HOW THE EUROPEAN PARLIAMENT VOTED ON THE EC DIRECTIVE - AND WHY

The European Parliament, at its debate on February 10th 1992, was unanimous in its praise for the work of the Legal Affairs and Citizens' Rights Committee. Geoffrey Hoon, the Member of the European Parliament for Derbyshire, UK, as the committee's rapporteur, introduced his report in the debate.

He said that the committee welcomed the Commission's efforts as it was "clearly of enormous benefit....that the law and practice relating to data should be consistent throughout the European Community's single market." However, he challenged the Commission's wisdom on going for "a very high level of production - a level consistent with the toughest rules anywhere in the European Community." His committee's report aimed at a "sensible balance between the effective protection of the privacy of individuals and the practical requirements of a modern world based on the collection and processing of data."

Here, he explains his committee's report and answers several of the most pressing questions.

The Commission's high level approach

The reason for such intensive lobbying and the huge number of representations regarding the draft directive on data protection is due to the comprehensive nature of the Commission's legislation. Not only is the Commission seeking to harmonize national data protection rules, but it is, at the same time, harmonizing them at a high level of protection. The latter has led to many difficulties and to numerous objections, in particular from the EC member states without data protection laws, and from all those member states which have become dependent on using all sorts of data in everyday transactions. Those countries which are most dependent on databases, targetting potential customers, and targetting potential donors to charities are certainly the ones which have reacted most strongly to the Commission's proposals. Indeed, most lobbying has come from the UK.

I do not want to be unduly critical of the Commission's proposal because of all the complexities of the subject and serious drafting problems the Commission has sought to overcome. If we criticize the Commission for being over-ambitious in attempting to establish a high level of protection in the Community, the Commission could equally reproach the European Parliament for not having enough time, nor resources to really understand and tackle this complicated subject.

Parliament seeks overall perspective

Indeed, the European Parliament has adopted a piecemeal approach in its amendments and has tried to concentrate on some of the most controversial issues, such as: *opting-out/opting-in, transfers of data to third countries, details of criminal convictions* etc., without necessarily retaining a proper overview of how our amendments hang together. Thus, as rapporteur, I have to accept the blame that the European Parliament properly deserves for not always having an overall perspective of the various problems that are raised. However, the situation is not assisted by the process of tabling amendments both in the committee and then at the plenary stage.

The amendments were agreed in the European Parliament on 11th March this year, although the final version varies to some extent to the report published by the Legal Committee in January.

The following are the main areas of discussions and problems and the way the European Parliament has tried to resolve them.

"Data" replaces "data file"

The argument behind this change of terminology is that, nowadays, the way data is held is not consistent with the expression "data

file" and, therefore, the simpler term "data" is more appropriate and current.

Providing for uniform rules on public and private sector data

It is sensible, in my opinion, to abandon the distinction in legal rules between these two sectors, not least because across the EC the status of a specific institution, such as a telecommunications company, may vary from one member state to another.

Scope of the directive and exemptions to the scope

Among the numerous exemptions (Art. 3.2), sometimes defined too broadly, the area of media and freedom of the press was a point of strong disagreement with the Commission's proposal. The Commission's approach in Art. 19 of the draft directive to leave the issue of the press to the discretion of member states seems to be fundamentally wrong with regard to the objective of the draft Directive - to harmonize national data protection rules across the Single European Market. It is important to have consistent rules and standards in each and every member state, especially in the light of current developments in the European media (satellite TV, for example). However, one has to admit that the task of striking the right balance is a difficult one.

The conditions for lawful processing of data (Art. 8)

This is probably the area within the Commission's proposal which raised the most disquiet and lobbying. The whole discussion has turned upon the question of the extent to which a data subject has a right to opt-out from or opt-in to lists.

The European Parliament has, on the basis of practical arguments put forward by numerous representations, and contrary to the Commission's proposal, accepted the opt-out system as a mechanism of achieving an individual's consent. In this respect, the European Parliament has amended the original Art. 8 (1) by adding point ca): "the data subject has been given an opportunity to object to the processing and has not done so."

Also, there is a complementary provision in Art. 8 (2) concerning the communication of data and the conditions in which data may be passed from one data user to another. Here, again, the issue is consent and provision of information. The European Parliament has included the new Art. 8 (2a): "The controller of the data shall inform the data subject of the communication of the data including details of the name and the address of the receiver," which, in my opinion, is wrong. I suspect that the Commission will quite like this amendment but a whole group of organizations will find this provision quite terrifying.

Special categories of data, particularly on criminal convictions

The Commission's original proposal was to limit the holding of this particular data to public sector organizations only, which is quite understandable and has the merit of principle. However, bearing in mind that proceedings and details of convictions of the courts in the UK are public and readily available if only someone would obtain it and compile it, there was an interest in certain private sector organizations being able to retain details on criminal convictions. Organizations like credit card companies, banks etc. do have a legitimate interest in holding such data, subject to certain safeguards.

This is why the European Parliament has, in the amended Art. 17(3), (while accepting the principle set by the Commission that data on criminal convictions should be held only by judicial authorities), allowed in appropriate circumstances an authorization by the supervisory authority to certain undertakings to hold such data. In this way, member states would have a wider margin of action to deal with this particular issue in the light of their own recent history and experience.

Data transfers to 3rd countries (Art.24)

By allowing these transfers only in the cases when the receiving country provides an *adequate* level of protection, the draft directive would seriously affect the activities of some organizations, the airline companies, for example. The European Parliament took a more relaxed view that there should be a reserved power to prohibit transfers to prevent damage to data subjects' interests resulting from an inadequate level of protection (Art. 24.1). This means that the possible damage to data subjects' rights arising from such transfers should be taken into account, as well as the fact that the creation of "data havens" should be prevented.

There is a need for monitoring standards elsewhere. If the EC is setting standards and they are emulated throughout the western world, that is not a bad set of standards for other third countries to aim at. It does not mean imposing a "lex Europeana" on the rest of the world. It does mean setting a worthwhile target.

The European Parliament is now awaiting the second, revised text of the draft directive. If the substance remains the same, there would, probably, be no need for the Parliament to change its opinion radically. In that case, the whole package would go to the Council.

ACKNOWLEDGEMENT

Privacy Laws & Business gratefully acknowledges the help of Professor Jos Dumortier, Director of the Interdisciplinary Centre for Law and Information Technology (ICRI) at the University of Leuven, Belgium, for his permission to use the integrated text of the Commission's data protection draft directive and the European Parliament's amendments published in ***Recent Developments in Data Privacy Law: Belgium's Data Protection Bill & the European Draft Directive***, edited by J. Dumortier, published by the Leuven University Press, Krakenstraat 3, B-3000, Leuven, Belgium, 1992. ISBN 90 6186 499 2.

QUESTIONS AND ANSWERS

Lobbying

Is there a better way for trade associations and other interested bodies to contact decision makers to try and influence the course of directives like this?

Geoffrey Hoon - Representations were both welcome and useful and did have an effect. It is unlikely that there has been another directive which has attracted so many comments. Many of them were mutually contradictory. I am not sure that I have been able to do them justice. Some were very late, such as those representing organizations which sample public opinion, and even the Commission officials responsible for the Eurobarometer Survey. Politicians are not experts, and they rely on representations made by organizations.

Is it fair to say that the biggest bulk of lobbying has come from the UK? It can be detrimental to the lobbying efforts, since European opinion is already formed in the sense that it seems it is always the British who are against new initiatives and complain about them. In the direct marketing field, for example, the associations on the continent have not done as much lobbying as the UK ones.

Geoffrey Hoon - It is true that there were representations from interested groups in other member states of the EC. However, they were fewer and less detailed. One of the explanations of such a response from the UK organizations, might be that lobbying, as an art, is much better organized in the UK, where it has been imported from the USA. As for the European Parliament, the opinions and the reactions to this issue are different. There is even a debate in the Rules Committee as to whether lobbying should be permitted. It is unfortunate if my colleagues react adversely to lobbying. My view is that this could be dangerous, since it would deprive us of expert opinion about particular subjects. That is how representative democracy should function.

Manual Data

Much of my organization's data relating to our customers goes back many years. Records written in 1932 were written with no expectation of the European Community Directive of 1992. My understanding of the directive is that it applies retrospectively to manual data. Can you shed any light on how this seemingly perversion of natural justice can be justified?

Geoffrey Hoon - I personally cannot see any logical distinction between manual data and data held in computer files. I really do not understand why the banks in particular have stressed the importance of this distinction so strongly. It may well be an entirely practical consideration on their part but most organizations these days will be looking to computerization even at the lowest level of their operation, and I cannot see why we should create this enormous gap in the legislation by exempting manually held files. I think the distinction could be an arbitrary one. I cannot see any distinction in principle, and I think it makes sense to have all data held subject to the same legislation.

Would you clarify the point about records written many years ago? Is it reasonable for the directive to apply to records written or held from before the directive was adopted?

Geoffrey Hoon - You would have to ask yourself what it would be like to have a set of files on which you then had to decide:

- some were subject to the pre-1994 legislation?
- some subject to the post-1994 legislation and
- what then happens to the bits that you add after 1994 to files that have existed before 1994?

I don't think strictly this is retrospective legislation in that sense. Everyone will know the date at which the legislation comes into force. They will have an opportunity before then of taking out any material which they feel is badly writtten or badly presented and should not be subject to the legislation. Although it is not strictly retrospective in that sense, it has some retrospective *effects* as far as the data is concerned. But they are very slight compared to practical problems that would result from having to maintain filing systems that distinguished between those held before and after the date of the legislation coming into force.

Surely the whole argument for the distinction between manual and computerized records in relation to data protection was based on the fact that computers could do at enormous speed things that could not be contemplated with manual records. At the moment in the UK, the Mailing Preference Service is wrestling with how to apply its list on tape of several hundred thousand names to a local list of two or three hundred. You simply cannot demand the same standards.

Geoffrey Hoon - Although they are clearly different, I can see no distinction in principle between the two. I do not believe it justifies having a different legal system for one rather than the other. It was a debate we had once before in the UK, and I was not happy with it then.

Enforcement and Transborder Data Flows

Regarding the functions of the supervisory authority, as covered in Article 26.1. The Commission's proposal is: "The Member States shall ensure that an independent competent authority supervises the protection of personal data." The European Parliament's amendment no. 86 (3a) (new) is: "The member states shall provide that the supervisory authority has appropriate powers of sanction....." We heard about a case where Fiat employees have their data transferred from France under an agreement which is then apparently ignored by the Italians. Did your committee see internal enforcement of the directive as a matter for the national authorities? Was this amendment directed towards that objective?

Geoffrey Hoon - The primary purpose of the directive is obviously directed towards

creating a single market in data flows. I wonder whether the logic is that where you have a multinational corporation doing business in the European Community, it is going to be extraordinarily difficult to check flows from its French to its Italian operation. However, looking at the whole corpus of the directive, if we allow a more liberal approach, for example on exemptions, we should ensure that in the policing of the principles, it is done effectively with proper sanctions and safeguards to ensure that principles are observed. This is the balance we need.

Concerning the provisions on transfers of data to third countries, what does the third country concerned do in the case of a block, or prohibition of transfer?

Geoffrey Hoon - If the European Parliament's amendments are accepted by the Commission, the chances of a block are very small, if none. It would be used only as a last resort, after the negotiations had proved to be useless. In that case, it seems to me that the GATT framework could be an international forum to discuss these cases.

What are your views on the amendments to the EC's oversight authority from the perspective of a third country which feels aggrieved over an Article 24 block? Where would we do our complaining and lobbying in the event that there was a block? In the absence of an authority with teeth in the Commission, is this going to be a bilateral fight with the country or do you see this finding its way into the GATS (General Agreement on Trade in Services) assuming that we finally get a services agreement?

Geoffrey Hoon - There is a sense in which we are all pulling ourselves up to certain standards, and I feel that it would be appropriate to deal with this in GATT if it really came to an issue involving a potential conflict. I suspect that the amendment tabled by the European Parliament will mean that it is relatively unusual for a block to be put into place. As the importance of transferring data to third countries is so crucial, it would be a last resort exercise by the Community to single out a particular country. Even if they could in practice prevent all data from flowing from that country, it would only be used at the end of a very long process.

Media exemptions

In the UK Data Protection Act there is no exemption for the press, and nobody seems to mind. Why has the European Parliament felt it necessary to include such an exemption in the EC draft directive?

Geoffrey Hoon - The numerous representations I have received from the press, journalists' associations, and TV channels have voiced great disquiet with the current draft directive. It is necessary to examine this exemption against the whole background of the directive. There is fear that the directive, as a whole, could limit their activity, especially in exploring corruption, financial malpractice etc. For example, a journalist would have to communicate the existence of the personal data to the person he may have under investigation.

This report is based on a presentation by Geoffrey Hoon, MEP, Derbyshire, UK, and MP Ashfield, at the *Privacy Laws & Business 5th Annual Conference* in Cambridge in July. It was written by Bojana Perovic who has just completed a postgraduate thesis, on the EC Data Protection Draft Directive and its impact on the private sector, at the European University Institute, Florence.

BOJANA PEROVIC SEEKS EMPLOYMENT

Bojana Perovic, the author of the above report and that on the Commission's policy (see p.14), is currently seeking work in London. She has a law degree from Belgrade University Law School with postgraduate studies in international law and international relations. She has a diploma in Advanced European Legal Studies from the College of Europe in Bruges. Fluent in English, French, Italian, and Serbo-Croat. Further information from the PL&B office.