



UK Home Office publishes Consultation Paper on the EU Data Protection Directive

The European Union Data Protection Directive, adopted on 24 October 1995, will have to be implemented in UK law by October 1998 at latest. The Home Office's Consultation Paper, published in late March, comes as a necessary and welcome first step towards the date of implementation. It has been eagerly awaited by data users and the Office of the Data Protection Registrar (ODPR). The latter is issuing its response based on its own consultation process and discussions with data users and is available from the ODPR (see p.20).

Questions, not answers

The Consultation Paper is the result of a very preliminary stage of thinking within the Home Office. To those who have been closely following the Directive's progress in the past years it cannot come as a great surprise or a novelty.

It examines in detail the Directive's provisions and gives the Home Office's basic interpretation of what they may mean in practice. Rarely, however, does the Home Office give any indication as to the way in which it will seek to implement these provisions.

The Home Office's main aim is to identify points of difference in relation to the present UK Data Protection Act (see box opposite taken from the consultation paper) and to seek views on the best way to use, but not abuse, the flexibility given to Member States by the Directive.

In a way, the Home Office's approach is also educational as it offers an in-depth analysis of the Directive article by article. If for no other reason, the Consultation Paper should be read as a ready made guide to the Directive.

However, for all those who are concerned with many of the Directive's provisions, it provides an opportunity to articulate these concerns with relevant examples. Rather than offering answers, the Consultation Paper abounds with questions to data users asking them to submit their views and experiences as to the way in which a particular provision should be implemented or a particular phrase interpreted.

Which approach?

What is absolutely clear from the Consultation Paper is that the Government does not intend "to go further in implementing the Directive than is absolutely necessary to satisfy the UK's obligations in European law." It is also clear that the Government is going to use to the full the flexibility given in the Directive and try to interpret its provision in the least burdensome manner for business, yet "affording the necessary protection for individuals."

What is not quite clear at this stage, however, is the particular course of action which the Home Office intends to take. Will it press for a new Data Protection Act 1998, or will it seek to implement the Directive by way of a regulation? The latter would mean having it passed by Parliament in its present form, as has been done in the past with many EU Directives. There is only a hint of either approach where the Home Office discusses the way of implementing the Directive's provisions which are unclear or are open to a range of interpretation. "One approach would be to include a particular interpretation of the relevant provision in the implementing measure. An alternative would be to reproduce in the implementing measure the precise words used in the Directive, and to issue separately guidance on the interpretation of the provision." One has to ask oneself here whether the second approach would offer the necessary dose of legal certainty for data users? What would be the legal standing of this interpretative guidance in a court of law? In a way, the number and the complexity of questions posed by the Home Office in the Consultation Paper demonstrate the difficulties there may be in interpreting the Directive and are good arguments for demanding proper and meaningful implementation by way of a new Act.

All responses to the Consultation Paper should be sent by 19 July 1996 to the address below.

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Data Protection Directive 95/46/EC Comparison with The Data Protection Act 1984

Directive

Applies to automatically processed and certain types of manually processed data.

Applies only to activities within the scope of Community law.

Contains a wide definition of "processing" (i.e. everything from collection to destruction).

Establishes data protection principles with which processing must comply.

Sets conditions which must be met before personal data may be processed.

Sets tighter conditions for the processing of "sensitive" data (e.g. data about racial or ethnic origin).

Provides for certain exemptions for journalism etc.

Requires individuals whose data are processed to be provided with certain information (e.g. about the purpose of processing).

Gives individuals the right of access to their personal data, and the right to have inaccurate data amended etc.

Gives individuals the right to object to *lawful* processing of their data.

Gives individuals the right to object to their data being used for direct marketing purposes.

Places restrictions on fully automated decision-making.

Sets specific requirements for security of processing operations.

Requires registration of *some* categories of automated processing operations. Requires *prior checking* in some circumstances.

Requires information about processing operations to be publicly available.

Requires Member States to provide remedies for breach of the Directive.

Sets detailed conditions for transfer of personal data to countries outside the EU.

Requires a national supervisory body to be established, and specifies its powers.

Establishes arrangements for monitoring of the Directive at Community level.

1984 Act

Applies only to automatically processed data.

Applies to all activities.

Contains a narrower definition of "processing".

Makes similar provision.

No express equivalent provision. Relies on data protection principles.

Allows special conditions for "sensitive" data to be set by Order. No Order has been made.

No corresponding provision.

No express equivalent provision. Relies on data protection principles.

Makes broadly equivalent provision, but with some important differences.

No equivalent provision.

No express equivalent provision. Relies on data protection principles.

No equivalent provision.

Relies on data protection principles.

Requires registration of *all* automated processing operations. No requirement for prior checking.

Requires register of data users to be available for public inspection.

Provides for remedies for breach of the Act.

Contains much simpler provision.

Establishes the Data Protection Registrar, with supervisory powers.

Not applicable.