

10 QUESTIONS AND ANSWERS ON THE EUROPEAN COMMUNITY DRAFT DIRECTIVE

The following questions and answers emerged from the European Community session at our annual conference in September with the draft directive's co-author Ulla Ihnen. I then repeated the questions at the European Community's Directorate-General 13 Legal Advisory Board (October 29/30th). The points below summarise the answers given by her and D-G 13's Serge Lustac, Deputy Head of the Information Services Policy Unit, chairman of the session in Luxembourg. Lustac made it clear that some points might need to be changed or clarified as a result of consultations with the European Parliament and the Economic and Social Committee.

The questions and answers would be best understood by referring to the final text of the European Community (EC) data protection draft directive (PL&B August 1990 p.11) distributed with this issue of PL&B.

Manual files

1. Will everyone holding structured manual files have to register with their national Data Protection Authority? (Article 2)

Name-linked manual files will need to be registered with a national Data Protection Authority only when such files are transferred to a third party.

2. With new techniques such as increasingly powerful data bases and scanners, unstructured manual records could more easily become structured, and, therefore, would come within the scope of the directive.

A decision on whether manual records come within the scope of the directive depends both on whether they are structured and on the intention of the person who controls the records. In practice, this could present a difficulty for the future. This kind of definitional difficulty has led some Data Protection Authorities to favour a global definition of the EC directive covering all manual files.

Data security

3. How is it envisaged that Data Protection Authorities will monitor data controllers' standards of data security? Who will arbitrate on disagreements? For example, if the national authorities demand detailed documentation on data security management, an organization's security could be endangered, particularly in countries, such as the Netherlands and France, with a law on a right of access to government information. (Article 18)

This point has not been specified or worked out at present. Clearly, the draft directive aims at a high standard of data security to ensure respect for confidentiality. There will be a need to take into account the circumstances of individual users and the type of data they are processing. Where standards exist, the national Data Protection Authorities may be able to give advice on implementing them. However, it is not for the national Data Protection Authorities to carry out computer audits.

Transborder data flows

4. In which circumstances would the Commission negotiate with third countries (outside the European Community) on transfers of personal data there from EC member states? Would there be a requirement to seek permission and, therefore, a negotiation for every case? (Article 24)

The Commission's guiding principle is that there should be export of name-linked data from the European Community only if there is an adequate level of data protection in a third country. The purpose of the negotiation would be to facilitate trade with the European Community while at the same time trying to ensure an "adequate" level of data protection in the recipient country.

The Commission would not want to negotiate on personal data exports in every case. The Commission would take a decision once for each country. A policy of individual approvals for each case would require a huge bureaucracy and would be impractical. The Commission's preferred course would be for countries outside the Community to ratify the Council of Europe Convention. The Convention requires a stricter standard for non-contracting countries - that they should have a law "equivalent" to its standards. On the other hand, the EC draft directive is stricter than the Convention in some respects.

Negotiating rights on such international trade issues are given to the Commission by Article 113 of the Treaty of Rome. Of course, negotiations take time. In the meantime, national Data Protection Authorities can take appropriate measures under national law.

Codes of Conduct

5. Do codes of conduct need statutory backing? (Article 20)

Yes! The principles in the draft directive should be followed by all sectors in the member states. However, it is not obligatory for a code itself to become statutory. There are fields, for example, medical ethics, which are difficult to regulate on a statutory basis. In such cases, there is a need for additional sectoral rules to complement the EC draft directive. In the first instance, the Commission needs to see whether professional codes exist, and if so, what they cover and how effective they are.

Codes of practice are known in the UK, the Netherlands and Ireland. How will they work elsewhere? The Commission will be guided by the Working Party and the Advisory Committee established by the draft directive (Articles 27, 28, 30).

Consent

6. Why is the standard of data subjects' consent for the lawful processing of personal data stricter in the EC draft directive than in the Council of Europe's Convention and Recommendation on Direct Marketing, when the latter took two or three years to negotiate and agree? (Article 8)

The Council of Europe Convention was adopted some ten years ago and it now needs updating. The European Community works in close cooperation with the Council of Europe but need not be restricted by specific standards achieved by the Convention or its Recommendations. The EC should not lag behind the latest national data protection laws.

Law applicable

7. When personal data is entered into a terminal in one country for immediate transmission into a computer in another EC country which does not have a data protection law, how does the draft directive apply? (Article 4.1)

EC law applies anyway. However, this case is a problem for a database distributed in several EC countries, some with and some without data protection laws.

8. The EC directive need not apply when a file controller consults a file located in a non-member state whose law does not provide an adequate level of protection, on condition that "such use is only sporadic." (Article 4.2)

There was no specific guidance on how "sporadic" is likely to be interpreted.

Data Protection Authority's powers to check public sector files

9. The draft directive's provision for giving national Data Protection Authorities powers to carry out supervisory checks on a range of public sector files, including national security and defence, and criminal proceedings, goes beyond current United Kingdom law and also seems to go beyond EC competence. (Article 15.2)

The Commission is asking member states to voluntarily give the European Community competence in these sectors for data protection purposes. National secret services will remain subject to national competence. There will be difficult cases which require further attention, such as the passing of information on suspected terrorists from the police to oil companies operating sea drilling platforms, or cases of economic spies. In both cases, a data subject's rights under the draft directive are likely to be restricted.

National law and European Community law

10. Will individuals retain a right of appeal to a national constitutional court on data protection issues?

Yes. National law can be stricter than European Community law. But the EC directive would apply when data is exported. There cannot be a too rigid framework. The European Commission must allow some flexibility at the national level.