

BOOKENDS

Transborder Flow of Personal Data within the EC by Adriana C.M. Nugter

The sub-title gives an insight into the scope of this book: "A comparative analysis of the privacy statutes of the Federal Republic of Germany, France, the United Kingdom and the Netherlands and their impact on the private sector." But, in fact, it is much more ambitious. This substantial book (430 pages) will be useful to anyone who wants a detailed comparative analysis and understanding of the national legislation in these countries, in addition to the transborder data flows aspects.

Dr. Nugter has turned her PhD. thesis into a book now edited for a wider audience. Her objective, as stated in the preface, is to study "two conflicting values.... the protection of the privacy of data subjects..(and) the advantages of new technologies." She hopes that this book will "stand witness to the necessity of Community action" to reconcile "the establishment of the Common Market and the needs of the European citizen."

Has a doctoral thesis ever had such a speedy response from the European Commission? Within three months of completing her work, the Commission published a comprehensive data protection draft directive responding to the substance of her proposals!

Her approach is highly structured: it aims to make "an inventory" of the differences between the data protection laws of the four countries: Germany, France, the UK and the Netherlands. These countries have been chosen because they share the same characteristics of covering only natural persons and they have close trading relations. However, Dr. Nugter recognizes major differences, such as their different legal systems. In addition, Germany's law was passed in 1977, and France's law in 1978, while the UK's dates from 1984 and the Netherlands' from 1988 with the latter group learning from the experience of their predecessors. The study concentrates on the private sector, automated data, and data transferred from one party to another.

The first two chapters cover the framework and the concepts. Chapters 3 to 6 are devoted to each of these national laws following a uniform scheme:

- (a) purpose and application of the statute - and its relationship to other relevant legislation
- (b) subjects - data subjects, data users and data bureaux: their rights and obligations
- (c) object - that which is regulated by the statute eg. the processing of personal data, or the use of personal data files
- (d) rights and obligations - related to the use of personal data by private enterprises
- (e) supervisory authorities - and their powers
- (f) enforcement - remedies and appeal procedures

Chapter 7 covers the transborder data flow rules of each of the countries - their territorial scope, export and import rules. The book has many helpful comments throughout, summarising the findings and illuminating the theme. For example, Chapter 8 examines the usefulness of the Council of Europe Convention as an instrument to safeguard the free flow of information in a European personal data market, and at the same time protect individuals' privacy when data on them is processed and/or used internationally. It concludes that even if all European Community member states ratify the Convention, three major problems would remain unresolved:

1. "the different territorial scope of each Act, leading to situations in which two or more acts or no act at all is applicable;
2. the existence of divergent national rules with regard to processing; and
3. the existence of divergent rules with regard to the protection of the data subject."

Chapter 9 deals with European Community law applicable to the transborder data flows of automated personal information in the private sector. Dr. Nugter argues that these data flows should be subject to the Community regime applicable to services, which provide criteria to test the legitimacy of the differences between national legislation.

Chapter 10 examines the merits and implications of three options which have been suggested for resolving the tension between free flow and privacy principles:

1. The member states of the European Communities ratifying the Council of Europe Convention
2. The use of contractual agreements where the recipient country does not have equivalent or adequate national legislation
3. European Community harmonization of national legislation

Dr. Nugter finishes with two important observations. Her study shows:

* "no evidence that protectionist considerations favouring domestic data processing industries have influenced the implementation of national privacy statutes as many, especially American, writers have feared;"

* "the need to protect privacy in an adequate fashion grows ever stronger in the light of technological developments and the use the private sector is making of these new technologies."

Readers should find useful more than 100 pages of appendices. They include the text of the Council of Europe Convention, but not the Explanatory Memorandum, in English; Germany's Bundesdatenschutzgesetz 1977 in German (the 1990 amendments were enacted after the book was completed); France's Loi Relative à L'Informatique, aux Fichiers et aux Libertés 1978 in French; the UK's Data Protection Act 1984 in English; and the Netherlands' Wet Persoonsregistraties in English. A bibliography and an index follow.

This study is packed with reliable analysis which will help those grappling with the likely impact on national legislation of the European Community data protection draft directive. It is complementary to Professor David Flaherty's *Protecting Privacy in Surveillance Societies* (PL&B December '89 p.29). Nugter analyses the national laws, the Council of Europe Convention, the EC provisions and transborder data flows, while Flaherty concentrates more on the work of the regulatory agencies in enforcing the national legislation. In any case, their only common countries are France and Germany, with Flaherty also covering Sweden, Canada and the USA.

Her style is thorough and analytical throughout with statements supported by references in footnotes and sections clearly signposted in the contents pages. Where possible, she has summarized her comparative analysis with helpful tables. This book may be more used as a reference work than read as a whole. It is better suited to lawyers or academics with a serious interest in the subject than for busy managers who deal with data protection as part or even all of their job. While in no way invalidating this work, a revised edition will be desirable once the final shape of the European Community's data protection draft directive becomes clearer.

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1992 And All That: Civil Liberties in the Balance by Michael Spencer

1992 And All That examines in 179 pages a rather neglected aspect of the Single European Market, human rights and civil liberties within the Community. It argues that with the emphasis on the economic benefits of closer integration, there is a danger that "some groups in society may actually be disadvantaged unless proper safeguards are put in place." It examines both the dangers and the benefits for a wide range of civil liberties and lays the groundwork for the establishment of an effective lobby for civil rights in the institutions of the European Community. Restrained in tone, well-documented in its approach, this book acts as an agenda for action for all those concerned with civil rights in the Community.

A result of the 1992 process could be adverse effects on "a genuine refugee trying to enter Europe; an immigrant resident in Europe seeking to cross internal borders.....a black or ethnic minority citizen of an EC state, harassed by the police as a suspected illegal immigrant; or anyone whose name has got into a computerised government or police file as a political activist." The book is not all pessimistic in tone, as it also discovers benefits in the Single Market process. As the book was being completed just as details were emerging of the European Commission's data protection draft directive, it is necessarily sketchy on this proposal.

Chapter 1 covers the working of the European Community, the Council of Europe and also spotlights the little known inter-government committees of EC ministers and officials which "meet in secret - outside the framework of Community institutions - The Trevi Group, the Working Group on Immigration,

and the cryptically named Co-ordinators' Group." Spencer argues that the European Parliament has too little control over Community decision-making resulting in a "democratic deficit" and that "civil liberties demand a more democratic and accountable political structure."

Chapter 2, entitled, Fortress Europe, examines border controls and the introduction of the Schengen Agreement on the freer movement of people between France, Germany and the Benelux countries, and harmonisation of policies on immigration, drugs and firearms. The Agreement includes an automated Schengen Information System on "wanted or missing persons, vehicles and other items stolen or missing, non-EC nationals to be refused admission at borders, persons to be extradited or expelled, and persons or vehicles under covert surveillance." Fortunately, the Data Protection Authorities have asserted themselves and have won an influence over the management of the system which is being based in Strasbourg, France.

Chapter 3, Information and Big Brother, deals with data protection and covers the sharing of personal information between government departments within and between countries. It examines the role of Data Protection Authorities and how their efforts might be better co-ordinated in an EC context. There is a survey of the use of identity cards across the Community which deflates some commonly held assumptions about them, for example, that "they are already accepted across most of Europe and that the law-abiding individual has nothing to fear from them."

Chapter 4, Policing Europe, discusses the future cross-border role of national police forces and co-operation in the field of criminal justice. Chapter 5, Social Europe, looks at the Social Charter and workers' councils.

Chapter 6, Human Rights for All, shows how human rights have been left in a secondary position at all stages in the development of the Community. There has been some progress on women's rights in the context of equal pay. The Parliament, Council and Commission signed a Joint Declaration on human rights and fundamental freedoms in 1977, and on racism and xenophobia in 1986. The preamble to the Single European Act draws attention to the European Convention on Human Rights and the European Social Charter but avoids giving them legal status. Spencer looks at two options for strengthening EC civil rights: the introduction of a Community Bill of Rights; and Community Accession to the European Convention on Human Rights.

Chapter 7, the Case for a Civil Liberties Lobby, identifies issues of concern and makes recommendations, including avoiding the misuse of sensitive data and enforcement of Community-wide data protection standards. The appendices give sources of information (including Privacy Laws and Business) plus a Guide to Euro-Lobbying.

This book persuasively draws together the evidence that civil rights have been relatively neglected in the development of the Community. It surely implies a difficult path ahead for the strong fundamental rights platform of the current data protection draft directive.

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