

THE COUNCIL OF MINISTERS PREPARES TO ADOPT THE EC DIRECTIVE

After two years of non-stop discussion by the European Parliament, the Economic and Social Committee and lobbyists on all sides, the EC Data Protection Draft Directive has now been revised by the Commission's experts and is awaiting approval by the Commissioners. Ultimately, the text must be submitted to the Council of Ministers. Philip Stevens, a UK representative on the Council of Ministers' Data Protection Working Party, gives us an inside view of the issues, explains the UK's goals and possible influence as holder of the EC presidency in the July to December 1992 period - and answers questions on vital issues.

Philip Stevens called many of the issues raised on the topic "hardy perennials. I think there are points which have to be made again and again and again." These points of principle and practice have to be stressed with the current draft and perhaps with the Commission redraft.

Lobbying

The working group has had 13 meetings, with an exchange of views, an article-by-article discussion of the provisions in the directive and finally discussions in anticipation of the Commission redraft, which he said had no doubt been delayed by an unexpected flurry of lobbying.

"I think we can see today how difficult it must be if you are being lobbied, not only from the United Kingdom but from all directions, in all languages, everybody wanting to preserve their particular patch." The Commission has to produce something consistent with important data protection principles and which "gives the greatest happiness to the greatest number."

"It may well be that because we are an English-speaking nation, we've caught the habit of lobbying from the Americans." Not

long ago there were no lobbying organizations, and lobbying in Britain was an "American idea." People in the UK at first wondered if they should lobby the Commission and were encouraged by people like Mr. Stevens, who said to EC expert Marie Georges; "If you've been over-lobbied, if we've had any role in that - I'm sorry."

Consultation has also been important, with everybody who has an interest in data protection. There has been a "rapid and comprehensive response." There was lobbying even before there was a formal text, which spread from direct-marketers to charities and groups such as Amnesty International, a "knock-on effect." He called both consultation and lobbying important, saying that when lobbying doesn't exist, consultation does not either. In Germany, for example, data users such as the major business group, were not consulted.

Timetable

The UK will hold two, two-day meetings in September, two in October, one in November and one in December. "We're anticipating a lot of work in the working group during our presidency." It is unfortunate that this could not begin in July. The question is whether the directive will be ready for the first meetings on the 1st and 2nd of September. At that point the intention will be to take the new draft, go through it article-by-article, identify how people feel about the redraft.

Groupings Within the Council

The UK will first watch for whether countries that have more stringent data protection laws - including France, Germany and Luxembourg - regard the new directive as being too weak, which could endanger harmonization. Secondly, what will be the reaction from countries seen as the UK's "allies" such as Ireland, Netherlands and Denmark. The position of the five countries who have not ratified the Council of Europe Convention on data protection is largely unknown. It will be interesting as the articles

are looked at to see "how the different countries are going to fall out."

The UK will take stock and see whether there are still "fundamental difficulties" which can only be hammered out by further negotiation or whether it is an effective compromise not needing "agonizing discussions."

The Leading Issues

He said he has some idea of the contents of the revised directive by the Commission's reaction to the Parliament. He envisages a directive that "is going to be a considerable improvement from our point of view but still won't be enough." He thinks *manual data* will still be in, there will still be special provisions for *sensitive data*, difficulties with *consent*, *notification of data subject* and *transfer to third countries*, as well as *press* difficulties with the directive. He said that the press concerns about the directive are important, but "I don't think that we would say that total exemption for the press is necessarily desirable."

Consent In the UK, where there is no statutory requirement for consent, a system of opting-out has been worked out in the area of direct marketing. "What we have been arguing in Brussels is that consent should be a mechanism and not an end in itself." The principle of "fair obtaining" works well, consent requirements should be residual and it should be a case of opting out, because opting-in is very bureaucratic and does not give the data subjects any increased rights.

Sensitive data If the new draft is anything like the current one, the UK has concerns, because "almost any data can be sensitive in certain circumstances." Your nationality, age, "the most innocuous information" could be seen as sensitive. The UK is arguing for a form of test by which "there can be restrictions on the processing of sensitive data if that processing might cause damage to the data subject." He expects improvements in the wording as far as transborder data flows are concerned here.

Public and private sector distinctions "caused us difficulties," but he expects that the distinctions between the two areas will be dropped, meaning that subject access exemptions which now apply to the public sector apply to the private sector. "We'll be highly satisfied by that."

Retrospectivity is also a problem area. People may be concerned that information they now give, such as referees who give references for job applicants, may become known by data subjects in the future. The directive could also apply to dead people, even those mentioned in the Domesday Book, something he called the "Domesday Scenario."

Manual Data he called "perhaps the most important difficulty." There is "no indication here that manual data are going to be omitted from the final draft." The UK government's arguments against inclusion of manual data are that "if it wasn't for computerization we would not have any data protection laws at all. I believe that if there had been no computerization, we would have no data protection rules anywhere in the world at the moment," aside from limited provisions relating to subject-access.

The UK data protection law was prompted by the government's feeling that "if it didn't sign up to the Council of Europe Convention, it wouldn't get data from other countries and that international computing operations would go to other countries...It was the power of computers...to store, collate and disseminate information." Computers are different from other stores of data which are held manually.

There are grey areas where there are masses of manual data, such as the collection of data by the Economic League. You can also think of areas where computerized collection poses no problem whatsoever to the individual and there has never been a subject-access request. "The main point about manual data is that we have here a pre-existing system which has been subject to no legislation. It doesn't seem, apart from certain cases where there may be an argument for sectional legislation to deal with a particular evil, it doesn't seem to be either any great abuse of manual data, nor does it seem

that manual data is being used in a widespread way to evade provisions of the Data Protection Act."

Manual processing is cumbersome, laborious, labour-intensive. The UK government is still opposed to the inclusion of manual data, and has raised the point that there is no evidence of transborder data flow of manual data, which weakens the case for including manual data.

Transborder Data Flows

Overall, a high level of protection "go to the very heart of our principal objections against the original draft." Recently, the Commission produced a report on examples of transborder data flows and cases where things had gone wrong. "It was not a very impressive list." One case where information was flowing between France and the Côte d'Ivoire was easily resolved.

In the case of transfer of data between Fiat offices in France and Italy, the chief problem was that Italy did not have any data protection laws at all. You cannot argue for a high level of protection in the directive based on cases like this. The only thing that would justify such strict measures, as in the EC directive, would be stronger cases, for instance if Germany had not allowed a data transfer to Britain because the UK legislation did not cover manual data.

Limited Influence for UK Presidency

Mr. Stevens finally said he does not want to be over-lobbied but stressed to the audience that "we are very keen always to get your views." With the release of the redraft, he said, a list of about 200 people would be consulted, and asked anyone else who wants to be consulted to send a letter to him at:

Room 603, The Home Office, 50 Queen Anne's Gate, London, SW1.

A short letter or business card will do, with a note to "please consult on redraft." The reaction of data users and subjects, he said, "will influence the way we deal with the directive during our presidency."

The presidency does not give the UK "a lot of advantage...we can set the agenda, but I don't think the UK can use its presidency to force through things that it wants. It rather more gives us a hand on the tiller, slightly" which would be used to come up with a satisfactory solution for data users and subjects.

QUESTIONS and ANSWERS

Timetable

What is the timetable? Will the UK actually achieve a common position by the end of its presidency? Marie Georges (D-G 3) suggested it would run over into 1993.

Philip Stevens - The procedure is "very complicated and the Maastricht Treaty has added yet another limb to it, I believe." There are about twenty stages and on the flow charts they meld into each other, "I reckon we're at stage seven of twenty possible stages." How quickly the stages are passed depends on what happens the first time the draft goes to the Council of Ministers.

There's not a chance of the draft going to the Council of Ministers even for the first time - and there may have to be a second time - during the UK presidency. This means that final adoption is some way off; "1994 is possible." The UK then has two years after that to implement the directive in national law.

Consent

On the issue of consent and opting-in, which Marie Georges did not indicate the Commission had reconsidered. "It is very important to charities and to other organization who use direct marketing in practical terms." The Commission is sticking with its original finding on legitimate interests and has left the idea of opting-out to one side

Marie Georges - the term opting-in and opting-out "is a marvellous media expression." The problem is that "You cannot deal legally with this kind of expression," which was why I did not use it in my presentation. "Of course,

when the safeguarding of individuals is enough through a practical opt-out system, it could be implemented through the directive, of course... You will see consent sometimes, where it's needed. Where opt-out is enough, the right to oppose, for example, being put on a list, will be acceptable. I think for most direct mail problems, opt-out is enough." The new draft will make this clearer. "There is not a legal choice completely, between consent and opt-out. I don't think there's a consistent view on this point," she said, adding that often there is a "slice" of consent when there are also opt-out provisions. "It's useful in data protection to have consent sometimes."

Philip Stevens - The fulcrum on which the whole directive rests is Article 8.1(c). "The directive is trying to balance the rights of data users and data subjects." These are not balanced in the European Convention on human rights, and the balance is different in different countries. Article 8.1(c) says "you do not have to get consent if the interests of the data user are overriding, provided that the interests of the data subject do not prevail." But because every single word in the directive is subject to the jurisdiction of the court in Luxembourg "we don't want to sign up in a moment of euphoria to this provision which seems to say carry on as usual, you don't have to do anything, don't worry all is well, only to be told by the court in Luxembourg...the UK law is giving too much to the data user and it must redress the balance." They are trying to accommodate all the different legal systems in the Community, but "we are nervous about 8.1(c)..it's not necessarily as good as it seems."

Legal privilege

At the moment under data protection legislation in Ireland, lawyers facing subject access requests are protected by legal privilege. But under the EC directive that appears to have been dropped. If a manual data provision were brought in "we would have a lot of confidential information on data subjects given by our clients and we would have to release that in breach of our

duty to keep it confidential." What is your approach to legal privilege?

Philip Stevens agreed that the rights of access contradict traditional notions of client confidentiality. The UK has the same problem, because the directive "seems to say that the right of confidentiality is not overriding."

Ban on Automated Decision-Making

What is the current state of thinking on Article 14.2, concerning automated decision-making? How will the European Parliament's amendments affect that?

Marie Georges - "It's true that the original draft of this provision is in the French law. This is a matter of principle." She said there needs to be clarification on what kind of decisions are included in this article.

1. "Important decisions which could affect the person...I don't think we had in mind marketing decisions...One day if you can't get access to any goods or any services without marketing techniques, maybe we will be in a different situation."
2. Article 14.2 also involves making a personal *judgement* of a person, not a matter of *fact*.
3. The decision also must be taken only by automated data processing, which means no human being looking at the decision.
4. The fourth condition is that a profile of a person is put together by processing. "Surely what we want to avoid... is an Orwell situation... If we are managed like metal boxes of goods in the future, we may have problems."

Article 14.2 should not inhibit daily, minor decisions. "Software makes decisions all the time." There must be clarification of what we mean by this. What is the profile and does it include the personality of the person? "If there are safeguards in order to prevent people being refused things, to stop adverse decisions against them, if there are safeguards in sectors in which they may like to use these kind of

techniques, these should be allowed." It is a question of thinking of safeguards in each member-state.

Geoffrey Hoon - It is helpful to think of a practical situation where this difficulty would arise. The most obvious example is where someone goes into a shop and wants instant credit. "To allow someone to get instant credit, it clearly has to be done mechanically." There is a need to be able to contact relevant organizations for information, quickly. We want to achieve a situation where if the mechanical judgement was favourable it would be all well and good. But if detrimental, the individual would have the right to challenge the basis of that decision, to have a human being look at the decision and see whether it was correct. It's a balance between allowing for mechanical decision making and allowing for people "who fall through the mechanical system."

Registration

A couple of years ago the UK Registrar recommended a simplified registration procedure, which was taken over by the first directive draft. What does the departmental committee or the UK government think of the situation now?

Philip Stevens - The departmental committee recommended abolition of registration, not just a scaled-down version. Registration is bureaucratic for all, not a requirement of the European Convention and does not help data subjects learn who holds data on them. The recommendation was accepted in principle but overtaken by the provisions of the draft EC directive. The working group "is pushing the argument for no registration at all" but has very little support. He expects registration will remain in the revised version of the directive.

Overcoming a Logjam in the Council

What would happen in the event of continued disagreement at the end of the year, if the UK continues to have objections?

Philip Stevens - "There must obviously be a guillotining procedure, because you cannot discuss these measures indefinitely." Perhaps when it comes to voting in the Council of Ministers you can take the thing in pieces and see if you can get a qualified majority on each provision. The Council could do this rather than voting on the whole package; the UK would prefer this.

Geoffrey Hoon - The timetable is very difficult to predict. If it is very different from the first draft, the Parliament may decide to look at it again. Then it depends on how long it takes the Council of Ministers to produce a common position. Then the timetable is clear, set out in the Act. "Between now and the common position is as long as a piece of string." It especially depends on how much support the UK position gets. With enough support they could stop it altogether. "There is a great deal of interest across the Community in establishing common standards. The issue is what those standards should consist of. I don't think anybody is trying to kill the directive. In the United Kingdom we have legislation of our own and, to a great extent therefore, we are already quite happy with legislation. Some countries still don't have any legislation at all. Clearly it's in the interest of those countries that have no legislation...to at least come up to that standard. The problem is that the standard in countries like Germany is very different from the standard in the United Kingdom."

Philip Stevens - "Undoubtedly, we occupy the end of the spectrum." Many of the UK concerns, such as manual data, have support from other countries, so there is no reason to believe there is a qualified majority on all issues.

This report is based on a presentation by Philip Stevens, Principal, Data Protection Policy, the Home Office, and a UK representative on the Council of Ministers' Data Protection Working Party, at July's *Privacy Laws & Business 5th Annual Conference* in Cambridge. The report was written by Mary Gooderham, a writer of a forthcoming book on privacy and technology.