FACULTY OF ADVOCATES

RESPONSE

BY

THE FACULTY OF ADVOCATES

To the call for evidence by the Ministry of Justice on the Review of the Balance of Competences between the United Kingdom and the European Union

Information Rights

Introduction

We have been asked to respond on behalf of the Faculty of Advocates (the Faculty) to the call for evidence by the Ministry of Justice on the review of the balance of competences between the United Kingdom and the European Union in the field of information rights.

The Faculty is a professional body, the members of which comprise the Scottish Bar. As requested, we have limited our responses to those questions where we feel we may have evidence that is "objective and factual" to contribute. Accordingly, we have answered only questions 1 – 5 as appended to the call for evidence. To some extent, however, and inevitably, the evidence we offer in answer to those questions is somewhat impressionistic and anecdotal.

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?

Our perception of the advantages and disadvantages of the data protection regime, deriving as it does from the Data Protection Directive, is necessarily informed by the duties and functions that attend the public office of advocate in Scotland. At the core of an advocate's calling is the duty of confidentiality

owed to instructing agents and clients.[1] Advocates almost invariably find themselves in receipt of personal data, sometimes sensitive personal data, relating both to natural and to legal persons. They handle such data as a regular and normal part of their daily work life.

In preparation for being called to the Scottish Bar, therefore, an advocate must register with the UK Information Commissioner, and must maintain his registration annually for as long as he remains in practice. As well as adhering to his professional obligations, he must also comply with the Data Protection Directive as implemented into Scots law. Depending on the nature of the work undertaken by an individual advocate, whether at a general level or in particular cases, compliance may involve a variety of steps ranging from simply securing the physical integrity of devices containing personal data to the adoption of sophisticated data protection techniques such as data encryption.

A positive data protection regime responds to the same imperatives of protecting individual privacy that underpin the advocate's fundamental duty of confidentiality. The expression of rules and guidance on the subject of data protection assist the advocate in the discharge of his duty of confidentiality. We regard this as one of the most important advantages of the data protection regime based on the DPD. The common law duty of confidentiality was not formulated with the diverse, sophisticated and constantly-evolving means for the generation, storage, sharing, and dissemination of personal data (not all of which is done for legitimate reasons) in mind. The responsiveness of a positive data protection regime to technological change, coupled with the duty of advocates to take all such steps as are reasonably practicable to achieve compliance with the regime, can only reinforce the trust placed on the profession which has historically rested on the duty of confidentiality.[2]

It would, however, be idle to suggest that the data protection regime is without disadvantages. It is extremely complex, and has become all the more so as secondary legislation has been enacted to supplement its original provisions. For self-employed data controllers such as members of Faculty, whose day-to-day work may not involve close familiarity with the regimes for data protection and access to information, it is cumbersome. Compliance, coupled as it is with the risks of sanction and stigma flowing from enforcement action, imposes costs on those subject to the regime, in terms both of time and of money.

Large economic operators may be able to absorb the costs associated with onerous and evolving data controlling obligations. At lower levels of the economy, however, such costs may be unduly burdensome, and even disproportionate. We note that the call for evidence itself expresses misgivings, at paragraph 52,

[1] Point 2.3.1 of the Guide to the Professional Conduct of Advocates states that "[*I*] *is of the essence of an Advocate's function that he should be told by his client things which the client would not tell to others, and that he should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right*".

[2] On a related note, where an advocate works in an EU jurisdiction outside the UK, the fact that he is registered with, and subject to the jurisdiction of, the UK Information Commissioner serves to demonstrate to other EU authorities that personal data is being handled appropriately.

about this aspect of the European Commission's proposals for new data protection legislation to be enacted under Article 16(2) TFEU. We agree with the observation at paragraph 47 of the call for evidence that "the protection of individuals' privacy and the pursuit of economic growth should not be attained at the expense of one or the other."

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?

We are not aware of any empirical studies which have attempted to assess the balance struck between the protection of individuals' privacy and the pursuit of economic growth, either in the context of Scottish legal practice or more broadly. It is our impression that most members of Faculty would regard the cost of compliance with the data protection regime as a real cost (in terms, for example, of renewing their annual registration with the Information Commissioner; appraising themselves of developments in the law; and taking such steps as may be necessary to upgrade data security in light of these) but not yet so significant and substantial as to represent a disproportionate impediment to the growth and development of their individual practices.

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?

We have not been able to identify research which has evaluated the way in which the competence of the EU has been deployed to meet these challenges. It seems to us probable that technological developments since 1995 will have outdistanced a legislative regime founded on the DPD (or, as we have indicated, that the legislative regime that has evolved in an attempt to meet those developments has itself become unduly complex and cumbersome). We note that the technological developments with which this question is concerned transcend national and even supra-national borders.

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?

We note that the proposed EU Data Protection Regulation seeks to reflect technological changes that have occurred since 1995. We cannot say on the basis of "objective and factual" evidence that the proposed Regulation will be advantageous or disadvantageous to members of Faculty. We confine ourselves to noting that the enactment of a Regulation avoids patchwork national implementation. This in turn should reduce the risks and costs associated with cross-border transfers of personal data.

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 Faculty does not have specific evidence indicating whether or not the right of access to documents is advantageous or disadvantageous to individuals, business, public sector or any other groups in the UK. Individual members of Faculty have found, however, that they cannot always obtain documents from the EU institutions, whether that be the Commission, Council, Parliament or Court of Justice, that they expect to be able to obtain. To the extent that there is an express legislative intention that the EU institutions work "as openly as possible" all efforts to make that a reality should be made.

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