

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chynghor i Aelodau'r Cynulliad a'u cynorthwyyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cynghor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

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Legal Advice Note

FOURTH LEGISLATIVE CONSENT MEMORANDUM – ENTERPRISE AND REGULATORY REFORM BILL –

Background

1. On the 11th January 2013, the Minister for Business, Enterprise, Technology and Science gave notice of a motion in the following terms – “To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that provisions of the Enterprise and Regulatory Reform Bill relating to the requirement on the supplier of goods and services to provide customer data in so far as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament..”

2. The Legislative Consent Memorandum (“LCM”) was considered on the 15th January 2013 by the Business Committee, which agreed not to refer the LCM to a committee for consideration due to the short timescale and that the Legislative Consent Motion to be debated in plenary on Tuesday 29 January 2013.. This Note is intended to inform that consideration.

3. This is the fourth LCM in relation to the Enterprise and Regulatory Reform Bill. A previous LCM was laid on the 12th June 2012 in relation to the water industry and another on the 10th July in relation to the Green Investment Bank. A third was laid on the 5th October 2012 in relation to

provisions of the Enterprise and Regulatory Reform Bill which relate to a power for Welsh Ministers to include sunset and review clauses in subordinate legislation, insofar as they fall within the legislative competence of the National Assembly for Wales. The matters dealt with in those LCMs are not included in the analysis that follows.

The Bill

4. The Enterprise and Regulatory Reform Bill was introduced in the House of Commons on the 20th May 2012 by the Secretary of State for Business, Innovation and Skills. The Bill was given a Second Reading on the 11th June 2012 and then proceeded to Committee Stage. It completed its progress through the House of Commons on the 17th October, and is now at Committee Stage in the House of Lords. The Bill consists of six Parts, of which the current LCM is only concerned with three clauses that have not yet been considered. They appear as amendments 58C, 58D and 58E in the latest marshalled list, and are annexed to this note for ease of reference. They are government amendments in the name of Lord Younger of Leckie, Parliamentary Under-Secretary of State and Government Spokesperson for the Department for Business, Innovation and Skills in the House of Lords.

5. The different Parts of the Bill would change the law in different ways in different parts of the UK. In relation to Wales, the Explanatory Notes state that –

“Westminster will not normally legislate with regard to devolved matters falling within the legislative competence of the National Assembly for Wales. Certain of the provisions of the Bill extending to Wales fall within the legislative competence of National Assembly for Wales. The consent of the National Assembly for Wales is therefore being sought for them through a legislative consent motion.”

6. “The main purpose of the Bill [according to the Explanatory Notes] is to encourage long term growth and simplify regulation generally.”

7. As these clauses are the subject of amendments that have not yet been reached, no explanation of their purpose is available on the Parliament website. This would normally be given by the proposer of the amendment in debate. No information is therefore available beyond that contained in the LCM.

8. The clauses are purely enabling in that they give the Secretary of State the power to make regulations to require a 'regulated person' (in practice a business) to provide customer data to that customer or a person authorised by that customer, on request. 'Regulated persons' are suppliers of gas, electricity, mobile phone services and certain financial services, together with any other service provider specified in regulations. This last could include, for example, providers of land-line telephone services. The amendments set out matters to which the Secretary of State must have regard, and define terms used in them. They also provide further details of the matters to be included in regulations, particularly in relation to enforcement by the Information Commissioner or some other person specified in the regulations.

Legislative Competence

9. The provisions to which the LCM refers do not come neatly within the National Assembly's legislative competence. The LCM identifies the Assembly's legislative competence under 'Economic development' as being relevant. However, there are specific exceptions in relation to financial services, the supply of electricity, oil and gas and telecommunications, which appear to be the main areas targeted by the amendments. Furthermore, the list of enactments that the Assembly may not generally amend include the Data Protection Act 1998, to which this legislation is related, as can be seen from the references to the Information Commissioner. The Assembly could not therefore make legislation in similar terms in relation to Wales.

The Consent Memorandum

10. The Legislative Consent Memorandum identifies a clause to be inserted after clause 73 as the one that relates to the Assembly's legislative

competence and requires legislative consent. It is a clause that is in fact inter-dependent with the two following clauses, as can be seen from the Annex to this note. However, the Legislative Consent Motion is worded in broad enough terms to apply to all three proposed clauses.

11. As paragraph 2 of the LCM explains, the test specified in Standing Order 29.1 is whether the Bill makes provision ‘for any purpose within the legislative competence of the Assembly’. It is not therefore necessary for the provision itself to be within that competence, provided the purpose of the provision is within that competence.

12. An earlier LCM in relation to this Bill related to the Green Investment Bank. Whilst banking is clearly outside the Assembly’s legislative competence, the fact that it had environmental objectives meant that it made provision for a purpose within the Assembly’s legislative competence relating to the environment led to the approval of that Legislative Consent Motion.

13. On that occasion, the Explanatory Notes to the Bill did explain the purpose of the provisions, which strengthened the argument that they were for a purpose within the Assembly’s legislative competence. This time, we are presented with amendments that have not yet been debated, and for which therefore no explanation is available beyond the LCM. That explains at paragraph 12 that “The strategy aims to give consumers more power. A key project in the strategy is ‘midata’ which aims to give consumers more control and access to their personal data so they might secure better deals for themselves individually and collectively.” Whilst ‘promotion of business and competitiveness’ is within the Assembly’s legislative competence, ‘consumer protection’ is specifically excluded.

Conclusion

14. The Bill will make provision in relation to Wales, but it is not clear that these provisions are for a purpose within the Assembly’s legislative competence. The Bill would certainly not have a negative impact upon it.

15. The tabling of a legislative consent motion may therefore not have been strictly necessary in the case of these proposed clauses, but when there is doubt it is certainly better to consider issues unnecessarily than to fail to consider legislative consent when it would have been appropriate.

16. According to Standing Order 29.7, “The Assembly must consider a legislative consent motion which has been tabled.” It is therefore in order for the Assembly to debate the motion that relates to this LCM.

Legal Services

National Assembly for Wales

January 2013

Annex

Text of proposed amendments

After Clause 73

VISCOUNT YOUNGER OF LECKIE [proposer]

[Amendment]58C

Insert the following new Clause—

“Supply of customer data

(1) The Secretary of State may by regulations require a regulated person to provide customer data—

(a) to a customer, at the customer’s request;

(b) to a person who is authorised by a customer to receive the data, at the customer’s request or, if the regulations so provide, at the authorised person’s request.

(2) “Regulated person” means—

(a) a person who, in the course of a business, supplies gas or electricity to any premises;

(b) a person who, in the course of a business, provides a mobile phone service;

(c) a person who, in the course of a business, provides financial services consisting of the provision of current account or credit card facilities;

(d) any other person who, in the course of a business, supplies or provides goods or services of a description specified in the regulations.

(3) “Customer data” means information which—

(a) is held in electronic form by or on behalf of the regulated person, and

(b) relates to transactions between the regulated person and the customer.

(4) Regulations under subsection (1) may make provision as to the form in which customer data is to be provided and when it is to be provided (and any such provision may differ depending on the form in which a request for the data is made).

(5) Regulations under subsection (1)—

(a) may authorise the making of charges by a regulated person for complying with requests for customer data, and

(b) if they do so, must provide that the amount of any such charge—

(i) is to be determined by the regulated person, but

(ii) may not exceed the cost to that person of complying with the request.

(6) Regulations under subsection (1)(b) may provide that the requirement applies only if the authorised person satisfies any conditions specified in the regulations.

(7) In deciding whether to specify a description of goods or services for the purposes of subsection (2)(d), the Secretary of State must (among other things) have regard to the following—

(a) the typical duration of the period during which transactions between suppliers or providers of the goods or services and their customers take place;

(b) the typical volume and frequency of the transactions;

(c) the typical significance for customers of the costs incurred by them through the transactions;

(d) the effect that specifying the goods or services might have on the ability of customers to make an informed choice about which supplier or provider of the goods or services, or which particular goods or services, to use;

(e) the effect that specifying the goods or services might have on competition between suppliers or providers of the goods or services.

(8) The power to make regulations under this section may be exercised—

(a) so as to make provision generally, only in relation to particular descriptions of regulated persons, customers or customer data or only in relation to England, Wales, Scotland or Northern Ireland;

(b) so as to make different provision for different descriptions of regulated persons, customers or customer data;

(c) so as to make different provision in relation to England, Wales, Scotland and Northern Ireland;

(d) so as to provide for exceptions or exemptions from any requirement imposed by the regulations, including doing so by reference to the costs to the regulated person of complying with the requirement (whether generally or in particular cases).

(9) For the purposes of this section, a person (“C”) is a customer of another person (“R”) if—

(a) C has at any time, including a time before the commencement of this section, purchased (whether for the use of C or another person) goods or services supplied or provided by R or received such goods or services free of charge, and

(b) the purchase or receipt occurred—

(i) otherwise than in the course of a business, or

(ii) in the course of a business of a description specified in the regulations.

(10) In this section, “mobile phone service” means an electronic communications service which is provided wholly or mainly so as to be available to members of the public for the purpose of communicating with others, or accessing data, by mobile phone.”

[Amendment] 58D

Insert the following new Clause—

“Supply of customer data: enforcement

(1) Regulations may make provision for the enforcement of regulations under section (Supply of customer data) (“customer data regulations”) by the Information Commissioner or any other person specified in the regulations (and, in this section, “enforcer” means a person on whom functions of enforcement are conferred by the regulations).

(2) The provision that may be made under subsection (1) includes provision—

(a) for applications for orders requiring compliance with the customer data regulations to be made by an enforcer to a court or tribunal;

(b) for notices requiring compliance with the customer data regulations to be issued by an enforcer and for the enforcement of such notices (including provision for their enforcement as if they were orders of a court or tribunal).

(3) The provision that may be made under subsection (1) also includes provision—

(a) as to the powers of an enforcer for the purposes of investigating whether there has been, or is likely to be, a breach of the customer data regulations or of orders or notices of a kind mentioned in subsection (2)(a) or (b) (which may include powers to require the provision of information and powers of entry, search, inspection and seizure);

(b) for the enforcement of requirements imposed by an enforcer in the exercise of such powers (which may include provision comparable to any provision that is, or could be, included in the regulations for the purposes of enforcing the customer data regulations).

(4) Regulations under subsection (1) may—

(a) require an enforcer (if not the Information Commissioner) to inform the Information Commissioner if the enforcer intends to exercise functions under the regulations in a particular case;

(b) provide for functions under the regulations to be exercisable by more than one enforcer (whether concurrently or jointly);

(c) where such functions are exercisable concurrently by more than one enforcer—

(i) designate one of the enforcers as the lead enforcer;

(ii) require the other enforcers to consult the lead enforcer before exercising the functions in a particular case;

(iii) authorise the lead enforcer to give directions as to which of the enforcers is to exercise the functions in a particular case.

(5) Regulations may make provision for applications for orders requiring compliance with the customer data regulations to be made to a court or tribunal by a customer who has made a request under those regulations or in respect of whom such a request has been made.

(6) Subsection (8)(a) to (c) of section (Supply of customer data) applies for the purposes of this section as it applies for the purposes of that section.

(7) The Secretary of State may make payments out of money provided by Parliament to an enforcer.

(8) In this section, “customer” and “regulated person” have the same meaning as in section (Supply of customer data).”

[Amendment] 58E

Insert the following new Clause—

“Supply of customer data: supplemental

(1) The power to make regulations under section (Supply of customer data) or (Supply of customer data: enforcement) includes—

(a) power to make incidental, supplementary, consequential, transitional or saving provision;

(b) power to provide for a person to exercise a discretion in a matter.

(2) Regulations under either of those sections must be made by statutory instrument.

(3) A statutory instrument containing regulations which consist of or include provision made by virtue of section (Supply of customer data)(2)(d) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(4) A statutory instrument containing any other regulations under section (Supply of customer data) or section (Supply of customer data: enforcement) is subject to annulment in pursuance of a resolution of either House of Parliament.”