Joint Data Controllers under the GDPR

Purpose: To advise the profession in relation to being a joint data controller with solicitors’ firms

Scope of application: All practising barristers and chambers

Issued by: The Information Technology Panel

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Status and Effect: Please see the notice at the end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

Introduction

1. The Bar Council’s IT Panel recently provided a note to the effect that barristers are not usually to be regarded as data processors acting on behalf of solicitor data controllers. This document addresses a different point, namely whether barristers and solicitors, who are each data controllers, are to be regarded as joint data controllers to whom GDPR Article 26 applies.

2. GDPR Article 26 is as follows:

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<th>Joint controllers</th>
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<td>(1) Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the</td>
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controllers are subject. The arrangement may designate a contact point for data subjects.

(2) The arrangement referred to in paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement shall be made available to the data subject.

(3) Irrespective of the terms of the arrangement referred to in paragraph 1, the data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers.

Joint controllership

3. The concept of joint data controllership is not new—it existed under the Data Protection Act 1998 (and indeed before). The 1998 Act defined a data controller as “a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed”. There was therefore a distinction between joint controllers, and those who only processed data “in common” with others. The Information Commissioner’s guidance on that provision states:

“In relation to data controllers, the term jointly is used where two or more persons (usually organisations) act together to decide the purpose and manner of any data processing. The term in common applies where two or more persons share a pool of personal data that they process independently of each other.”

4. The GDPR does not expressly refer to processing of data by a controller “in common” with others, and the Information Commissioner’s guidance has not yet been updated. Nevertheless, it is considered that the distinction is still a relevant and helpful one.

5. Article 26 applies only where “two or more controllers determine the purpose and means of processing”. Other than in exceptional circumstances, this will not be the case in relation to a barrister and their instructing solicitor concerning a typical set of instructions or a typical brief. Instead, the barrister will (and will be professionally obliged to) form their own opinion as how the personal data should be used, how and where it should be stored, and as to the period for which it should be retained. The barrister and the solicitor will therefore be processing a pool of data “independently of each other”, and will not be joint controllers. Any attempt to restrict the barrister’s freedom of action in relation to the use of personal data could have the effect of preventing the barrister complying with Code of Conduct
obligations, in particular with regard to the barrister’s duty to the court (CD1, rC4 and rC16), and with regard to obligations to act independently in the best interests of the client, not to permit the professional client to limit the barrister’s discretion as to how the interests of the client can best be served (CD4, rC3.5 and rC15), and to keep appropriate records (rC87.2).

**COMBAR/CLLS guidance**

6. The Commercial Bar Association, COMBAR, and the City of London Law Society, CLLS, have recently published the following guidance in relation to joint controllers, concerning clause 19.5 of the recently revised [version 3 of the COMBAR/CLSS terms of contract](#):

“In some circumstances, the Solicitor and the Barrister may be joint controllers of personal data (perhaps with the Lay Client) within the meaning of article 26 of the GDPR. These circumstances may include the drafting of letters or witness statements, into which considerable input is received from both Solicitor and Barrister and which contains personal data of various data subjects. If the Solicitor and the Barrister are joint controllers, they are obliged to determine in a transparent manner their respective responsibilities for compliance with their obligations under the GDPR, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in articles 13 and 14, by means of an arrangement between them. Clause 19.5 sets out an arrangement, placing individual responsibility on the Solicitor and the Barrister for the processing each undertakes, for the implementation of appropriate technical and organisational standards and as regards the exercising of the rights of the data subject. However, it places responsibility on the Solicitor to comply with articles 13 and 14 of the GDPR. These articles oblige the data controller to provide a "data subject" with certain information. This obligation does not apply to personal data that consists of information in respect of which a claim to legal professional privilege could be maintained in legal proceedings (paragraph 19 of Schedule 2 to the Act).”

7. For the avoidance of doubt, this guidance is not inconsistent with what is stated above. The circumstances in which a barrister and solicitor may be joint controllers are likely to be rare. They might conceivably occur where a letter is drafted, or where a barrister is instructed to assist in the drafting of a witness statement with no ongoing involvement in the case thereafter. But where the barrister who assists in the drafting of a witness statement is to be instructed at trial, the barrister may need to be free to take independent decisions in relation to the use, retention and deletion of personal data.
Article 26 Arrangement

8. If in a rare case joint controllership arises, there is no need for a formal written contract between the parties. Article 26 (by contrast with Article 28(3)) does not refer to a contract but only to “arrangement” between joint controllers. The aim is to ensure that they are each aware of their respective responsibilities, and that the essence of the position is made transparent to the data subject. Accordingly, if it is required at all, there is no reason why an Article 26 arrangement need do any more than state what the position would be in any event, namely that each data controller should remain individually responsible for ensuring that its own processing is in compliance with data protection law. This is the approach taken by Clause 19.5 of the COMBAR/CLLS terms, which includes the following:

“If and to the extent that the Barrister and the Solicitor are joint controllers (whether or not with anyone else) for the purposes of Data Protection Law, each shall, unless otherwise agreed, be individually responsible for ensuring that the processing each undertakes is in accordance with Data Protection Law, for ensuring so far as each is able the implementation of appropriate technical and organisational measures in accordance with Data Protection Law, and as regards the exercising of the rights of the data subject, but the Solicitor shall be responsible for the provision of information referred to in articles 13 and 14 of the GDPR if and to the extent that this provision of information is required by Data Protection Law.”

9. Any arrangement which goes beyond this and purports to provide for indemnities or other terms which might alter the allocation of liability following a data breach on the part of one of the joint controllers, is potentially problematic and should be approached with caution. Barristers must of course have in mind their professional obligation to act independently in the best interests of the lay client. An agreement to alter the allocation of liability might, depending on the wording and on the circumstances, be incompatible with that duty of independence, and might have ramifications in relation to professional indemnity insurance (especially insofar as it requires a barrister to assume any liability to which would not have arisen in any event by reason of common law, equity or statute.)

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