**RESPONSE OF LEWIS SILKIN LLP TO CALL FOR EVIDENCE ON REVIEW OF BALANCE OF COMPETENCES: INFORMATION RIGHTS**

**Who are we?**

Lewis Silkin LLP is a medium-sized (47 partner) law firm with highly-rated teams specialising in employment law and media and technology. We are members of the Global Human Resource Lawyers, Ius Laboris which spans 44 countries.

Our response to this survey is based on our experience of data protection law, acting for clients in relation to information rights and participation in the Workplace Privacy International Practice Group within Ius Laboris.

**Balance of competences review**

**Questions 1 to 3**

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?

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?

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?

**Response to questions 1 to 3**

(a) In principle, the EU should have competence in relation to data protection.

(b) The implications of the way in which competence has been used have varied over time.

In the mid-80s, before any significant use of email, electronic word processing and the internet, rights based on the OECD Guidelines and Convention 108 worked effectively in relation to data held on small relational databases.

The EU based the Directive 95/46 on the Guidelines and Convention. By the time the Directive was approved there was an increasing gap between the rights expressed and effective arrangements whether viewed from the perspective of individuals or businesses. As time has passed, this gap has continued to widen to the extent that in many contexts compliance is impossible – at least in any practical sense.

(c) As a result of the widening of the gap, protection of individuals' rights has been undermined coupled with significant burdens on business. The fundamental problem is the attempt to set up a common set of principles to work regardless of context. This makes no allowance for the context in which individuals or businesses are operating.

(d) There is a big difference, for example, between unstructured free-form data (for example, emails, documents in an employment context), data listed and accessible through a search engine and data held in a structured database.

(i) Data controllers exercise very little control over the content of emails. Although many monitor or block emails containing obscenities, they are unable to ensure compliance with principles on content (such as fairness, adequacy, accuracy and relevance). Many emails will be or become inaccurate or no longer relevant; others will fail to satisfy processing justifications. For example, an email as anodyne as one saying

> "Sorry, I can't make the meeting, my daughter has chicken pox"

contains sensitive personal data about a child – for which there will be no proper justification and has content which will be inaccurate once the daughter has recovered.

(ii) Another example of data over which a controller exercises very little control can be found with search engines. The *Google Spain* case related to removal of irrelevant data (the right to be forgotten) but the more important conclusion was that Google as operator of a search engine was a data controller. It follows that the data protection principles apply. But what control can a search engine excise over matters such as fairness, accuracy or relevance or over whether information is excessive?

Records listed will inevitably be inaccurate or irrelevant and will frequently be excessive. To take a trivial example, if an event is reported by a news agency it may be picked up by hundreds of papers who will each carry largely the same story. Is that excessive – would one story do? What is to happen when it is yesterday's news…irrelevant. This goes further than *Google Spain* – if an individual loses a job or some other opportunity as a result of "old news", they may have a claim for damages regardless of whether they have asked the search engine to remove the data.

(iii) In contrast to the previous example, data held in a structured database – for example relating to credit card use may be extensive but it will be manageable and identifiable through the structure.

**Question 4**

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?

**Response to question 4**

(a) In our view the concerns about the Directive apply equally to the proposed Regulation. It is unfortunate that the European Commission has not developed its thinking on how to protect personal data and is clinging to the same conceptual framework without regard to the way in which use of personal data and the digital economy has developed.

(b) The Commission seems to equate the imposition of burdens on data controllers with protection of individual's rights. So the Regulation seeks to impose a considerably more granular approach. There are many examples including: more information to be provided to data subjects in Article 14; policies are to be set up and measures taken not only to ensure compliance but separately to be able to demonstrate compliance with the Regulation (Article 22); obligations to carry out data protection impact assessments in

relation to pre-specified aspects coupled with biannual compliance reviews (Articles 33 et seq.). There is no evidence that detailed policies offer protection to individuals and considerable evidence that no-one reads them.

(c) The Commission intends the proposed Regulation to provide a common set of rules across the Union and points to significant savings for businesses operating in Europe. Rather bizarrely given that approach the Regulation envisages that in the area of employment member states may have divergent approaches (Article 82). Since so much data is held in relation to employees and significant numbers of businesses operating across Europe will have employees in different states, this seems to undermine the advantages of a common approach.

(d) If there is to be a Regulation (as opposed to a Directive), the proposal leaves far too much to be determined by the Commission with inadequate controls.

**Questions 5 to 6**

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?

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

**Response to questions 5 to 6**

We have no comments.

**Questions 7**

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?

(a) There would be significant advantages both for individuals and for UK business if action were taken at an international level setting up agreed common standards. Given the borderless nature of data flows, looking at information rights from a national or regional perspective will inevitably create obstacles which interfere with business. If those obstacles lead to effective protection of the rights of individuals that may justify the "obstacle". The model clauses and safe harbor regimes provide a chain of responsibility which appears to provide effective protection and protection equivalent to that applying within the region (i.e. the EU). But it is unclear if there is any substance in the protection. We are not aware of it being tested "in anger". That is not however to say that the approach lacks merit. It may be that the main advantage of the approach is not the substantive result but that it encourages relevant parties to give consideration to processing of personal with gains for, for example, data security.

(b) Although there are encouraging similarities in approach at a regional level between, for example, the EU, the APEC Privacy Framework and, at a national level, Canada, consolidating this at a global/international level seems ambitious at present.

We do not support the approach taken to national competence in the proposed Data Protection Regulation. Article 82 permits member states to adopt local rules regulating the employment context – but only in accordance with the provisions of the Regulation.

So this does not give member states power to derogate from the Regulation, rather it enables them to impose most specific local requirements. This is bizarre given that the Commission's ambition for the Regulation is to reduce costs; it undermines the "one-stop" shop in a way which is significant given the prevalence of employee data.

If there is to be national competence in the employment context, members states should have the freedom to derogate from the specific measures in the Regulation provided that the protection to data subjects is broadly equivalent. In other words, member states should be free to use different means to achieve protection.

**Questions 8 and 9**

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?

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?

**Response to questions 8 and 9**

(a) We are not aware of information rights being used to expand the competence of the EU -– except through the caselaw of the ECJ as flagged in the consultation paper.

(b) For the reasons summarised in the consultation paper based on its caselaw, the EU exercised competence which was de facto wider than the single market before the Lisbon Treaty. We have not identified an impact.

**Question 10**

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?

**Response to question 10**

(a) See our response to question 7 and generally. The challenge is the status quo.

(b) Regulating information rights has to be achieved at an international level. The proposed Transatlantic Trade and Investment Partnership between the EU and US and the Trans-Pacific Partnership between states within the Americas and Australasia provide an opportunity for a framework agreement.

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