

both are supplemented by some state, provincial and sectoral legislation.

The OECD Guidelines means the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data adopted on September 23rd 1980.

The Council of Europe Convention means the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data. The Convention was opened for signature on January 28th 1981.

Countries which have signed the Convention indicate that they intend to enact measures in accordance with it, or that they have already done so. Countries which have ratified the Convention indicate that they accept being bound by the Convention as a legal instrument.

ARE FEARS OF DATA EXPORT RESTRICTIONS JUSTIFIED?

Now that the UK has ratified the Council of Europe Convention, will the ratifying countries restrict the export of name-linked data to the USA and Canada?

In the early 1980's US based multinational companies in particular were alarmed that national data protection laws and the Council of Europe Convention would soon lead to companies being prevented from transferring name-linked data from countries with data protection laws covering the private sector to those without, like the USA and Canada. The ultimate fear was that in October 1985, when the Council of Europe Convention came into force, after five countries had ratified it, the doors would be locked and US companies might be cut off from their affiliates' employee records, credit card transactions and marketing lists. Now, two years later, what are the prospects for maintaining the free movement of name-linked data?

Scenario 1. Ratifying countries would act together to ban data exports to non-ratifying countries. Although the Convention makes provision for the ratifying countries to form a consultative committee, to give its opinion, it does not have binding force. So far the committee has not gone further than procedural questions and is not due to meet again until next year.

Scenario 2. National laws and data protection authorities would make a clear distinction between permitting data exports to ratifying countries and restricting exports to those which had not ratified, even though they had a national data protection law.

Scenario 3. National laws and data protection authorities would make a distinction between permitting data exports to countries with data protection laws and restricting exports to those without such laws.

None of the ratifying countries rigidly distinguish between name-linked data exports to other ratifying or non-ratifying countries, or even those without a law. The following case examples show that far more important are the criteria which include: the sensitivity of the data; the purpose of the export; its use; disclosure; and security arrangements.

orway permitted Readers Digest to carry out data processing in Sweden. This is not surprising because both have ratified the Convention.

2. When France had a data protection law and the UK did not data on American Express transactions was sent to the UK for data processing without a problem. The French authorities were satisfied with Amex's data security arrangements.

3. Similarly Norway permitted Citibank to transfer the data processing of its customer files to Belgium which does not have a law. This was acceptable so long as the company complied with Norway's data protection law as if the data processing was carried out in Norway.

4. Sensitive medical files present greater problems. A current unresolved case involves a request by the Stockholm hospitals for the export of data on 1600 kidney patients to a Europe-wide database held at St. Thomas' Hospital, London. The data would contain names and addresses, identification numbers and medical details. In a decision on February 16th this year Sweden's Data Inspection Board ruled that the hospitals must inform each individual that such information would be transferred to the UK. If any individual objected data on that person would not be exported. The hospitals have appealed against this decision.

To clarify the issues the Board told PL&B that

- a) if the data had been linked to identification numbers rather than names it would not have made any difference to the decision because the data would still be name-linked
- b) the fact that the UK has a data protection law made the decision less restrictive.
- c) if the UK had already ratified the Convention the export of the data would not have been stopped but the Board nevertheless would have retained the right to impose data export restrictions.

5. Germany is different as the Federal Data Protection Commissioner has no jurisdiction over the private sector. Here the courts maintain workers' data protection rights even if they permit a company to conduct its data processing abroad, as Texaco discovered.

So far, the Council of Europe Convention has provided a framework for restricting data exports, but has had little part in actually doing so. In the next issue we shall look at whether the EEC plans to intervene in this area.