

## EUROPEAN COMMUNITY LAUNCHES DATA PROTECTION INITIATIVE

On July 18th, the European Commission adopted a package of draft directives aimed at providing an equivalent standard of data protection legislation throughout the Community. The Commission's objective is to ensure that national rules will not be used as barriers to the use of information networks throughout the Community (PL&B December '89 p.7).

The first draft directive concerns general principles, and was prepared by Directorate-General III (internal market).

The second covers the protection of personal data and privacy in the context of public digital telecommunications networks, prepared by Directorate-General XIII (telecommunications, information industries and innovation).

This report will cover only the first proposal, looking at the Commission's objectives; why the Commission is acting now; the current position regarding data protection within the Community; the main provisions of the draft directive; and the likely timetable for Community action.\*

### Objectives

The Commission explains the aims of this initiative as "establishing an equivalent, high level of protection in all the Member States of the Community in order to remove the obstacles to the data exchanges that are necessary if the internal market is to function." This protection includes common rights of data subjects, data quality, and the setting up of a Working Party on the Protection of Personal Data to advise the Commission on data protection issues. The proposal covers the private sector and the parts of the public sector covered by Community law, for example, excluding intelligence agencies.

Put simply, the aim of the proposal is that individuals within the Community will enjoy an equivalent high level of protection concerning data on them so that Member States will no longer be able to restrict the flow of such data in the Community on grounds of protecting data subjects.

---

\* Ensuring Compliance with the Data Protection Act:

Complaints, Investigations, Audits, Prosecutions

This Privacy Laws & Business conference features a session on the EC draft directive on data protection which will be discussed by its co-author, Ulla Ihnen. The conference will be held on 11-13 September, at Cambridge, England. For further information, contact PL & B. Papers will be available after the conference.

### Why is the Commission acting now?

The European Parliament has passed resolutions urging the Commission into action on data protection since 1976. The Commission itself adopted a Recommendation in July 1981 that the Member States should ratify the 1981 Council of Europe Convention on data protection by the end of 1982. That call by the Commission for Member States to act had little effect, as Belgium, Italy, Greece, Portugal and Spain still have no domestic legislation.

However, the Commission, has not ignored the issue. Directorate-General XIII has for some years convened a twice yearly Legal Advisory Board. This is to help it prepare opinions on legal aspects of its information services market programme, IMPACT. The work includes data protection and others, such as: intellectual property protection, computer related crime, liability of information service providers, authentication of electronic transactions and confidentiality of database searches. Throughout the 1980's, the Community has maintained regular liaison with the Council of Europe and the International Conference of Data Protection Commissioners.

The impetus for action now is due to the drive to accomplish a single market. The European Council of 8th and 9th December 1989 emphasized the need for "the protection of individuals with regard to the use of personalized data banks" in the context of measures to promote the free movement of persons.

### Diffuse national data protection in the Community

At present, seven members of the Community have data protection laws covering the public and private sectors: Denmark, France, Germany, Ireland, Luxembourg, the Netherlands and the United Kingdom. Guernsey, Isle of Man and Jersey also have their own Data Protection Acts.

However, the national laws differ in their coverage of several important points, such as:

1. manual data files
2. the protection of legal persons
3. legal procedures required before files may be created
4. the extent of the duty to notify a Data Protection Authority
5. giving information to individuals at the time data is collected
6. the processing of sensitive data
7. the transfer of data to other countries

The existence of the Council of Europe Convention provides a good basis for Community policy but is not an ideal solution. Some countries have ratified it, which means that they accept its provisions as binding in national law. But the Convention gives some latitude on several points and

there are certain surprising aspects about the countries which have ratified it. In particular, Spain has ratified the Convention but has no domestic law, while the Netherlands has a domestic law but has not yet ratified it!

### The consequences for the Community

The consequences for the Community of varying data protection standards in the member states are that:

1. The lack of and differences between the national laws do not reflect the Community's commitment to the protection of fundamental rights, declared by the European Parliament, the Commission and upheld by the Court of Justice of the European Communities.
2. The flow of personal data is a necessity as far as the establishment and functioning of the internal market is concerned, in particular:
  - to accompany the free movement of goods, persons, services and capital;
  - with the abolition of frontiers, the authorities in one Member State will increasingly be required to perform tasks which are normally the responsibility of those in another, and the flow of data is essential to such co-operation;
  - for scientific co-operation purposes.

Differences in national approaches to legislation may enable a Member State to place barriers in the way of the free flow of data on grounds of inadequate or no protection in the country of origin or destination.

3. These differences of national legislation could distort competition between companies in different Member States.

### What happens now?

In September, the consultative procedure begins with the text going for scrutiny by the Economic and Social Committee and the European Parliament. There is likely to be some opposition from business groups because the directive would enshrine in Community law some of the strongest elements in the various national laws. The directive gives strength to its provisions by describing them as fundamental rights.

Business is likely to lobby against the text in its present form for a host of reasons because, for example:

1. it covers manual records;
2. it gives powers to the Commission to veto the export of personal data to countries outside the Community; and
3. it sets up the Commission as a major decision-maker in the regulation of the information services market.

4. the 12 Member States are an artificially narrow group that excludes important European trading partners, such as Sweden and Switzerland. These countries are members of the Council of Europe which business groups will, no doubt, say is the appropriate forum for data protection issues.

The Council of Europe does, indeed, play a useful role. However, its work is essentially inter-governmental rather than supra-national, which means that it moves slowly by consensus, working through its Consultative Committee. Secondly, its work tends to result in well respected recommendations, rather than a hard hitting enforceable directive, which the Commission has just produced.

This draft directive is ambitious and carefully crafted. If it is adopted by the Council of Ministers in its present form, it will have a profound impact on companies' management of personal data both inside the Community and in exporting data outside the Community. Its provisions will require strengthening of existing national data protection laws, as well as much faster momentum towards legislation than is now apparent in Italy, Greece, Portugal and Spain.