The Information Commissioner's response to the Ministry of Justice's call for evidence on the review of the balance of competencies between the United Kingdom and the European Union – Information Rights.

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA), the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the Privacy and Electronic Communications Regulations 2003 (PECR).

He is independent from government and upholds information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Commissioner welcomes the opportunity to respond to this consultation.

Questions

1. **What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

   Data Protection

   The Data Protection Directive has created a clear principle based framework for upholding individuals' rights, with flexibility to accommodate the different legal, economic and business models in member states. Whilst more can still be done to improve consistency the Directive has provided a framework that has enabled improvements to data flows for businesses across Europe over the last 20 years.

   It is important to note that the UK would require comprehensive data protection legislation to trade in the globalised economy, whether it was part of the European Union or not.

The establishment of data protection as a Fundamental Right under the Charter of Fundamental Rights has also been advantageous to individuals. The awareness of such a right, with both individuals and organisations, has raised the profile of data protection and the importance that should be attached to the rights. This has also been reflected in the judgments of the Court of Justice of the EU.

We would also observe that the EU model of regulation via independent supervisory authorities has provided an effective system for addressing individuals' complaints and enforcing compliance.

Despite significant efforts by the Commissioner and other authorities, data protection compliance is still regarded by some businesses and organisations, particularly SMEs, as a complex activity. This complexity is sometimes ascribed to its European basis. The Commissioner believes that this focus is misplaced and this challenge would probably exist regardless of the basis of the law, which includes principles that are the feature of most data protection laws around the world. There are similar challenges in different data protection regimes outside the EU.

There is also emerging evidence of the benefit of co-ordinated actions by the Article 29 group of data protection authorities, of which the Commissioner is a member. The basis for this co-operation is set out in articles 28, 29 and 30 of the Directive. Significant amounts of personal data are now processed by large multi-national companies, often established in many member states or offering internet services to citizens in all member states.

The Article 29 working party has developed a process for approving applications for binding corporate rules (BCRs), to enable international transfers of personal data within multi-national companies, and with appropriate data protection safeguards. European data protection authorities have developed a system of "mutual recognition" for BCRs; whilst the system can be improved it provides a good platform to further develop the concept of a "one stop shop" for data controllers. This joined up system provides greater certainty and efficiency for businesses trading across the EU.

This level of co-ordination has also enabled the European data protection authorities to work together on significant cases where personal data is processed by companies operating across many member states. This has recently included co-operative working on complaints about Google's revised privacy policy. Working together

in this way has given greater impact to the enforcement actions taken by the data protection authorities, to the benefit of individuals.

Access to Information

The Commissioner would also conclude that the exercise of the EU's competence in respect of access to environmental information has brought about benefits for individuals. There is considerable evidence about how the UK public have used their rights under the Environmental Information Regulations (EIR). The EIR accounts for approximately 10% of the ICO's access to official information casework. Whilst there may be many similarities with the Freedom of Information Act (FOIA) there are some important features of the EIR regime, including an explicit presumption in favour of disclosure, a public interest test for all exceptions and a restriction on using certain exceptions when the information requested relates to emissions. The EIRs also potentially cover a wider range of public authorities than FOIA, for example the public utilities. It is also relevant to note the recent Court of Appeal judgment in relation to the use of the FOIA veto and the finding that the veto cannot apply under the EIR.

Access to information, as part of the decision making process related to the environment, is internationally recognised under the Aarhus Convention. Given the global and European dimension to environmental issues, including climate change, it is appropriate that EU has exercised its competence to implement the Aarhus Convention's access to information provisions via a Directive.

2. What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) strikes the right balance between individuals' data protection rights and the pursuit of economic growth?

The Commissioner believes that the Data Protection Directive sets a reasonable balance between individuals' data protection rights and economic growth. The Directive provides a clear and balanced framework; however, as noted below, we recognise the need for the Directive to be reformed to meet the challenges of the 21st century.

The current Data Protection Directive has allowed the ICO to develop a flexible approach in implementation, mixing education and enforcement. Data protection rights and growth do not necessarily need to be in competition or against each other. The Commissioner has long argued that it should be possible for good

data protection practice to be a source of competition and a way of differentiating services and products to customers.

There is not strong evidence to suggest an imbalance but there is a case for reform, considering the new challenges of the 21st century, including global trade and the growth of online technologies. The Commissioner observes that the costs that businesses or the public sector sometimes ascribe to the data protection regime are not purely standalone costs – the data protection principles reflect the lifecycle of information many businesses would need to manage - regardless of data protection e.g. retention policies for data and the principles of customer service clearly link to the data principle of fair processing. That is not to say that data protection does not provide important standalone rights.

There was considerable debate about the burden and cost of introducing "cookie consent" requirements of the E-Privacy Directive. Whilst further thought could have been given to the impact and practicality of the provision when the amendment was added, it has been possible for businesses to comply with the provisions without the disproportionate impact on business models that some have claimed.

3. What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) is meeting the challenges posed by the increasing international flow of data, technological developments, and the growth of online commerce and social networks?

The current Data Protection Directive has met some of the challenges listed above. The principles contained in the Directive are still fundamentally relevant to protecting individuals' rights.

The Commissioner accepts that there are questions as how the Data Protection Directive can effectively work in an era of such routine international data transfers, particularly in relation to cloud computing. There are relevant questions about what role a data protection authority can effectively have in approving international transfers and other aspects of data processing.

He has supported the Commission's intention to revise the data protection regime to tackle the challenges posed by technological developments. He is also supportive of their intention to address the issue of how EU data protection laws should apply to online services offered to EU citizens, from companies based outside the EU. There are challenges in developing a realistic system to deliver

the data protection rights in practice in this scenario, and ensuring expectations can be met, but it is important that the issue is addressed. The recent Court of Justice judgment in the Google Spain case has provided welcome clarity on the issue of establishment in the EU and whether online search engines are data controllers. This should enable data protection authorities to be more effective in upholding individuals' data protection rights.

4. **What evidence is there that proposals for a new EU Data Protection Regulation will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Commissioner's views on the proposed Data Protection Regulation are set out in detail in the "article by article" analysis, published in ICO website[1]. Reform to the European data protection regime is required. More effective data protection rights for individuals are needed – including greater control over their personal information - and clearer responsibilities for those that process information about them.

The Commissioner is neutral on the question of whether a Regulation is the best form of legislative instrument; there are benefits of both options and both could successfully deliver the desired data protection framework. Our focus is on the text rather than the form. The aim of the Regulation should be greater consistency rather than full harmonisation – the scope and range of sectors and processing activities covered by data protection make full harmonisation very difficult to achieve.

There are many aspects of the Regulation the ICO supports. Firstly, the Regulation will create a stronger framework to protect and enforce data protection rights, enabling individuals to gain greater control over their personal data.

A "right to be forgotten" can bring benefits in allowing citizens greater control but we have concerns about how the extent of the right, as set out, can be fully delivered in practice. We also support the inclusion of a higher standard of consent, alongside other alternative conditions. The proposed Regulation needs to reflect different legal systems, particularly in relation to the concept of 'legitimate interests'.

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1 http://ico.org.uk/news/~/media/documents/library/Data_Protection/Research_and_reports/ico_proposed_dp_regulation_analysis_paper_20130212_pdf.ashx EU data reform in detail February 2013

Overall, current proposal is too prescriptive in terms of its administrative detail and the processes organisations will have to undertake to demonstrate accountability. This could be a particular problem for SMEs. There needs to be more emphasis on outcomes rather than processes and for a truly risk-based approach to compliance.

Data protection authorities will need adequate resources to carry out the many new functions they may be tasked with, and to maintain their independence. A more risk-based approach in the law would allow data protection authorities to maximise their effectiveness by focussing on high-risk data processing. This will become even more important in the future given the constant and rapid expansion of data processing activity across the EU and beyond. The Commissioner supports the inclusion of risk based concepts such as data protection impact assessment and data protection by design, though the text could be improved to introduce a clearer risk-based approach and less prescription of what the processes entail. The introduction of the co-regulatory concept of data protection certification as way of demonstrating compliance is also welcome.

The debate about the benefits, costs and burdens of the proposal has become highly polarised, with some of the estimates on both sides hard to justify, including the figure for the benefits proposed by the European Commission. A more balanced debate is needed. The Commissioner commissioned research from London Economics on the impact of the proposed Regulation on business[2]. The findings indicated that a lack of understanding about the provisions in the proposed general data protection Regulation persisted across business. The research also found that the majority of businesses surveyed were unable to quantify their current spending in relation to data protection responsibilities under existing law – and this persisted in relation to estimates for expected future spending under the new proposals. This uncertainty indicates that existing evidence on the financial impact of the regulation is difficult to corroborate. Some financial impacts suggested fail to recognise the existing costs of the current regime, and the other business practices and legal compliance measures related to data which would still make a number of the activities necessary. As proposed, the Regulation would create some significant new burdens but the Commissioner is sceptical about the extent argued by some. All parties involved in presenting costs and benefits should be transparent about their data and methodology.

[2] Published May 2013
http://ico.org.uk/news/latest_news/2013/~/media/documents/library/Data_Protection/Research_and_reports/implications-european-commissions-proposal-general-data-protection-regulation-for-business.ashx

While he has concerns about the proposed Regulation the Commissioner believes it is possible for the text to be reformed to deliver a data protection regime that is effective in improving the level of protection for individuals, whilst still enabling economic growth and business innovation.

5. **What evidence is there that the right to access documents of the EU institutions has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?**

The Commissioner does not have jurisdiction for this regime and therefore no direct experience. A right of access to documents held by the European Institutions is an important tool for citizens to understand the operation of the EU and hold decision makers to account. The Commissioner would observe that the regime under Regulation 1049 does not appear to provide comparable rights of access to the UK's Freedom of Information Act and the Directive on Access to Environmental Information.

6. **How would UK citizens' ability to access official information benefit from more or less EU action?**

Drawing from experience of the Directive on Access to Environmental Information there would be a benefit from setting out key access to information principles at EU level, along the lines already set out in the Council of Europe Convention on Access to Official Documents[3]. There would be a benefit from the stability this would bring to the UK's access to information regime. This would benefit the ability of UK citizens to consistently access official information.

7. **How could action, in respect of information rights, be taken differently at national, regional or international level and what would be the advantages and disadvantages to the UK?**

It is clear that the interoperability of international data protection regimes, within the EU and beyond, will be an increasingly important issue as international trade and data flows become even more globalised. Action is needed to enable better interaction between the different regimes. A good example of this would be the recent mapping between the EU BCR and APEC CBPR regimes for international data transfers. Further action may also be needed to support a framework to enable co-operation and information sharing between data protection authorities

[3] http://conventions.coe.int/Treaty/en/Treaties/Html/205.htm

internationally, to support joined up enforcement activity. As well as achieving more effective data protection outcomes this can also be a more effective and efficient use of resources.

8. Is there any evidence of information rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

We don't have any evidence to submit in response to this question.

9. What is the impact on EU competence of creating an entirely new legal base for making data protection legislation that is not expressly linked to the EU's single market objectives?

There is a reasonable justification for creating a new legal base for the data protection legislation not expressly linked to the single market objectives. The range of personal data processing and its potential impact has changed significantly over the last 20 years and there is a strong basis for arguing that the importance of protecting these rights should be set out as a freestanding right, whilst still respecting the important relationship with the single market.

10. What future challenges or opportunities in respect of Information Rights might be relevant at a UK, EU or international level; for example cloud computing?

The response has already touched on many of these issues above. The additional challenges, relevant at UK, EU or international level, are:

Data Protection

- Rise and use of technologies to exploit big data and profiling.
- Jurisdiction of data protection laws over online services.
- Regulating data protection risks of mobile apps.
- Opportunities to create a framework to share information and co-ordinate cross border data protection enforcement.
- Opportunities to create co-regulatory approaches to data protection using data protection seals and certification.

Access to Information

- Opportunities to create more joined up approaches to open government through the convergence between open data, re-use and access to information legislation.

- Challenge of “following the public pound” – jurisdiction of access to information laws and public sector outsourcing.

The challenges posed by cloud computing are also recognised.

11. Is there any other evidence in the field of EU Information Rights that is relevant to this review?

We don’t have any further evidence to submit in response to this review.