

BATTLE FOR EC DRAFT DIRECTIVE CONTINUES BUT REVISED VERSION ON HORIZON

A year after the EC data protection draft directive's first public presentation at the Privacy Laws & Business 3rd Annual Conference in September last year, the proposal has been discussed by the EC's consultative bodies. The proposal has received many, often contradictory, criticisms but remains in its original form until after the European Parliament's plenary debate around the end of the year. Then it will be revised by the Commission. The second reading and final adoption by the European Parliament might take place before the end of 1992. Ulla Ihnen, co-author of the text, analyses the response to the draft directive.

The proposal is still a proposal (PL&B August '90 p.11, October '90 p.5). It was adopted by the European Commission in July 1990, and sent from there to the European Parliament, the Council, and the Social and Economic Committee.

Is a directive necessary at all?

The overall response to the general directive has been positive; everybody who has commented at all has welcomed the initiative taken by the Commission. This is a very good starting point because it now seems obvious that a European directive is necessary in order to safeguard the flow of data (see page 2).

This has not always been the case. The earliest responses requested that the Commission should issue a directive asking only for ratification of the Council of Europe Convention. But as the details came under closer scrutiny, this opinion was heard less and less. These dissenters have surely come to realise that something has to be done in the field of safeguarding the free flow of data, and that the Convention alone is an unsuitable instrument as far as the single market is concerned. Safeguarding data flows is one of the main objectives of the directive (Art. 1.2).

The Council

The Council has held preliminary discussions at working group level under the Luxembourg Presidency, chaired by René Faber, President of the Luxembourg Data Protection Commission and met four times in the January to June period. In July, the Netherlands Presidency took over and the working group is currently chaired by Peter Hustinx, the President of the Netherlands Data Protection Authority. The working group has examined the proposal but has not yet published its position.

The Data Protection Authorities

The EC Data Protection Commissioners have organised working groups - one focussing on the general directive, chaired by Professor Dr. Spiro Simitis, Hesse Data Protection Commissioner, Germany. Another working group is on telecommunications and media concentrating on the Integrated Services Digital Network (ISDN) directive and is chaired by Dr. Hansjürgen Gartska, Berlin Commissioner.

Vice-President Dr. Martin Bangemann has met the group in Brussels to discuss the general directive. Belgium, although it has no data protection law, is represented at these meetings.

The reaction from all the authorities has been favourable, welcoming a legally binding directive, although they regret that the EC has reacted late to a worsening situation of divergent or even non-existent national data protection legislation.

The file concept: The Commissioners consider that the directive should be more concerned with the processing of *personal data* rather than with the processing of personal data contained in data files. This means deletion of the file concept.

The distinction between public and private: The working group would like the distinction between public and private sector legislation removed, with the objective of achieving a standard of protection common to both sectors, and applying the *finality principle* to both.

Substituting equivalent for adequate protection: It was agreed that references to *adequate protection* should be altered to *equivalent protection* both on transfers of personal data outside the EC member states (Art. 24) and throughout the directive. Doubts remain over Art. 24's export procedures.

The working party: The DPA's want the working party to elect a chairman rather than have the position appointed by the Commission. The working party should be consulted by the Commission on sectoral codes (Art. 20), data export decisions (Art. 24.4 and Art. 25.2) and other measures proposed by the Commission to apply the directive to specific sectors (Art. 29).

The Economic and Social Committee

The key issue for this committee was that protection must be provided for all processing of personal data with a guarantee that this protection is strictly respected by all member states, institutions, public and private sector companies and organisations.

Subsequently, exchanges of data must be permitted and developed as they are vital to a dynamic Community in areas, such as trade, industry, technology, social life and culture.

The committee stressed:

Public sector prior examination: The processing of personal data by the public sector should be explicitly subject to prior examination by independent Data Protection Authorities - these obligations must be equivalent in all member states.

An independent European DPA along the lines of the national authorities should be responsible for monitoring the implementation of the directive's principles in certain sectors or personal data processing categories.

Need to maintain high level protection: The committee criticised a lowering of levels of protection in some member states with existing legislation. It expressed surprise that the obligations placed on the private sector appear greater than those on the public sector, for example, notification requirements for the

private sector but not communication between organizations within the public sector.

The European Parliament

Five committees have prepared opinions on the draft directive. The lead has been taken by the Committee on Legal Affairs and Citizen's Rights. The other four, Budget; Energy Research and Technology; Environment, Public Health and Consumer Protection have all voted on the reports drawn up by their rapporteurs and have tabled amendments. These are now being incorporated into a consolidated new report, by the Committee on Legal Affairs which is preparing a report for the European Parliament's plenary session.

There is a very wide range of opinions and so it is difficult to give an overview.

Amendments have been tabled dealing with: definitions, scope, abolition of loopholes, data transfer to third countries, codes of conduct, data on criminal convictions to be allowed to be used in the private sector and several of the issues which have been referred to by other consultative bodies. The rapporteur of the Committee on Legal Affairs is attempting to reduce 172 proposed amendments to a more manageable number.

Business Reservations

There has been strong lobbying on the general directive from business. Representations have been made from the direct marketing and mail order industries, advertisers, press and media, banks and financial institutions, credit reference agencies, data processors and associations like employer's organisations and trade and business associations.

Most comments do not question the need for a directive, but have strong reservations about the drafted provisions. Most accept the idea that there should be some legal safeguards for the protection of the individual.

The main argument in the business community is that it does not strike the right balance between the needs of industry and the protection of individuals. In particular:

1. it is perceived as *too bureaucratic*, costly and burdensome
2. it has the most *restrictive elements of national legislation* and loopholes in the directive will prevent harmonisation
3. the *consent principle is unworkable* in practice, and will inhibit use of data which could benefit data subjects
4. *definitions* of "communication" and "third party" are missing
5. a *differentiation* must be made between processing, communication and use
6. no *obligation to inform* the data subject of a communication should be necessary if the data subject should be aware of the communication
7. the *notification procedure* should be reduced to a minimum
8. industry fears that *profiling* will be absolutely forbidden
9. the directive does not foresee the possibility of limiting *access to data files* in the private sector
10. the prohibition on holding data on *criminal convictions in the private sector* would cause problems
11. *press and the media* are particularly concerned about the derogation clause because it only allows but does not oblige member states to grant them
12. the *data export* provisions are regarded as unworkable
13. there is concern over the application of the directive to *back-up/temporary files*
14. there is concern over restrictions on *credit reference* companies
15. Many comments have requested the availability of an *appeals procedure* against decisions of the DPA's
16. Many requests have been received for a *deletion of the principle of finality* or purpose, although finality and consent are the most important principles underlying this directive.

Consumers' Support

Civil liberties groups, consumer and charitable organisations, have submitted their views, mostly in support. Their main points:

1. the *consent principle* is the single most important factor towards improving the situation for data subjects, although they recognise that it will create more work for data users.
2. protection for *manual files* is welcome
3. there is widespread support for an EC wide development of *mailing preference* type lists
4. *codes of conduct* are supported, if consumer organizations are consulted
5. consumers support *stronger DPA's*
6. consumers support principle but not procedures of Art.24 on *data exports*.

One report received from the UK said: "If all else becomes negotiable, this single principle - of informed consent - would ensure the transparency that consumers require. Its universal adoption could generate significant goodwill from customers, and allay fears and anxieties from data subjects as a whole."

In 1988, *Taking Liberties*, a study carried out by the UK National Consumer Council, showed that an overwhelming majority of people object to information about their financial affairs being passed on to other organisations without their consent. They particularly object when such information, which gives an indication of people's habits, behaviour, level of expenditure, income etc. is exploited for commercial purposes such as by direct mailings and cross selling of lists. The Commission recognises this public disquiet and is adopting an approach consistent with these findings.

This report is an edited version of a presentation by Ulla Ihnen, Expert, D-G 3, The Commission of the EC, at July's *Privacy Laws & Business 4th Annual Conference* in Cambridge.