EU HEADS OF GOVERNMENT SUPPORT ADOPTION OF DATA PROTECTION DRAFT DIRECTIVE BY END OF 1994

The European Union's Heads of Government forming the European Council came to two important conclusions and political decisions at the Corfu Summit in June on the basis of the Bangemann Group report (see page 7). The first was the need for a common legal framework and, in particular, a common position on the Data Protection Directive by the end of 1994. The second was the need to establish data protection rules for the areas, such as judicial and police co-operation, which are outside the scope of EU law.

1. Need for a legal framework

There is a need for a clear and stable legal framework in the area of data protection; Member States and the Community have to take responsibility for this. Where there are "pending" directives, they should be adopted by the end of the year. According to the June 21st decision of the Internal Market Council of Ministers, the common position on the Data Protection Directive should be adopted by the end of this year.

Thus, there is a clear political commitment to proceed at a faster pace. In line with this conclusion, the German presidency, which took over in July this year, is organising the work and the meetings at all levels - the Working Group, COREPER and, ultimately, the Council of Ministers - in order to achieve the adoption of the common position within the set timetable.

2. Areas outside Community law

In the areas outside the scope of Community law, such as judicial and police co-operation, the rules on data protection have to be established with particular attention to the right of access and its exemptions. There should be a single authority to control the level of data protection in these areas.

At the moment, there are several Conventions at governmental level dealing with these issues, (for example, the Schengen Agreement), covering immigration, police and customs co-operation. All these agreements contain provisions on data protection. Thus, a single supervisory authority, comprising of all national Data Protection Commissioners, should be established to monitor all these areas.

Progress under the Belgian presidency

Under the Belgian presidency (July to December 1993), the second reading was completed for one third of the Directive - Art. 1 to Art. 9. Thus, the Working Group of The Council covered the objectives of the Directive, its scope, the definitions and general principles for setting up data processing (i.e. data quality principles as envisaged by the Council of Europe Convention 108) and legal grounds for processing. Also, progress was made on the issue of sensitive data (Art. 8) and the media exemption (Art. 9).

In general, many controversial points were clarified and some articles, such as definitions, were simplified. This resulted in a better understanding of the Directive. The discussion on the question of jurisdiction and applicability of national legalisation (Art. 4) was postponed until a later stage, since the national Data Protection Authorities who were concerned about this article were already examining the issue and wanted to do some preliminary work on it.

However, two significant problems were raised that will have to be resolved on a political level at a later stage.

1. Minimum or high level of protection?

Should the Directive set a minimum level of data protection and allow Member States to go beyond its provisions to provide for a higher level of protection?

This is a general dilemma facing most EU legislation. The main argument against this approach is that it would be detrimental for the Common Market, since it would endanger the free movement of personal data throughout the EU.

The Commission advocates that the Directive *should* provide a high level of protection. It argues that data protection is an issue of human rights where a minimal approach is not sufficient. Furthermore, a high level of data protection is already implemented in some Member States and this approach is followed by the Directive. The Directive should not lower the level of protection already provided by national legislation and the other Member States will have to accept this situation. However, the Commission is aware that there might be problems and differences in interpretation and these will have to be resolved by common action once the Directive is implemented.

On this issue, as well as on many others, there is a *double blocking minority*. Some Member States favour either:

- a lower level of protection *or*
- a lower level of harmonisation of national legislation.

Others argue for both:

- a high level of protection *and*
- a high level of harmonisation,

since the former cannot be achieved without the latter.

This issue has yet to be resolved, although there has been some progress in negotiations and the situation is much clearer than before.

PROCEDURE FOR THE DIRECTIVE'S ADOPTION

The Data Protection Directive was proposed by the Commission in 1990 on the basis of Art. 100A of the Treaty which provides for the harmonisation of national legislation in the internal market. Although the Commission has the exclusive power to propose EU legislation on matters within the framework of Community law, it is the Council of Ministers which ultimately has to adopt the Directive by a qualified majority. However, before adoption, the Directive was subject to the scrutiny of the Economic and Social Committee and the European Parliament. The former gave its opinion in 1991 and the latter in March 1992. Subsequently, the Commission amended its proposal in October 1992 (PL&B Dec '92 p.2).

The next step is the adoption of a common position in the Council of Ministers by the Member States' representatives. However, since the Directive was proposed, the Maastricht Treaty introduced some changes in the EU legislative process giving the European Parliament greater involvement in the legislative machinery. Thus, the Data Protection Directive now falls under the so-called Co-operation Procedure. This means that the common position, as adopted by the Council of Ministers, has to go to the European Parliament for a second reading and then back to the Commission and the Council. If there is no agreement between the European Parliament and the Council, a *conciliation group* will be established to adopt the text.

There is no time limit on the Council of Ministers to adopt a common position. However, once it is adopted and passed to the European Parliament, the subsequent stages in the Co-operation Procedure all have a deadline which together cannot exceed a year.

At the moment, the Member States are in the process of adopting a common position. Since October 1992, when the revised text of the Directive was submitted by the Commission, the Council of Ministers has been working on its adoption.

Initially, this was done at the Working Group level. The first stage (known as the first reading) was held in the Council under the UK and Danish presidencies. There, Member States' delegations had an opportunity to ask questions, analyse and clarify the text of the Directive article by article and state their position.

The negotiating process, in which a compromise is reached, starts only with the second and the third readings. The purpose of the second reading is to arrive at solutions for the problems put forward by Member States and the third reading serves to resolve any outstanding points of disagreement which have not been satisfactorily concluded in the article by article discussions.

The first reading of the Directive took place under the UK and Danish presidencies - each of which is for 6 months - (PL&B Dec. 1993 pp. 2-5). The second reading, and hence the negotiating process, started under the Belgian and continued under the Greek presidency.

This is one of the issues which cannot be settled in the second reading (at the Working Group level) but might have to go to a higher political level for resolution.

2. Manual files

The controversial issue of whether manual files should be covered by the Directive is still on the agenda. It is a very sensitive question for some Member States, such as the UK, Ireland and Denmark.

In an attempt to make it easier for the Member States where manual files are currently outside the scope of data protection legislation, it has been suggested that the data protection principles for manual files could be implemented in such a way that the costs will be acceptable to their organisations and society as a whole.

Those opposed to the inclusion of manual files in the scope of the Directive put forward the following arguments:

1. There is no evidence that there are data protection problems in this area.
2. There are no problems with the transfer of manual files across national borders.
3. Extending protection to manual files would be very costly for organisations.

These criticisms have been met with counter-arguments by other Member States and the Commission.

1. There is high risk of circumvention of the legislation if non-automated means of processing are not covered in the Directive. There have already been such cases, including in the UK.
2. There are potential problems with transborder flows of manual files, since some stages of these transfers can be manual and other automated.
3. The question of cost has to be dealt with, and the best way to do so is to envisage a transitional period in which manual files will be made compatible with the Directive as they are being used. One of the suggestions under the Belgian presidency was that inclusion of manual files within the scope of the Directive should take place in stages.

There is already a qualified majority in the Council in favour of covering manual files in the draft Directive. This means that a solution has to be found for Member States with difficulties in extending data protection to manual files in order to ease the task for them.

Progress in COREPER

Under the Belgian presidency there was also a preliminary discussion on the Directive at the ambassador level - in the Committee of Permanent Representatives (COREPER). This is a more political discussion and is the last stage before the Directive is discussed at ministerial level in the Council. The delegations gave their support for the Directive and its aim to go beyond the Council of Europe Convention 108, which by itself would not guarantee free circulation of data between the EU Member States.

The question of the cost of the Directive was raised and most delegations confirmed that the cost would not be higher than at present under national legislation and, anyway, a slightly higher cost is affordable.

The question of a minimal protection Directive was not discussed as it was considered to be at too early a stage.

Progress under the Greek presidency

The Greek presidency (January to June 1994) was very keen to make progress on the draft Directive and covered all the remaining Articles in the second reading. The Greek approach was slightly different from the previous ones. The discussion was concentrated on the main issues and pressure was exerted on the Member States' delegations to force a resolution. Finally, Greece has a special interest in seeing the draft Directive adopted quickly, since Greece, with Italy, is one of the last two remaining EU countries without data protection legislation and its government wishes to propose a national law in line with the Directive.

Sensitive data

Two main issues were discussed in relation to sensitive data:

1. Should the provision for sensitive data be a minimum one or not? In other words, can any other category of personal data, *not* specifically listed in the Directive, be considered to be of a sensitive nature? Is there any sensitive data, other than that listed in the Directive, whose processing should be completely prohibited? Although these issues have not been completely resolved, Member States could not find many examples of sensitive data which are not already covered by Art. 8.
2. The main derogation from the provisions on sensitive data (Art.8(2)(c)), as envisaged by the Commission, poses problems for some Member States. The derogation applies in cases of processing where there is no manifest infringement of individuals' privacy. This approach is not favoured by some Member States who believe that the nature of sensitive data is so special that it should not be processed at all. Consequently, consideration was given to replacing this provision and allowing for derogation in some specific areas, such as health and employment.

Notification of the individual at the time of collection

The provision establishing a duty on the data controller to inform data subjects about data processing at the time of data collection and about third party disclosures was another contentious issue.

Some Member States regard this duty as much too heavy a burden for the data controller. They are in favour of *reducing* the amount of information given to data subjects by confining it to the purpose of the data processing.

A smaller number of Member States do not see a need for such a provision and argue that this is already covered by the principle of fair collection of data as envisaged in Art. 6 of the draft Directive. Even then, the precise meaning of *fair collection* still has to be established and some Member States would like to see more guidance on the interpretation of this principle.

This will probably be an area where a compromise has to be made. However, the compromise is not going to be on the principle of fair collection, but on the way it is going to be implemented in a harmonised manner.

Data subjects' rights

The rights of data subjects, as envisaged by the draft Directive, were not disputed, except for the right of individuals to know the logic followed by automated data processing. Being a novelty for the majority of Member States, this provision is still an issue for discussion. Although some Member States would like to see this provision placed together with that on decisions based on automated data profiling, the majority agree that two separate provisions are necessary. The reason is that since processing has become so complex, the infringement of privacy cannot be limited only to cases where processing has resulted in a decision based on an automated personality profile of a data subject.

The other rights of data subjects, especially the right to know the origin of data, will remain. Thus, data subjects will have the right to:

- gain access to personal information on them,
- information on the logic used in automated processing,
- information about the sources of data, and
- have a third party notified of a correction or a deletion of data.

This consensus means that there is likely to be a high level of harmonisation and privacy in the area of data subjects' rights in the final text of the Directive.

Notification to supervisory authorities

On notification (registration), all Member States agree that there should be some sort of registration of processing activities. However, there is disagreement as to the form in which this should take place. Thus, there are two main approaches based on national legislation:

1. There should be a *specific list* of data processing operations for which registration is necessary,
2. *All processing activities* should be notified, in principle. However, the supervisory authority may, in advance, specify the areas and conditions to be fulfilled in order for them to fall within a specific category of data processing for which registration is not necessary.

At the moment, it is not clear what the solution will be. In any case, the following issues have to be taken into account when deciding on the best way to regulate registration:

- There are *Member States with no or little experience of resolving concrete data protection problems identified through registration*. For example, the data protection laws in Portugal, Belgium and Spain have not yet become fully operational, hence, these countries lack practice and experience. Furthermore, Italy and Greece have yet to pass data protection legislation.
- The system of a *specific list of cases where registration is necessary* is interesting because it is possible, in advance, to identify the most problematic areas. However, the main disadvantage is that this system does not allow for new technologies and developments in the area of data protection, since the legislation is unable to foresee future problems and issues.
- In all the Member States, even in those where there is little official notification or registration, much preliminary work is done, in practice, with *contacts made between the data controller and the supervisory authority*. These contacts do not necessarily relate to notification, but to other issues, such as new legislative proposals or administrative decisions. All EU countries are familiar with these procedures, either informal or written into the law, for preliminary discussions and analysis of new developments. Thus, the system adopted in the Directive should allow for these contacts in specific areas prior to setting up data processing activities.

Transfers of personal data outside the EU

The principle still remains that personal data may only be transferred to countries outside the EU which provide for an adequate level of protection. However, there are exemptions to this rule and the list is not going to be reduced. Two particular areas have been the subject of debate.

1. Should the data subject's consent be sufficient to allow transfers to countries without an adequate level of data protection?
2. What should be done when there is a contract between the data controller and another person in the interests of a data subject, who is not a party to the contract?

The procedural issues concerning the relative responsibilities of Member States and the EU will have to be clarified and made more precise. It is clear that it is for the Member States to allow or refuse a particular transfer of personal data to a third country. However, a general decision, taken at the EU level, is required to define a common policy for future transfers. Thus, the roles of Member States and the Community would be more precisely defined in the final text.

Codes of conduct

There were no particular problems regarding codes of conduct. Implementation of the procedure in the draft Directive will be optional for the Member States.

Supervisory authorities

There has been some discussion regarding the powers of the national supervisory authorities. The following powers were discussed:

- investigation,
- effective intervention in data users' operations, which could vary from one Member State to another depending on their constitutional provisions,
- bringing legal proceedings,
- handling complaints.

The essential political problem which has to be addressed is the nature and the extent of each supervisory authority's independence. This is a particular problem in Germany because of its constitutional provisions. The most important question is the extent of the supervisory authorities' independence *in practice*.

Working Group and rule-making powers of the Commission

The advisory Working Group, comprising of national Data Protection Commissioners, does not seem to raise problems.

On the other hand, the provisions on the rule-making powers of Commission in order to enforce the Directive has been a subject of much criticism. The final text should clarify the particular areas which the Commission would have power to regulate. Member States are deeply concerned about the way in which they could effectively control the Commission when it is exercising its rule-making powers to enforce the Directive. This is also a political issue and will have to be resolved at a higher level.

In the light of new developments under the Maastricht Treaty, there is an on-going debate on the way in which the European Parliament could exercise control over the Commission's rule-making powers. This debate has been common for all post-Maastricht Directives. It is not specific to this initiative and solutions will be found on a general level soon.

The future

The main questions were raised at the ambassador level (COREPER) at the beginning of June. The Greek presidency submitted its report to the Council on the progress of the Directive in mid-June, when the Council held a political debate about the necessity of the Directive, the level of protection and the timetable. It became clear that, apart from a few Member States which are reluctant to have a Directive with too much detail due to the high cost, a majority of Member States confirmed the following:

- the Directive should provide for a high level of protection and be more detailed than Council of Europe Convention 108,
- the adoption of the Directive is urgent and the remaining issues will have to be decided at a political level.

In the meantime, there has been some discussion in the EU on the Commission's White Paper on *Growth, Competition and Employment*. In this paper, the Commission stressed the need for a stronger policy in order to tackle these issues and, specifically, the need to develop in the area of information networks. The Commission asked for a clear and stable legal framework on two particular issues - intellectual property and data protection.

Regarding the issues of the information society and the information infrastructure, a high level group was especially established - the Bangemann Group, chaired by the EU Industry Commissioner, Martin Bangemann. It submitted its report at the European Council Summit in Corfu on 24th June this year.

One of the conclusions in this report is that the EU should treat this issue as a matter of urgency, as it is a prerequisite for an information society policy that the EU plans to adopt.

This report, written by PL&B consultant, Bojana Bellamy, is an edited version of the presentation given by Marie Georges, Expert, D.G. 15, European Commission, at the *Privacy Laws & Business* 7th Annual Conference, Cambridge in July 1994.