



## European Union states reach political agreement on EU telecoms (ISDN) directive

Italy ended its six month presidency of the European Union in June by achieving a political agreement between the Member States (except for Portugal) on the EU Telecommunications (ISDN) Draft Directive (PL&B Oct. '94 p. 9,11). Directly after completing his term of office, Dott. Giovanni Buttarelli, President of the Council of Ministers Data Protection Working Group, reported on their results at the *Privacy Laws & Business* 9th Annual Conference at Cambridge. This is an edited version of his presentation.

The Working group chose the following four areas as the focus of its activity:

1. The modified proposal for a Directive concerning the processing of personal data and the protection of privacy in the telecommunications sector, in particular in the Integrated Services Digital Network (ISDN) and digital mobile networks.
2. Co-ordination of the stance to be taken by the European Community regarding the work currently in progress on this same subject-matter at the Council of Europe.
3. The issue of co-ordination to be sought more specifically in respect of the draft recommendation of the Council of Europe on medical data and
4. The proposal for accession of the European Community to the Council of Europe Data Protection Convention 108. Such an accession would be in addition to those of the individual Member States.

### The Draft (ISDN) Directive

A common position on the ISDN Directive was achieved in Luxembourg on 27 June 1996. More specifically, a political agreement was reached on the text of all articles between all Member States with the sole (hopefully temporary) exception of Portugal. The European Parliament may decide to make a few additional changes, but the basic framework of the Directive is now established.

This is an important result, as is acknowledged by the Commission and all Member States, since it sheds light on the stance to be taken by Member States in the field of data protection. They will therefore be better able to carry on the preparatory work for enacting national legislation in accordance with the general framework Directive 95/46/EC, taking due account of the provisions which are specifically necessary in the telecoms sector.

### Summary of the process leading to the common position

The process which led us to this achievement may be summarised as follows: In 1986 and 1988, the European Parliament adopted two resolutions which required the Commission to submit specific proposals in the telecommunications sector by taking into account the envisaged opening up of the market and with a view to ensuring a level of privacy in respect of personal data as adequate as possible in the process of modernising services.

The ISDN Directive is the result of a draft prepared by the Commission in 1990. This draft was not examined in detail by the Data Protection Working Group until July 1995, as all efforts were focused on the General Directive. Following the Edinburgh Council of Ministers' Conference in June 1994, the Commission submitted a modified draft which had been simplified in the light of the subsidiarity principle. Under Spain's Presidency, the Working Group proposed a few changes to be made to take account of the liberalisation of telecoms services. However, the ISDN draft Directive was evaluated in detail only this year.

### Was a new Directive necessary?

A few Member States maintained that this new Directive was unnecessary, the general framework Directive being enough. Some other Member States took a stance quite different from that adopted during the discussion on the general Directive, because the focus for discussion was the activities of service and network providers, rather than the rights of data subjects

This came partly as a surprise to the Presidency. It could probably be accounted for by the political changes occurring in some of these countries and, above all, by the fact that some delegations were co-ordinated by experts in telecommunications who had no previous experience in the field of data protection.



The final result was that the draft which the Presidency had drawn up at the beginning of its six month term was considerably 'softened'.

A compromise solution was therefore found. On the one hand, it takes only partial account of the requests made by the European Data Protection Commissioners (who had prepared a 'Common Statement' which the Italian Presidency submitted to the Working Group). On the other hand, it does not meet the requirements of other countries which believe that the ISDN Directive has been deprived of much of its impact - so much so that it actually could be a step backwards as compared with Recommendation R (95) 4 of the Council of Europe on Telecommunications.

I partly share these views, but I am convinced that the ISDN Directive is in any case a useful step in the direction of a common policy. Further, it should be pointed out that the concept of harmonisation had to be reconciled with the subsidiarity principle which is clearly expressed in the recitals.

#### **Why the new Directive is necessary**

This new Directive is necessary since digital telecommunications networks allow the transmission of voice, data, pictures, texts and sound in the form of totally new services. Network digitalisation enhances the development of 'intelligent' activities and functions which impinge on privacy in totally new ways and warrant more specific provisions as compared with those of Directive 95/46/EC. The objective is that of ensuring a correct use of data and services as well as the social 'acceptance' of digital networks (only think, for instance, of 'video on demand' and interactive television). If the development of all these services is not harmonised, this will probably jeopardise free competition among service providers and the free market of the Information Society.

#### **The aim of the ISDN Directive**

The aim of the ISDN Directive is the same as that of the general Directive: namely, to ensure an equivalent level of protection of fundamental rights and freedoms (in particular - but not only - the right to privacy), with respect to processing of personal data in the telecommunications sector, and to ensure the free movement of such data and of telecommunications equipment and services in the Community.

I would refer to the ISDN Directive as a derivative Directive, since it 'particularises' and 'implements' Directive 95/46/EC. The latter will continue to apply to the telecommunications sector, but it will be particularised by the ISDN only in respect of specific issues.

#### **ISDN Directive may supersede the General Directive.....**

The Common Position, as often requested by the Presidency, does not appear to include provisions which are incompatible with the General Directive. This objective was better stated as a principle in the previous draft. The Working Group shared the view that changes to the General Directive should be avoided, but chose to use a wording which, if applied literally, would result in applying the ISDN Directive - rather than the general one - whenever the two texts are found to diverge.

#### **.....except in the case of internal telecoms networks**

In the world of telecommunications there will be at least one sector in which only the General Directive will apply rather than the ISDN one. This sector is the processing of personal data relating to telecommunications services provided within non-public networks. This is the case with a company's internal network, where there is a need to protect employees' privacy. However, the ISDN Directive does not prevent Member States from choosing to apply the same Directive to this category of services as well.

#### **The compromise approach which includes legal persons**

Article 1 of the Directive is the result of the painstaking search for a compromise solution among Member States concerning the inclusion of legal persons into the scope of the new Directive, in addition to natural persons. This Byzantine solution centres on these four criteria:

(a) The ISDN Directive will also apply to legal persons to the extent that the latter are *subscribers*. For example, the directive will *not* apply, at least directly, to a legal person who is a service provider, whereas it *will* protect any corporate body which is a party to a contract with the provider of a publicly available telecommunications service.



(b) In no case will the ISDN Directive give rise to the obligation for Member States to include legal persons in the scope of application of the General Directive, which will continue to apply to natural persons only.

(c) The ISDN Directive will protect the 'legitimate interests' of legal persons. This conventional wording is used on account of the fact that the rights conferred on legal persons are, in a few countries, considered equivalent to individual rights, whereas in other countries they are regarded as legitimate interests or interests of a factual nature.

(d) In the absence of a general definition of 'legal person,' the latter will further be based on national law (in a few countries, legal persons are all bodies whether by fact or by law, businesses, and any other collective agencies such as associations, foundations, committees, etc.).

### **Fears that adopting ISDN Directive may affect scope of General Directive**

There can be no doubt that this approach was adopted following the concerns expressed by a few countries fearing a chain reaction - namely, the risk that following the adoption of the ISDN Directive, the scope of application of Directive 95/46/EC could be extended so as to include legal persons as well. It was possible to overcome these concerns on the basis of three main considerations:

1. The ISDN Directive protects subscribers and users of telecommunications services, and it would be quite difficult for service and network providers to distinguish between subscribers who are legal persons and subscribers who are natural persons;
2. There are legal persons who are interested in protecting the security and confidentiality of their communications, perhaps for commercial reasons, and are not willing to receive unsolicited calls or communications;
3. A diversified approach by Member States might result in obstacles to the internal market for telecommunications.

It is clearly stated in the recitals that the protection of legal persons must take account of the concurrent national and Community provisions which apply to such persons.

Obviously, the ISDN Directive also provides that activities falling outside the scope of

Community law are excluded; the wording of Article 1(3) is in line with that of article 3 in the General Directive. The ISDN Directive will not apply to radio and television broadcasting, provided these activities are performed according to traditional modalities (that is, as point-to-multipoint services). Conversely, however, the new point-to-point services such as interactive television and video on demand will be governed by the ISDN Directive.

### **Analogue or digital?**

The most controversial issue in the Directive probably concerned the issue of whether it should apply to analogue or digital or both services. Again, a compromise solution was found with some difficulty. There was a reconciliation between the concerns of those delegations believing that the application of the Directive to analogue services would entail excessive costs, and those who correctly maintained that the protection of fundamental rights and freedoms should not differ on account of the networks involved. The General Directive itself is applicable to all types of network.

This balance was struck partly because it is not easy to identify clear-cut differences between analogue and digital networks. Furthermore, a few services are offered partly through the former and partly through the latter networks. The Directive will apply to any service (via ISDN; mobile digital networks; analogue networks, etc.) independently of cost/benefit assessments. The Directive provides in any case that Member States may refrain from applying three Articles in the Directive to analogue networks (they should inform the Commission in this case): namely, the Articles concerning calling - and connected - line identification and automatic call forwarding, if this is technically unfeasible or involves a disproportionate economic effort.

### **Security obligates the service provider**

Article 4 of the Common Position does not add very much to Article 17 in the General Directive (which is referred to in a recital and in a declaration). It is nevertheless useful, as it provides that the security obligations conferred by the General Directive on the controller are to be discharged, in public telecommunications networks, by the entity dealing most closely with subscribers - that is to say, by the service provider.



Where measures concerning the security of the whole network are required to safeguard the security of its services, such measures will have to be adopted in conjunction with the provider of the public telecommunications network, who will be jointly liable.

The service provider will have to inform subscribers concerning the specific risks of a breach of security, the possible remedies and the costs involved.

### **Confidentiality; listening and recording**

A specific obligation will be imposed on Member States, also arising from the European Convention of Human Rights: namely, ensuring the confidentiality of communications within the scope of application of the Directive. Article 5 allows Member States to adopt a flexible approach: they will not be obliged to issue provisions governing the recording of a telephone conversation by either of the users having such a conversation; however, they will have to prohibit listening to, recording, surveillance and interception of communications by third parties where they are performed without the consent of the users involved. One need only think, for instance, of the use of loudspeaker-equipped apparatus. A recital was included in which it is recognised that a few countries prohibit such interference only when it is intentional, whereas they do not prohibit listening to a casually intercepted communication.

### **Traffic and billing data**

The ISDN Directive basically 'particularises' and complements the provisions of the General Directive concerning the processing of traffic and billing data. Traffic data relating to subscribers and users, processed to monitor calls, must be erased or made anonymous. However, the network or service provider may further process personal data for the purpose of subscriber billing and interconnection payments, up to the end of the period during which the bill may lawfully be challenged or payment may be pursued. Where the processing is carried out for the purpose of marketing its own services, the service provider will have to apply for the subscriber's consent: a simple 'opt-out' solution will therefore not be sufficient.

### **Itemised billing**

The sensitive matter of itemised billing was dealt with by recognising the right of subscribers not to receive this service. Member States may decide to allow service providers to offer such services either as a default option (according to an opt-out scheme in favour of the subscribers), or only upon application. Furthermore, Member States will have to adopt the necessary measures in order to reconcile the right of subscribers to verify correctness of their bills with the right to privacy of calling users and called subscribers.

This will be achieved either by requiring the deletion of a certain number of digits from the called numbers mentioned in itemised bills (the Directive does not specify how many digits should be deleted) and/or encouraging the development of telecommunications service options such as alternative payment facilities which allow anonymous or strictly private access to publicly available telecommunications services (for example calling cards and facilities by credit card). I am sure this is good news for unfaithful spouses and turbulent young people. Children and domestically harassed women will also be relieved to hear that all calls made free of charge - including emergency calls - will not have to be included into itemised bills according to the ONP Directive 95/62/EC of 13 December 1995.

### **Line identification**

Another major issue in the ISDN Directive concerns the provisions applying to calling-line identification and connected-line identification. Where these services are offered, which is mainly, if not exclusively, the case with digital networks, there must be the possibility to eliminate, free of charge, the presentation of the calling-line identification on the receiving equipment. This option will have to be offered on a per-call basis to the user, or on a per-line basis to the subscriber. The called subscriber will further have the possibility:

- (a) 'to be unaware' (that is to say, to prevent the presentation of calling-line identification);
- (b) to avoid nuisance calls (i.e. to reject incoming calls where the presentation of calling-line identification has been eliminated by the calling user or subscriber);



(c) to override the elimination of the presentation of calling-line identification, in the presence of malicious or nuisance calls; and

(d) to eliminate the presentation of connected-line identification to the calling user (particularly in the case of call forwarding).

The activities of organisations (such as help lines) which have an interest in ensuring the anonymity of their callers will thus be protected.

Adequate information will have to be given to the public about the possibility of choosing among the available options and using some of them free of charge. Furthermore, organisations providing emergency services, if recognised as such by a Member State, will have the possibility of overriding the elimination of the presentation of calling-line identification. All subscribers will have the possibility, free of charge and without constraint, of preventing automatic call-forwarding by third parties.

### **Opt-outs**

Subscribers will have the right to decide if, and to what extent, they are to be included in printed or electronic directories of subscribers available to the public or obtainable through directory enquiry services. Subscribers will be entitled:

(a) to have only such data included as are necessary to identify them, their consent to be required for the publication of additional personal data (such as occupation or educational qualifications);

(b) to be omitted from one or more directories, whether electronic or printed;

(c) to be included in such directories only on condition that their data are not used for the purpose of direct marketing;

(d) to have their address omitted in part (for instance, by omitting the street number); and

(e) not to have any reference revealing their sex (for instance, by abbreviating first names).

These rights will be exercised free of charge or subject to the payment of reasonable costs which will not be dissuasive in their nature. Member States may make such rights available only to subscribers who are natural persons.

### **Unsolicited calls**

An important provision which met lively opposition in the direct marketing sector, concerns unsolicited calls. On 29th June 1995, a Common Position (No. 19/95) on the so-called Distance Selling Directive was adopted; this Directive contains provisions on the protection of consumers in respect of distance contracts. However, such provisions only apply to business-to-consumer relationships. It was therefore necessary to extend this type of protection to business-to-business relationships as well.

Article 12 of the ISDN Directive was drafted a number of times. In its final wording, it lays down the following principles:

(a) the use of automated calling systems without human intervention (automatic calling machines) or facsimile machines (fax) for the purpose of direct marketing should only be allowed to subscribers who have given their prior consent; and

(b) unsolicited calls for the purpose of direct marketing by means other than those mentioned above should not be allowed without the consent of the subscribers concerned or those subscribers who do not wish to receive these calls. The choice between an opt-in system and an opt-out one should be left to national legislation.

### **Timetable**

The Directive will have to be enacted by national legislation by 24th October 1998; that is, within the same period provided for the European Union Data Protection General Directive. There are also a few transitional provisions, in particular concerning already published editions of telephone directories. The Commission will specify the technical details relating to data which may be processed for the purpose of subscriber billing and interconnection payments. There will be no need to follow the usual Council procedures.

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