

## **EC REVISED DIRECTIVE OFFERS DATA USERS CONCESSIONS AND HOLDS LINE ON PRIVACY**

*The long awaited revised text of the EC Draft Directive has now been published in the Official Journal (OJ C311) on 27th November 1992 following the Commission's adoption of the text on October 15th (PL&B Oct. '92 p.2). In the following two reports, Bojana Perovic offers a detailed analysis of the new text, and a roadmap guide (see p.9).*

Reaction from business groups and civil liberties groups (see box) has, so far, been mainly positive. They find the text considerably improved. The European

Parliament's amendments have been taken into account and in many cases inserted into the new text of the Directive. Not only is the revised Directive better structured and presented, clearer and more precise, but also it appears less rigid and bureaucratic, allowing Member States more space for manoeuvre.

In any event, as stated in the Explanatory Memorandum and formally demonstrated by the change of title - "*Proposal for a Council Directive on the protection of individuals in relation to the processing of personal data and on the free movement of such data*" - the intention of the Commission is clear. It is attempting to strike a fine balance between the right to privacy and the free flow of data, thus satisfying equally the interests of data subjects and those of data users. It is due to this

### **BUSINESS AND CIVIL RIGHTS GROUP WELCOME REDRAFT AND PRESS FOR MORE..... IN OPPOSITE DIRECTIONS**

The Federation of European Direct Marketing (FEDIM) has stated that it "welcomes the Commission's initiative in proposing the Directive," noting that the new draft takes account of criticisms made by the direct marketing industry. "In particular, it has clarified the provision determining *when consent is not required* for processing done in pursuit of a legitimate interest."

However, there are still provisions in the new draft that would pose serious difficulties for those engaged in direct marketing, says FEDIM. Specifically, starting with a sectoral briefing session with the Commission in November, FEDIM is pressing for the deletion of Article 15.3 which currently reads: "The controller must ensure that the opportunity to have data erased without cost has been expressly offered to a data subject before personal data are disclosed to third parties or used on their behalf for the purposes of marketing by mail."

Liberty (the UK's leading civil rights organization) has welcome the revised draft directive as a further overall improvement to the original draft. It considers that the European Commission has responded to amendments suggested by the European Parliament and other bodies, to an extent that would be most improbable during passage of a bill through the UK Parliament. Liberty particularly endorses the following proposals as a major step toward giving greater recognition and force to the right of privacy:

1. protection of *manual files*
2. restrictions on holding and use of *sensitive data*
3. stronger rights of *subject access* with a reserve power for the national supervisory authority to check closed files on a person's behalf
4. the possibility (if member states agree to the Resolution in the original 1990 proposal) to apply the same rules to files held by *intelligence, police and immigration authorities*.

Liberty is, nevertheless, concerned about some remaining gaps in data protection. The most obvious is a failure to limit the exchange of personal data between government departments, including the security services, and the failure to specify restrictions on the use of Personal Identification Numbers.

balancing act that the most important changes have taken place. The whole regime has been made more flexible, whilst preserving its aims.

### **Definitions (Art. 2)**

There has been both clarification of existing definitions of terminology used in the Directive and addition of new necessary concepts and definitions of terms such as: *the data subject's consent, third party and processor* (see p.6).

Further, in respect of automated processing, the concept of *file* has been abandoned in favour of the term *personal data* which is more appropriate to modern data processing operations. However, in the case of manual processing, the term *file* has been preserved to include in the scope of the Directive any structured set of data which facilitates access and use of personal data (Art. 2(c) & Art. 3.1).

### **Scope and exemptions (Art. 3)**

The revised Directive clearly spells out that it covers both automated processing, whether or not contained in a file, and manual processing, as long as the latter forms a part of a file. However, the regime for manual files is less strict in relation to the notification requirements, since manual files are not governed by these provisions. The Directive leaves to Member States the power to determine the conditions under which the provisions as to notification, simplification and exemption, apply to manual data (Art. 20).

The Directive remains unchanged in excluding from its scope processing which falls outside Community law and processing for purely private and personal purposes.

However, the previous exemption for non-profit making bodies, of a political, religious, cultural or trade union nature, has been included elsewhere in the Directive. Such bodies benefit from an exception to the general prohibition against processing sensitive data and the obligation to notify (Art. 8(2)).

### **Public and private sectors**

A uniform legal regime has been provided for processing operations in both of the above

sectors. However, in practice, different exceptions will be relevant to each sector.

### **Grounds for processing - the consent rule (Art. 7)**

While leaving unchanged the principles relating to data quality (Art. 6), the revised text has included under a new heading the preconditions to be fulfilled for the lawful processing of personal data. In this way, the structure of the Directive has been clarified and made easier to follow.

The troubling consent rule is listed among these conditions. It is defined (Art. 2) as any freely given and specific express indication of agreement by the data subject to the processing of his personal data, where he is informed of its purposes, categories of data, disclosures, the controller's identity etc. Thus, unlike the first draft with its vague notion of the consent rule, the revised text makes it clear that, while the data subject's consent has to be informed, freely given and specific, it need not be in written form. When viewed together with other conditions for lawful processing contained in the same article, the issue of consent should, hopefully, cease to be a point of disagreement. In this respect, the revised provision should allow the businesses concerned scope to find the most appropriate way to obtain the necessary consent, in particular, by way of an opt-out clause.

Further, the other conditions for lawful processing have to some extent been clarified and amended. Thus, processing carried out preliminary to entering into a contract is included, as well as processing in the general interest, or the legitimate interest of the controller or a third party, unless the interests of the data subject prevail.

### **Data subject's rights (Art. 10-15)**

In its positive attempt to balance the competing principles of, on the one hand, the right of privacy and, on the other hand, the free flow of data, the revised Directive has been careful in no way to restrict the rights of the data subject. Indeed, the present text has,

in an even more precise, clear and structured way, set out these rights and, where appropriate, the exceptions to them.

Thus, in relation to disclosure of personal data to a third party, there is sufficient protection for the data subject's rights and adequate safeguards for the controller against impractical requirements. The rule requiring the controller to inform the data subject of the disclosure at an appropriate time and, in any event, no later than the first disclosure, may be more flexible for the controller.

Moreover, the data subject's right of access is further guaranteed by the new provision which gives a right to the data subject not to be forced to exercise his right of access, unless the third party's request is based on national or Community law (Art 13.2).

Finally, the data subject has been granted a new right to be expressly given an opportunity to have his data erased before it is disclosed to third parties, or used on their behalf, for the purpose of marketing by mail (Art 15.3).

#### **Profiling (Art. 16)**

The revised Directive has retained the prohibition on both administrative and private sector decisions based solely on automated processing defining a personality profile and adversely affecting the data subject. However, the Commission, has, after heavy criticism of the previous draft, brought forward necessary clarification as to the limited situations which are covered by the prohibition. Moreover, it has listed the exceptions to the general prohibition of profiling, subject to suitable safeguard measures.

#### **Notification (Art. 18-21)**

The provisions on notification (registration) have also been made more precise and less cumbersome.

On one hand, there is now in principle a general obligation for the controller to notify the supervisory authority before the processing takes place. Further, provision is made as to the information to be given in the notification. Finally in relation to notified processing

operations which pose specific risks to the rights of individuals, the supervisory authority has been given additional powers of prior review and authorization (Arts 18.4 and 18.5).

On the other hand, the burdensome requirements in the previous draft have been "lightened" and therefore so has the position of the controller. The most significant innovation is that Member States have a duty to provide in their national legislation for exemption or simplification of the notification requirements. This is applicable to certain categories of processing which do not adversely affect the rights of data subjects. The Directive explicitly gives several examples of these categories of processing: the production of correspondence or papers; the satisfaction of legal, accounting, tax or social security duties and the consultation of documentation services accessible to the public (Art 19.1).

#### **Transborder data flows to third countries (Art. 26 & 27)**

While the main rule prohibiting transfers of data to a third country not having an adequate level of protection has remained unchanged, significant exceptions have been provided for. Thus, the transfer will be allowed if:

- the data subject has consented to the proposed transfer (requiring therefore that the data subject must be informed of the potential transfer beforehand);
- it is necessary for the performance of a contract between the data subject and the principal;
- it is necessary on important public interest grounds;
- it is necessary in order to protect the vital interests of the data subject.

Furthermore, necessary clarification of how to assess an adequate level of protection in the receiving country has been provided by the Commission.

The regulation of data exports is planned to work by *member states deciding when to veto personal data transfers outside the Community*. They would report each case to the

Commission which could then choose to negotiate with the country outside the Community to avoid harming interests of the Community or of a member state. In this way, Commission would develop a general policy on each trading partner based on cases on which it became informed.

#### **National and Community codes of conduct (Art. 28 & 29)**

Envisaging the drawing up of codes of conduct at both national and Community level, the Commission has given greater latitude to these flexible instruments to provide supplemental, tailor-made provisions for specific sectors, and has thus recognised the value of this trend in modern data protection legislation. Such codes would be *reviewed* by national supervisory authorities but they are not required to *approve* them. These new provisions will undoubtedly be welcomed by European businesses.

#### **Sensitive data (Art. 8)**

The revised Directive deals far more precisely with the question of special categories of data, recognizing the fact that, indeed, different categories of data deserve different legal treatment.

The exceptions to the general prohibition against processing sensitive data are clearly set out and, apart from the exception for non-profit-making bodies (see p. 2 under heading Scope and exemptions), they include cases where the data subject has consented in writing and where there is manifestly no risk of infringement of privacy.

Also, a more specific provision is envisaged for data on criminal convictions, which can be held only by judicial and law-enforcement authorities and by persons directly concerned with those convictions. However, Member States are given the power to enact exemptions to this rule.

Finally, it is left to the Member States to provide, by way of national legislation, the conditions for the use of national identification numbers and any other similar systems.

#### **The press and media derogation (Art. 9)**

It is now an obligation for Member States to derogate from the Directive envisaging a specific, less restrictive legal regime for processing within the press and media. The Directive has thus recognized the need to balance the right to privacy with the freedom of expression.

#### **Supervisory authority (Art. 30)**

The powers of the national supervisory authority are more clearly set out, adding the power to bring an *action before the courts* for an infringement of the national provisions implementing the Directive.

#### **Commitology - Working Party (Art. 31 & 32) and Advisory Committee (Art. 34)**

The hopes of creating a supranational, independent European body to supervise data protection issues, voiced by interested and competent parties, particularly Data Protection Authorities, in the Member States in the discussions following the first draft of this Directive, have not been fulfilled by the Commission. Little has been changed in relation to the composition, procedure and tasks of the Working Party.

The Commission's representative will no longer automatically assume the role of chairman, but the latter will be elected for a renewable term of two years by all the members of the Working Party.

The right to give an opinion on Community codes of conduct has been added to the list of tasks of the Working Party. In that respect, its purely advisory status has remained unchanged. The provision that the Commission will have to additionally inform the European Parliament and the Council on action taken pursuant to the Working Party's opinions and recommendations should increase public awareness of EC data protection policies.

The Commission has retained the system of two advisory bodies, the Working Party to represent the national supervisory bodies, and

[continued on p. 18]