## HOW THE COMMISSION IS REVISING THE EC DIRECTIVE

***When Commission Vice-President Martin Bangemann spoke at the data protection debate at the European Parliament on February 10th 1992, he explained that while the Commission's proposal was ambitious, it was not attempting detailed harmonising of member states' national laws. Nor was it taking existing legislation and finding the lowest common denominator. The Commission needed a clear set of principles, otherwise it would be left with a patchwork. Exceptions should be clearly defined and limited. He could accept several but not all of the European Parliament's amendments, some only partially, some with editorial changes. He wanted the proposal to be selective, effective and flexible in application. The Commission, he said, could have steered a middle course, but deliberately set out to protect private lives.***

***At the Strasbourg debate, helping Vice-President Bangemann respond to points made in the debate, was Marie Georges, the Commission's data protection expert. Here, she elaborates on how the Commission's policy staff has developed Bangemann's public position into a revised text since the European Parliament's vote in March until the completion of the revision process by the Commission's data protection service at the end of July. She also answers your questions.***

### Current Status

The directive is based on Art. 100A of the EC Treaty, which envisages the so-called cooperation procedure. The Commission published the official draft of the directive in September 1990. The Economic and Social Committee gave its opinion in April 1991. In March this year the European Parliament voted on amendments to the original draft but supported the initiative unanimously. Since then, the Commission has been preparing the revised draft of the directive.

The decision on the revised draft should be taken in September, when it is due to go to the Council of Ministers. In the Council, a common position has to be taken by the member states' representatives. However, some discussions are expected, so that, realistically, it would take some time, perhaps in 1993, to arrive at a common position. Then, the European Parliament has a right to a second reading, after which, if no other amendments are proposed, the final decision will be taken by the Council of Ministers.

The first draft of the Directive has triggered a storm of reactions and criticism from industry, data protection commissioners, member states, and third countries. This is due to the fact that personal information is involved in so many different activities. Personal data flows are needed to ensure the free movement of goods, people, services and capital. Also, data is being used, on a regular basis, for the purpose of mutual assistance between bodies carrying out public functions (the European transborder networks for administration, for example).

The information market is growing rapidly. Information has specific commercial value and especially, when it is related to individuals and to fundamental rights, one has to be extra careful. This is why transborder data protection problems have to be solved. The question is, how to do it. It seems that we need a system that will give confidence to all the member states and this is the key point.

The European Parliament amendments have shown that data protection is a complex issue. Not only because it involves some sensitive issues such as fundamental rights, but also, because it is a rather recent issue, having emerged in the last twenty five years. For law-making and the legal world this is not such a long period. However, there has been great evolution in data protection laws and a term "third generation legislation" is now being mentioned. Bearing this in mind, it becomes clear that the second version of the draft directive will have to take into account all this experience, as well as the opinions of the European Parliament, data protection

commissioners and companies. We are facing a problem of the system as a whole, and not a single, sectoral problem. This has to be kept in mind when dealing with the specific provisions of the draft directive.

### The Commission's Response to the European Parliament's Amendments

**The difference between the public and private sector should be abolished.** Does this mean that the same rules should apply for both sectors? Member states do vary in determining whether an organization falls within the public or private sector. In this sense, the Commission position is in line with this fact.

**The method of enforcement of the principles.** In the first draft there was only some notion of notification and very few comments on codes of conduct. In the case of harmonization of national legal regimes, this should be enough, since a directive, as a harmonisation measure, should only set the objectives and leave it for the member states to implement Community legislation through their own means and procedures. The European Parliament proposes to go further with these methods of enforcement. The question is why?

**Some basic concepts and definitions had to be determined.** In this respect, some member states talk about *files*, some about *data processing* and the European Parliament proposes the term *data* only. Here, again the right concept has to be found, for the minimum required is to have, at least, a common definition in a given area. *Processing of data* is better than the term *files*, for it is the use of data that is important, and not the way data is organized. This brings us back to the purpose principle. While the European Parliament has, on the one hand, abandoned the concept of file, it has, nevertheless, encouraged the covering of manual files within the scope of the Directive. In this particular case of manually held data, the term *file* is still useful, in order not to cover just any papers, but only structured and organized ones.

**A long list of exemptions to the scope of the directive.** But the rights of persons still remain. The Parliament envisaged the following exemptions for:
*Associations.* But the Parliament included these organizations in the chapter on sensitive data, leaving it to the Commission to make the final decision.
*Data to fulfil legal obligations.* It depends on whether this data needs to remain at the national level or whether it needs to circulate among the member states. It is difficult to keep this data (social security, tax etc.) outside the scope of the directive, as there is a need for cooperation between national administrations, as well as the free movement of persons throughout the Community. However this particular issue, in my view, should not be too much of a problem, for even if it remains within the scope of the directive, this data could be exempted from the notification requirements.
*The press.* This could also create some problems. The Commission was rather surprised by the discussion on this subject, for it felt that there was no need for a total harmonisation in this difficult area where one had to reconcile privacy with freedom of expression. Looking at the member states' legislation, one notices that they have different legal regimes for this sector. This is why the original draft of the Directive has left member states with a possibility of fitting the press provision within their own legal systems. Now, it seems that the only possible way is either to include this sector as a mandatory provision within the directive, or to leave it out and leave this issue to the member states.

### The Commission's Priorities

There has been a lot of misunderstanding in the talks about the draft Directive and the Commission recognizes that the balance of the Directive was not the right one. Taking into account all the different opinions, the Commission is likely to tackle the following issues which will influence the type of harmonization we can achieve.

#### 1. Substantive rules for data processing

These principles (finality principle, fair collection and processing) have been taken

from the Council of Europe Convention on Data Protection no. 108. The Commission, however, plans to go further and to be more specific on some notions, giving some clarifications, common references and guidelines. The question, for example, is what is a *legitimate purpose?* However, we must not go too far, since it is not possible to determine in advance on a general level what is lawful data processing.

The Commission, unlike some non-European states (the USA, for example), has taken and will continue to take a general approach which needs to be implemented on specific sectors and in each and every case. Truly, the Commission has recognized the need for some specific rules for some sectors. The ISDN directive, for example, is a sectoral measure. The question remains how we can make this general approach more precise and specific in order to satisfy the need for common references and guidelines, and, yet, not go too far, leaving little space for further flexibility.

**2. Methods of application**

Bearing in mind the differences in legal systems and constitutions of the EC member states, one has to be careful to aim for convergence toward equivalence but not harmonize national rules entirely. We need the *subsidiarity principle* here. Some of the issues that need to be examined, in this respect, are the questions of:

- self-regulation (balance between self-regulation and public control)
- public control (preventive control vs. follow-up checks)
- we need an equilibrium between substantive rules and methods of application
- ombudsman function vs. prosecutions.

There might be differences between member states in these areas, not only because of their legal systems but also because of their experience. This could lead to new sectoral rules. For example, on notification, the European Parliament's selective approach and simplified procedure could mean that up to 75% of data processing could remain outside the scope of notification. In this last case, however, some kind of preventive control has to exist for special purpose data. In the future, new sectoral rules can be developed on the basis of experience.

**3. Rights of data subject and obligations of data users**

Some clarifications are needed. Some critics suggested that data subjects' rights would lead to superfluous burdens for enterprises. However, I hope that we will not lower the level of protection. In limiting or in the absence of a registration system, the issue of data subjects' rights, such as the right to know of the existence of personal data, and data controllers' obligations gain in importance. This, again, is a necessary balance. Also, the rights such as the right of information at the time of collection and about the disclosure of data to third persons, or the well known right of access, with the improvements suggested by the European Parliament, are very important, especially for the transparency of data processing. The question of data security is also becoming more of an issue, although there has not been much discussion about it.

**4. Transfers of data to third countries**

This is a difficult point. There has not been much talk within the Commission about the terminology (*adequate* or *equivalent* level of protection). We have opted for a term adequate for the sake of third countries, in order not to make them feel as though the European law is imposed upon them. Anyway, some clarifications as to what the term *adequate* means, will be made. It is the duty of member states to ensure adequacy of protection in the countries to which personal data will be transferred. Any exemptions must be precise and limited. We have to demonstrate that we are in a field much broader than a European one. There has been progress in several countries, for example in Canada, the USA and in the GATT negotiations, where some third world countries are interested in privacy principles and the United Nations has

elaborated a privacy recommendation. The EC needs to keep up with this growing movement. We need to keep up pressure where higher standards are needed. Not to prevent data flows but to emphasize that better protection is needed. Caller identification is a perfect example. If we do not have the same solutions, these services will not work and they need to work on a world level. There are no complete solutions but we cannot forget the problem.

**5. Community application of the directive**

Since the member states will be the ones to implement the directive, there might occur some differences in the mechanism of application. However, this is not a problem. The Community could, through some solutions, make sure that the differences in implementation are minimised. We need flexible systems. For this reason, the Working Group has been established by the directive. The European Parliament's opinion was that its composition and competence should be enlarged to include representatives of many parties and increased powers of investigation. The Commission does not think that there is a need for such an institution yet. Thus the Working Group should only have an advisory role to ensure harmonized application. However, its opinion should be of great importance to the Commission and, if the need arises, further measures could be taken for specific purposes or areas. The important point is that we will have the general directive as a reference to start this work.

## QUESTIONS AND ANSWERS

### Power of the European Parliament

**Will the European Parliament have the possibility to block the directive using its powers given by the new procedure in the Maastricht Union treaty under the Article 189B procedure?**

**Marie Georges** - This has been under consideration, although it is not expected to happen.

### Member States' Differences to Influence Transborder Data Flows

**If the member states have too many differences in implementing the directive, then will transborder data flows be restricted as with the Council of Europe Convention, both between member states and outside the Community?**

**Marie Georges** - One main difference between the Council of Europe and the European Community is that the Community system, because of its nature, needs to have rules for the application of principles. Of course, we will have differences of interpretation in some cases. There are differences of data processing techniques, and innovation needs to flourish. But in most cases, there will not be much difference between the member states. If there is, it would be because of different legal traditions. There is no need to abolish these differences. In any case, there is always the European Court of Justice to ensure compliance and uniform implementation of the directive.

### Sectoral Directive on Direct Marketing

**How true are the rumours that a sectoral directive for direct marketing is being prepared?**

**Marie Georges** - This is not possible before the general directive passes through the legislative procedure. Studies have been asked for, but that is all. For the time being, we think that the general directive is enough.

### Legitimate Interest & Legitimate Purpose

**Will the term *legitimate interest* be spelled out clearly in the second draft?**

**Marie Georges** - I referred to *legitimate purpose* of data processing, referring to the concept in the Council of Europe Convention no. 108. We did put into the first draft some criteria for legitimacy or legitimate purpose, based on consent, or an obligation to fulfill a legal obligation or the public interest duty a body is pursuing. It is true that we have retained the clause about the interest of the controller of the data, or the public in general,

and the condition that the privacy interest of the person does not prevail. This is the limit of harmonization. If we want to stay with a general directive which would be compatible with future data processing techniques, we need to ensure that we have a general clause which would fit all these remaining cases. This also means that interpretation of this clause will be done on a national level, through procedures member states would choose.

### Police Data

**Will the establishment of EUROPOL - The European Office of Police - (Inter-governmental cooperation established under the Maastricht Treaty) and the resulting exchange of criminal data be affected by the directive?**

**Marie Georges** - No, because it does not fall under Community law. It is based on a convention between the member states. There might be some influence of the revised Directive, but it is up to the member states.

### Staff Associations

**Will the Commission retain the European Parliament's amendment to Article 3.2(b) to add *staff association* to the list of non-profit making bodies to which the directive will not apply "on condition that they relate only to those members and corresponding members who have consented to being included therein and that they are not communicated to third parties."**

**Marie Georges** - It was logical for the European Parliament to add staff associations to the Commission's list of exempt not-for-profit bodies. If they remain outside the scope of the directive, will the member states still implement the rights of members in relation to such an association? It is possible, but we do not know. The conditions we made, such as no communication, do not fit with the legitimate routine uses of personal data by such bodies.

My personal view is that it is better to have everything within the scope of the directive but give a specific derogation where it is needed. The rights of not-for-profit bodies, such as trade unions and staff associations, to express and defend their members' opinions represent fundamental rights in a democratic society. Of course, they have a right to have a list of their members without public control. Otherwise, this would infringe their rights to organize for the purpose of freedom of opinion. Their rights need to be ensured. Nowadays, many such organizations also work at the European level and may need to exchange information.

### Data Security and the ISDN Directive

**What is the status of the other items in the Commission's 1990 package, in particular, the security measures and the ISDN directive? How would you interpret the proposed resolution by member states to extend the scope of the directive to activities of the public sector not governed by EC law, for example, the police sector?**

**Marie Georges** - The security decision was adopted in March 1992. The revised ISDN directive will be published with the general directive.

The resolution has not yet been discussed by the member states in the Council of Ministers. But if it is not under Community law, then it is not under the competence of the Commission to launch an initiative. As some of the data used by organizations not under Community competence comes from organizations which are, then it would be logical to regulate these sectors under the same principles. Of course, the Community law line moves from time to time but for the moment it has not been discussed by the Council of Ministers.

**This report is based on a presentation by Marie Georges, Expert, Directorate-General 3, the Commission of the European Communities, Brussels, at July's *Privacy Laws & Business 5th Annual Conference* in Cambridge. This report was written by Bojana Perovic who has just completed a thesis on the EC data protection directive at the European University Institute, Florence.**