

# Brussels conference debates changes to EU data protection laws

By Stewart Dresner

**L**AST MONTH'S DATA PROTECTION CONFERENCE in Brussels provided businesses and consumers alike with the opportunity to voice their opinions on privacy protection in the EU. *PL&B International* takes a look at some of the arguments.

At a two day conference organised in Brussels by the European Commission on September 30th and October 1st, over 450 participants from around the world gave the Commission a host of proposals on how the EU Data Protection Directive should be amended. Having already published the views of the Commission (see *PL&B Int*, Sept 2002 p.9), we now present the views of other important stakeholders.

Peter Hustinx, the Netherlands Data Protection Commissioner, caught the participants' mood by declaring that no one who had spoken during the conference had suggested that the principles enshrined in the directive are not valid, or that the directive is unworkable. The speakers' presentations and other participants' comments were diverse but constructive.

## THE PRESIDENCY

Opening the conference, Lene Espersen, Denmark's Minister of Justice, emphasised that: "Every individual has fundamental rights that must be respected... On the other hand, we need to ensure that the internal market can function efficiently."

She also referred to the impact of the directive on the wider world. "The Data Protection Directive has had a positive influence beyond our Community... The directive has helped put the issue of data protection on the agenda in several countries [regarding] whether the country in question has a level of protection that can be considered adequate in accordance with EU standards... I find it extremely positive that our directive

may help create a healthy and productive debate on data protection beyond the borders of our Community."

## THE MEMBER STATES

Austria, Finland, Sweden and the United Kingdom have published joint proposals for amending the directive and have invited other member states to support their initiative. Their aim is summarised in the statement that "by removing unnecessary, and in some cases costly, bureaucratic requirements for which there is no conclusive added value in data protection terms, the core requirements of data protection are more likely to be complied with by data controllers." The proposals include the following:

**Sensitive data** – Article 8.1 of the directive prohibits the processing of certain categories of sensitive data, with certain exemptions. The prohibition arguably applies to the processing of an image of a person, since that image will always "reveal" the ethnic or racial origin of the person, unless that person is masked or otherwise disguised. The prohibition also applies to publication of a name in a telephone directory, since names "reveal" ethnic or racial origin. The proposed amendments to recital (33) of the directive are intended to make clear that such essentially incidental "revelations" of the characteristics described in Article 8.1 do not amount to sensitive data for the purposes of the Article.

**Information given to data subjects when collecting personal data** – These member states' concerns are the

absolute requirement to provide information under Article 10; and the requirement to apply different rules according to whether or not the information is collected from the data subject. The proposal changes the time limit for informing the data subject. The current formulation of Article 11.1 allows the provision of information to be deferred indefinitely if the intention to disclose is never fulfilled. Under the proposal, where the data is collected from the data subject, the information is to be made available at the time of collection. In other cases, the information is to be made available within a reasonable period after collection, having regard to the particular circumstances.

**Subject access** – Where the data controller cannot easily retrieve the personal data, the data is not likely to be used in a way that is detrimental to the data subject. The proposal is to require data controllers to give subject access only where they are able to locate the data. However, there would be a duty on the data controller to make "all reasonable efforts" to locate data relating to the data subject. The proposal expressly encourages the data controller to ask the data subject for help in locating data on that individual.

**Notification** – The aim of the proposal is to reduce the procedural requirements which member states are obliged to impose by the directive. This would be achieved by removing the list of information which member states must specify when providing for exemption or

simplification. Instead, the proposal permits exemption or simplification when a simple test is satisfied: that processing is unlikely to affect adversely the rights and freedoms of data subjects.

**Transfer of personal data to third countries** – The proposal addresses the issue of how the directive should be applied to networks, such as the Internet. Any personal data published in the EU through such networks will be accessible from all third countries. Since Community law on data protection prevents the publication of personal data which would harm individuals' privacy rights, it follows that the lawful publication in a member state of personal data does not harm those rights. The proposal is that the directive should clarify that such lawful publication in a member state, which results in the personal data being accessible from third countries, will not be in breach of Article 25 and Article 26.

#### **BUSINESS VIEW**

Christopher Kuner, a lawyer with Hunton & Williams in Brussels and Vice-Chair of the International Chamber of Commerce's (ICC) Special Advisory Group on E-Related Issues, presented the ICC's recommendations on the directive. He said that the member states have great latitude in implementation. Differing implementing legislation has resulted in legal uncertainty and unnecessary extra costs and burdens for business operating across the single market. Significant differences and discrepancies include:

- different processing categories not requiring notice to or registration with data protection authorities
- some member states allow notification for free (Finland), while others require a fee (UK)
- different standards and fees for access to data (particularly non-automated data) at the request of data subjects
- differences in judicial recourse for non-compliance

- differences in approval requirements for transborder data flows – some member states still require a licence even when using the European Commission-approved model contracts; some member states allow data controllers to reach their own adequacy determination (UK), while others have more regulatory requirements (Spain)

- discrepancies as to whether information about criminality is sensitive data or can be processed.

Regarding rule-making at European level, Kuner complained about a lack of transparency by the Article 29 Data Protection Working Party and the Article 31 Committee. He called for publication of agendas on the Internet and consultation on decisions before they were taken.

He requested that corporate privacy officers at European level could replace notification and some other requirements. He also stated that since adequate protection exists throughout the Community, compliance with a single member state law should normally be sufficient.

#### **CONSUMER VIEW**

Anna Fielder, Director of Consumers International, said that its research revealed widespread neglect of good privacy practice and lack of compliance with data protection legislation. She reported that people are seldom aware that companies use comprehensive databases to build up customer profiles to target advertising or raise prices selectively, or the fact that sensitive data, such as medical records, can now be placed online, often without their consent or adequate protection.

She gave three reasons for existing measures being inadequate:

1. rules are ambiguous and can be interpreted in a manner that suits, for example, the commercial interests of companies
2. the frequent absence of good practice guidelines
3. poor enforcement: few complaints

are being investigated and even fewer lead to prosecution.

Her recommendations included:

- better monitoring of existing practices by data protection agencies, through research and statistics that are meaningful and comparable across countries
- more resources should be made available to data protection agencies to enable them to conduct more investigations and clear backlogs of complaints
- a requirement to data protection agencies to use advisory boards to include consumer groups
- improved education and training for businesses
- clear, easy to understand and easily accessible independent information for consumers, which explains their rights, the practical implications for giving consent, and steps to protect their privacy
- model privacy policies for business that are brief, to the point and easy to understand
- providing consumers with easy access to independent redress mechanisms that are cheap, quick and effective.

#### **THE EUROPEAN COMMISSION'S CONCLUSIONS**

Frits Bolkestein, Internal Market and Taxation Commissioner, in his concluding statement, reminded his audience of the directive's broad human rights framework. The Commission would be reconciling three sets of considerations:

1. the need to provide not only for high, but also effective, standards of data protection, taking account of the latest technological developments
2. the need to facilitate the free movement of personal data for legitimate uses – "this means a more consistent application of the directive" across the EU.

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