UK Government to adopt minimalist approach in implementing the EU Directive

In March this year, the UK Home Office published a Consultation Paper on the EU Data Protection Directive (95/46/EC) in order to seek views on its implementation. Graham Sutton, the Home Office's data protection adviser, explains the government's minimalist approach and answers questions.

Although the consultation paper was not intended to set out firm proposals from the government, there are two points which can be firmly stated nonetheless:

1. The paper reflects the government's commitment to removing unnecessary regulation.
2. The UK data protection regime should be the least burdensome for data users while giving necessary protection for individuals.

The government will therefore go no further in implementing the Directive than is required by its European commitments. These are not only the EU Directive but also the 1981 Council of Europe Convention no.108.

The government will consider, within that general approach, the scope there may be for making additional changes to the existing data protection regime.

Definitions

The consultation paper is essentially a commentary on the Directive. In some cases the definitions are less clear than they might be, for example:

- The relationship between all the main players as they are identified in the paper, e.g. controller, processor, recipient, third party.
- The definition of "manual data which form part of a filing system," even when read with the recitals, the initial statements that precede the Directive's Articles.
- With reference to Article 3 it is not possible to define clearly what is covered by the scope of Community law.
- Under Article 4, which considers the definition of national law applicable, it is essential that there is a clear commonality of approach by all States of the Union. If not, then there is a risk that some processing operations may be covered by more than one Member States' law, or by no laws at all.

We must ensure that interpretation across the European Union is consistent.

Processing sensitive data

Article 7, the provision which sets out the criteria for processing is an important one, as is Article 8, relating to sensitive data. This will be new to the UK. There is power in the UK Data Protection Act 1984 for the Home Secretary to make an order introducing different criteria relating to processing of sensitive data, but no order has been made. Under the Directive, we are obliged to have distinct provisions.

Exemptions: journalism and security

Further key points include Article 9 which provides a partial exemption relating to journalism. This is an issue which has raised a certain amount of discussion with the media and we expect some interesting representations from journalists.

Article 13 contains the general exemptions which will be very important to such areas as national security. We will have to ensure the particular exemptions are cast sufficiently precisely to meet all the needs there may be.

Notification/registration

Article 21 requires information which is notified to the supervisory authority to be kept in a register, so we may continue to call it registration. This is important as registration arrangements go to the heart of the existing regime. The Directive actually adopts a somewhat lighter touch than that which currently exists. The Registrar has issued a consultation paper on her proposals for amending the existing registration regime, which would be capable of meeting the requirements of the Directive. The government will be interested to see the response and her final proposals.

Enforcement

On the question of enforcement, our paper adopts a fairly open ended approach. Should it follow the existing regime or a new one? The Directive allows Member States considerable freedom as regards the particular enforcement regime that is to be adopted.

Transfers to non-EU countries

Transborder data flows to non-member countries is one area where some serious concerns have been expressed. The Commission has reserved to itself considerable powers of intervention, so we will have to see how they operate too.

Transitional arrangements

One of the issues here, which may be regarded as a debating point, is whether the provision allowing processing which is already underway applies to a *specific* operation, or does it apply to *all* processing operations that are underway in relation to those particular data?

Timetable

We have a working timetable, though it is not a firm government commitment. The Directive was adopted in October 1995 and the consultation paper went out in March 1996. Responses were due on 19th July. We expect to submit firm policy proposals to Ministers in late autumn. When policy is firmed up, we will release a paper.

If the way forward is fresh primary legislation, that will be a White Paper. If the implementation route is to be an order under the European Communities Act 1972, draft regulations for consultation will be prepared. The Bill or Regulations would be introduced in the 1997-1998 Parliamentary session. By Spring 1998, we would hope to have the legislation passed by Parliament. That would allow everyone six months to prepare for when it comes into force in October 1998. We will have to do a compliance cost assessment, and we will need to ask, private sector organisations in particular, for some estimate of likely costs.

Questions

Primary or Secondary legislation?

Q1. The Registrar has put forward a number of compelling arguments for primary legislation. The government has always maintained that there will be insufficient time to prepare and debate primary legislation. In contrast to this, Germany, which updated its own law as recently as 1990, is nevertheless going to make extensive proposals to amend that law and there will be full parliamentary procedures to enact the amendments both in the Bundestag and the Parliaments of the Lander. It does raise the question of whether our system is so inefficient that we cannot match that, or is it simply that there is no political will to do so?

Response - Graham Sutton:
We have three years to translate the Directive into national law and that may not, because of the demands on Parliamentary time, be long enough. There is a view that time may be short given the complexity of the issues.

The point in relation to Germany is that different countries have different ways of dealing with things. It is a matter for them how they go about it there, and a matter for us how we go about it here. The fact is that back in 1972, over twenty years ago, Parliament took the decision that in implementing European Directives, and other measures too, a fast track approach could be adopted. You may take the view that such an approach, involving regulations which are debated once only in each legislative chamber, implies a democratic deficit. But that is not a matter specific to this Directive. It is a matter for Parliament to deliver a view on the acceptability of regulations, which it did in 1972.

As to the choice that still exists for implementing this Directive between fresh primary legislation and an order under the 1972 Act, there is extreme pressure on parliamentary time for primary legislation. The fact is that this Directive can be implemented by means of an order. Ministers will have to collectively address whether there is, nevertheless, a case for implementing it by means of a Bill. The government will decide in the light of responses to the consultation paper.

Audit powers for the national supervisory authority?

Q2. Most people might assume that the investigative powers and effective powers of intervention in Article 28, which establishes national supervisory authorities, implied the power to conduct a data protection audit regardless of any complaint. But the consultation paper makes no comment on this at all. It simply asks whether the present system, where the Registrar's powers are very limited, is the correct model to follow or not. Again, one has to contrast it with Germany, where audit powers are already extensive and widely accepted, and in particular by all the federal agencies which handle large amounts of personal data and are subjected to regular audit. Some of us wish this was the case in Britain. In

Germany again, there is every expectation that these powers will be extended again as a consequence of the Directive. It seems to be accepted as a necessary measure to provide confidence.

Does the Government accept that the power of an independent audit would be particularly valuable in the public sector in the interests of public confidence, open government, and transparency? Secondly, does it accept that independent auditing is required to properly implement the Directive?

Response - Graham Sutton:
I cannot answer the first part of the question, as it refers to the government's proposals that will come forward in the light of the responses to the consultation paper. I know that there is a view that the supervisory authority should have powers of audit. I would like to know how these would differ from what we have at the moment. Should there be a development of the power of the Registrar to be able to enter premises with a warrant? Or a free standing power to enter without a warrant, which has important implications? How would it work? We need to know more about it.

As to the second question - whether powers of audit are required to implement the Directive - there is scope for debate about what the Directive requires. I think it is at least arguable that the existing enforcement provisions in the 1984 Act meet the Directive.

Definition of Personal Data

Q3. What is the definition of personal data? The consultation paper and other commentators have drawn attention to the possible absolute nature of this definition: it shall mean any information relating to an identified or identifiable natural person, and an identifiable person is a person who can be identified directly or indirectly. My concern is this: anything you say or write down which could in some way relate to a person is potentially personal data. There is a whole spectrum from the term "identified persons"; persons who can be identified in terms of Section 1 of the UK's Data Protection Act 1984, identified from information in the possession of the data user, right through to the unidentified person in the crowd scene or television picture who can be identified by someone who knows that person in the crowd, but who is completely unidentifiable so far as the data user or controller is concerned.

Has the Home Office come to the view that we are driven by the words "can be identified" to take a very broad view of that definition, or do we still have the option as a Member State of keeping to our Section 1 definition of a person who can be identified by reference to those data or other information in the possession of the data user? If the former is the case, then how will the right of subject access be properly exercisable and/or how will the controller possibly know when the controller has to comply with the data quality provision because there may be someone out there to whom the data relate?

Response - Graham Sutton:
One of the Directive's recitals states that in determining whether someone is identifiable, account has to be taken of all the means reasonably likely to be used.

The government has not yet taken a view as to whether it will be broadly or narrowly defined. We have to take the view that there is likely to be a broader definition than the one we have at the moment. In particular, in Section 1, identifiable means identifiable, not only by the controller, but by anyone. So the information could be in the possession of someone else, and the individual could be identifiable but not by the controller or the person using the data. We did debate this at some length in the Working Group, and that is why the qualifying phrase went into the recital.

Comment - Nick Platten, Expert, European Commission:
Recital 26 of the Directive is pretty clear. It is a question of the person being identifiable by the controller or any other person, which is a change from the existing UK position.

Prior Checking

Q4. The issue of prior checking is one which needs to be addressed. We are concerned that if Member States implement this, either loosely or varyingly, it could start to create a non-tariff barrier to trade. For example, a company may go into one Member State with some new business which involves an information technology development of some kind and the supervisory authority of that State could delay it for prior checking in relation to notification. I think people know how crucial time could be in these types of instances. What is the

UK likely to do in terms of constraints? What can be done through the Commission or network of Member State governments to ensure that Member States do play by similar rules and that those rules are fair?

Response - Graham Sutton:
Whatever the prior checking requirement may be in that particular country, would it not apply in the same circumstances to any organisation from the country also setting up a business in the same way? If so, what is the problem?

The problem is that there are no time constraints in the Directive at all, and that is a cause for concern. The second thing is that Member States favour their own companies to the detriment of those based abroad. If an innovation comes in and is being established in a Member State and has a competitive advantage, prior checking could make that company lose that competitive advantage to the benefit either of competitors in other Member States or competitors in that Member State itself.

Response - Graham Sutton:
The UK government's general view on prior checking, is that it would like to keep this to an absolute minimum, and that is clear in the consultation paper. In fairness, the Directive too says that it would expect prior checking to be a requirement in very few cases indeed. That may not answer your question, but the number of processing operations likely to be subjected to prior checking is, as now, likely to be very small.

We are concerned however, that there should be fair competition throughout the EU; that there should be a similar approach through all Member States to that of the UK government and indeed the Commission. There does need to be some kind of redress if a supervisory authority gets it wrong and damages a company through delay.

Response - Nick Platten:
It would be contrary to the Directive and perhaps also to the EC treaty (Treaty of Rome as amended by Maastricht) for a Member State to have different criteria for prior checking for its own companies than those based in another Member State. You are worried about whether, in practice, there would be problems. The role of the Article 29 Committee will be important in allowing governments to keep each other informed in terms of the way that they are transposing the Directive, so we can arrive at a situation where harmonisation in practice will be even greater than that required by the Directive.

Consent

Q5. Article 8 2(a) allows Member States to provide that even where the data subject has consented to something, that consent may be overridden in the interest of the data subject. Do you have any feel for how, when or why this might apply?

Response - Nick Platten:
This Article is about protecting the subject either against himself, or where, in effect, consent is not itself a sufficient protection. Data subjects might consent to the processing of the information because they might receive an important service, and so sacrifice their data protection rights. An example may be the use of health-linked genetic data for insurance purposes. There is an ongoing debate whether that sort of information should be used for insurance purposes even where the subject has consented. There may be overriding ethical reasons which mean that this type of data should not be used.

Response - Graham Sutton:
This provision was intended (and the UK is not behind it) to ensure, in circumstances where the national law says that individuals may not consent, or should not be able to consent, that consent should not be capable of being given. It is intended to protect data subjects against themselves. There may be circumstances where one cannot consent but those circumstances would be rare.

Graham Sutton, Home Office Adviser on Data Protection, addressed the *Privacy Laws & Business* 9th Annual Conference in July 1996.

This report was written by Mark Snell, who is currently completing research for a D.Phil at Oxford University, funded by Telecom (Australia) Fund for Social & Policy Research in Telecommunications.