COUNCIL OF EUROPE CONVENTION LIMITED IN ACHIEVING EQUIVALENT LAWS

When the EC draft directive was published last year, industry's first reaction was to urge its abandonment in favour of the Council of Europe Convention, backed if necessary by a contract between the exporting and importing parties (see page 6). Here, Dr. Adriana C M Nugter shows that relying on the Council of Europe Convention is an inadequate basis for safeguarding data protection rights or even giving companies a consistent regulatory framework.

The European Commission's proposals for two directives in the area of data protection, as presented last year, have raised a storm of protest with industry both inside and outside Europe. In general, industry considers the draft directives as being too stringent and too bureaucratic (see page 3).

Nevertheless, no-one has denied the Commission's starting point that the protection of privacy is a value worth taking into account and as such needs to be reconciled with the free flow of information, and that the latter is a prerequisite for the development of the European internal market. But opponents prefer the adoption of the Council of Europe Convention of 1981, which has already been signed by most and ratified by half of the European Community member states. The Convention is, to date, the only international agreement specifically devoted to privacy protection.

The ratification of the Convention by all EC member states would, at least theoretically, guarantee a free flow of personal data and an equivalent minimum level of data protection for the data subjects within the EC as a consequence of its Article 12. Accordingly, the establishment of the European internal market would no longer be endangered by the existence of national laws regulating the transborder flow of data in different ways.

However, the Council of Europe's *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* fails to safeguard privacy interests and a free flow of information at the same time, because:

1. not all personal data is covered;
2. no equivalent level of data protection is established because states are left free in the way they implement the Convention;
3. the Convention departs from the so-called minimum approach, allowing states to grant a wider measure of protection than the level stipulated in the Convention;
4. import restrictions are not prohibited;
5. the diverging national regimes may be contrary to EC law;
6. the territorial application of the national laws is not harmonised.

In fact, if industry seriously tried to take into account the existing diverging national privacy requirements in their day-to-day business operations, they would soon come to the conclusion that the absence of a harmonised EC approach to data protection costs them a great deal of extra money. As a result, it would not only be data subjects but also data users who would gain by the same level of data protection throughout the EC.

The ratification of the Convention by all EC member states, although certainly a step forward, would not be an adequate way to establish a free and balanced flow of personal data within the Single European Market. All these problems find their source in the minimal approach to harmonization that has been explicitly chosen by the Council of Europe. Only harmonization at the highest possible level can overcome these problems.

This report by Dr. Adriana C M Nugter is an edited version of her presentation at July's *Privacy Laws & Business 4th Annual Conference* in Cambridge. Dr Nugter is the author of *Transborder Flow of Personal Data Within the EC* (PL&B no. 16 p .23).