In advising the striking down of the Data Retention Directive the Attorney General, Pedro Cruz Villalón said that the retention of such data "may make it possible to create a both faithful and exhaustive map of a large portion of a person's conduct strictly forming part of his private life, or even a complete and accurate picture of his private identity."¹³ It is clear that data collection has implications for privacy rights which cannot be ignored even if data is collected for commercial single market purposes.

Moreover, the overruling of this directive on the basis of the fundamental rights contained in Articles 7 and 8 of the Charter shows how firmly these rights are anchored in the Treaties. They not only set limits on what is acceptable in the restrictions on liberty in the pursuit of security but were also upheld as a shield against indiscriminate blanket retention of data and state overreach. The Court has clearly shown that legislation which encroaches upon these fundamental rights will be subject to strict tests of proportionality and necessity. As Kuner has commented, the judgment "...represents a milestone in EU data protection law, both with regard to the fundamental rights standards applicable to the collection and sharing of data for law enforcement purposes and more generally as well."¹⁴

Hijmans and Scirocco¹⁵ stated that there were strong arguments in favour of Art 16 TFEU having direct effect. They note that its wording is similar to Art 18 EC on citizenship which the Court of Justice deemed to have direct effect in *Baumbast*.¹⁶ Moreover, the fact that the language of Art 16 TFEU mirrors Art 8 of the Charter gives added strength to the

jurisprudence of the European Court of Human Rights, e.g. in cases: *S. and Marper v. the United Kingdom*, 4.12. 2008 (Application nos. 30562/04 and 30566/04) and *Rotaru v. Romania*, 4.5. 2000; no. 28341/95, § 55, ECHR 2000-V.

¹² *Digital Rights Ireland (C-293/12) v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General, Kärntner Landesregierung (C-594/12)*, Michael Seitlinger, Christof Tschohl and others, Judgment of the Court (Grand Chamber), 8 April 2014

¹³ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/cp130157en.pdf>

¹⁴ Christopher Kuner, *European Court Gives a Boost to EU Data Protection Reform*, Privacy Perspectives, 9 April 2014,

https://www.privacyassociation.org/privacy_perspectives/post/european_court_gives_a_boost_to_eu_data_protection_reform

¹⁵ Hielke Hijmans and Alfonso Scirocco, *Shortcomings in EU Data Protection in the Third and The Second Pillars. Can The Lisbon Treaty be Expected to Help?*, *Common Market law Review* 46: 1485-1525, 2009, p. 1517, <http://www.kluwerlawonline.com/document.php?id=COLA2009061>

¹⁶ Case C-413/99, *Baumbast v Secretary of State for the Home Department*, 17 September 2002

fundamental right. The authors have stated that the constitutional dimension of Art 16 TFEU will have a limiting effect on the margin of appreciation of the legislature when trying to limit data protection.¹⁷ Indeed, the strength of the fundamental rights to privacy and data protection were demonstrated in the Court of Justice's ruling invalidating the Data Retention Directive on the basis that the interference with these rights was disproportionate.

Conclusion

The Liberal Democrat Home Affairs, Justice and Equalities Parliamentary Party Committee concludes that the need for EU-wide regulations covering data protection and the right to access official information is wholly necessary and appropriate. As technology continues to develop at a rapid pace and data flows more frequently across borders the EU must be able to guarantee protection.

Aidan O'Neill QC, a specialist in EU law eloquently notes whilst freedom of information is not one of the four freedoms which form the foundations of the EU project the way in which the EU has grown in areas such as Justice and Home Affairs has created a "need to share information immediately [bringing] up the possibility of abuse and hence the need for regulation to ensure that the interests of the individual potentially informed upon or against are duly taken into account. Thus data protection laws can be seen as the necessary corollary in a national or supra-national polity which aspires to respect the principles of the rule of law in this information-age."¹⁸

We hope that Britain will continue to be firmly involved in negotiations to bring the Data Protection Directive up to date. We agree with the Secretary General of the Council of Europe, Thorbjørn Jagland who argued that the "internet is a global public resource. It has to be managed in the public interest and its governance must have global reach."¹⁹ We are of the opinion that an update and properly enforced set of data protection regulations in Europe has the ability to be the new global standard as it once was.

¹⁷ Shortcomings in EU Data Protection in the Third and the Second Pillars. Can The Lisbon Treaty be Expected to Help?, p. 1518

¹⁸ <http://inform.wordpress.com/2010/12/15/eu-law-freedom-of-information-and-data-protection-part-1-aidan-oneill-qc/>

¹⁹ <http://www.dw.de/data-protection-surveillance-and-internet-governance-the-human-rights-perspective/a-17746030>

