

EURIM Briefing No 1

The mission of EURIM is to facilitate effective consultation and monitoring with regard to the development and implementation of European policy initiatives as they affect users and suppliers of Informatics and Telematics related products and services.

THE EUROPEAN
INFORMATION
SOCIETY GROUP

EURIM



EURIM Briefing on EC Draft Directive on Protection of Personal Data

Introduction

The Council of Europe Convention for the Protection of Individuals was issued in 1981, setting out Guidelines for the protection of personal data. Since then, all Member States of the European Community have ratified the Convention.

The UK was in the forefront of introducing legislation to meet the requirements of ratification, and the Data Protection Act 1984 was enacted. Not all Member States have been as diligent in meeting their obligations, and this has resulted in an imbalance in data protection across the Community.

The position has been viewed with some concern by the European Commission and the result has been the decision to issue a directive, thereby achieving in principle a harmonisation in the levels of protection of personal data.

The EC Directive was issued in first draft in 1990. There was considerable comment from most Member States. A second draft has now been issued and it is this which is the subject of this paper.

Overall, there are still items which will cause additional costs to many areas and data users, without necessarily improving the benefits to the data subjects. The simple approach which was facilitated by the Convention has largely been lost, mainly as a result of certain States failing to respond to the needs expressed with the Convention. ***There is widespread industry concern regarding the need to ensure that bureaucratic rigidity is not introduced or accentuated as a result of national interpretation and the resulting legislation.***

Among the areas of the Directive where there have been particular concerns are:

Principles of Data Processing

There appears to be consensus over the need to ensure that provision is made for on-going relationships to enable processing to continue without repetitious obtaining of consent;

Automated Decision Making

The original wording was capable of being interpreted to prohibit the use of cash dispensers, payment of bank standing orders etc, but the rewording allows automated decision provided certain conditions are met. However, comment has also been made that the proposal could affect the use of automated profiling techniques for marketing purposes.

Notification to Supervisory Authorities

Great care will be required to ensure that reducing the effort related to notification does not increase the queries and consequent workload of data users.

Transborder Data Flow

The British Bankers Association in particular believes that it is essential that organisations in the private sector be expressly permitted to pass information across national boundaries for the prevention or limitation of fraud.

Manual Data

The interpretation of what is to be included as manual data is critical. Too rigid an interpretation will add considerably to business costs and should be avoided in the UK legislation needed to respond to the Directive.

Express/Implied Criticism

Some organisations believe that the requirement for express consent is a move in the right direction, but most were firmly of the view that implied consent was adequate, less costly and much preferred.

DETAILED COMMENTS

The Directive runs to 37 articles and the individual comments attached are :

1. HIGH IMPACT

Definitions (Article 2) the extension of the regulations to include manual data.

This has caused a great deal of comment. Most have been that this will cause a significant cost and administrative burden to commerce, industry and public service bodies. Several organisations were of the view that the cost could be minimised according to interpretation to what should be included as manual data, and others considered the inclusion to be of considerable benefit. The House of Lords Select Committee concluded that the protection should be extended to include manual data, but that the burden on data users be eased by ensuring the Directive is not unduly onerous and the right of access to manual data should not be retrospective.

The data subject's consent is defined as an express indication of his wishes. Express rather than implied consent has also raised a considerable volume of concerns. It is considered by some to be impractical and could lead to disputes (*EXXEL*), whereas others consider this to be a step in the right direction (*Liberty*). The *CBI* considered this to be one of the most important issues to be addressed and expressed strong views regarding the cost and impracticality of express consent. It was also pointed out that the European Parliament had proposed that implied consent was sufficient, but their view had not been heeded by the EC.

Sensitive Data (Article 8) the processing of sensitive data should be prohibited unless written consent has been given by the data subject.

We found no objections to this in principle. Originally this included details of criminal convictions on a blanket basis, but Member States will now be permitted to lay down exemptions. It is vital that this be done, to enable Organisations (e.g. insurance companies and banks) to avoid potential fraud. (*ABI, BBA, Barclays Bank*). There is also a need to include medical records in the exemption, as under certain circumstances they may

include details of criminal convictions, for example, where sexual abuse has taken place. (*BMA*)

Freedom of Expression (Article 9) exemptions from the requirements of the Directive should be given to enable freedom of expression to be balanced with the right to privacy.

This applies to the processing of personal data solely for journalistic purposes by the Press, the audio-visual media and journalists. The Data Protection Registrar expressed some reservations on certain aspects of this issue in his written evidence to the Select Committee. *Liberty* were in agreement with the principle. The Select Committee concluded that there should be no special exemptions for the media. (H. of L. Report)

Collection of Data (Article 11) When collecting data, the collector must advise the data subject of various points, including the purpose of the processing intended for the data.

This was felt by some to be impractical under certain circumstances (e.g. telephone ordering), although *Hoskyns* have advised that the Commission has refuted the telephone scenario. The Article also implies that the data subject should be re-advised on each occasion that additional or fresh data is supplied, although again there are contrary views to this implication. This would be costly to the data collector and of no benefit to the data subject. (*NCC, CBI, Post Office.*)

Right of Access (Article 13)

We found no opposition to right of access for the data subject. However, certain additional requirements are challenged for various reasons. The correction of inaccurate or incomplete data is a basic right, but notification to previous recipients of the data would create logistic and cost problems. A possible compromise would be for it to be based on reasonable steps being taken (*NCC, BCS, Hoskyns*). The requirement that the reasoning being automatic decision making should be advised to data subjects should the decisions be against him, could facilitate an increase in fraud and excessive borrowing, and care should be taken with UK legislation to avoid such a problem

(*BBA, Barclays Bank, DP Registrar*). The DP Registrar also regretted that there was no exemption from subject access to protect the data subject, for example, divulging medical information which could have a detrimental effect on the patient.

Automated Decision Making (Article 16)

There has been considerable objection to the proposal that individuals should not be subjected to an administrative or private decision adversely affecting them which is based solely on automatic processing defining a personality profile. The original wording was capable of being interpreted to prohibit the use of cash dispensers, payment of Bank standing orders, etc. but the re-wording allows automated decision making provided certain conditions are met. The foremost of these are the entering into or existence of a contract, and the right of objection to the decision by the individual, should the decision be negative (e.g. decline for a loan following automated credit scoring). Comment has also been made that the proposal could affect the use of automated profiling techniques for marketing purposes (*BBA, Barclays Bank, DP Registrar, CHANGE*).

Transborder Data Flow (Article 26)

The current draft has been accepted more readily than the first draft although further improvements have been suggested by the **CBI and BBA**. In particular, the *BBA* believes that it is essential that organisations in the private sector be expressly permitted to pass information across national boundaries for the prevention or limitation of fraud. The proposal in its current form was also supported by *Liberty*. *Hoskyns* considered that there would have been merit in including the Data Protection Authorities as part of the assessment process.

2. MEDIUM IMPACT

Definitions (Article 2)

The definition of personal data is intentionally broad, but concern has been expressed that medical research data files and statistical data could be included as they can often be identified through data other than names and addresses. (*BMA*). The effects this definition has had on identification of patients "at risk", let alone

medical research in Germany, has caused serious concerns. Such problems may become more widespread.

Scope (Article 3)

Clubs, Societies, and non-profit making bodies (e.g. charities) are now included within the Directive. Some comments on this were that it was an unnecessary demand (*BCS and NCC*), although others were in favour of the inclusion, particularly as it is slightly alleviated by Article 8.2(b) in respect of special categories of data. (*Hoskyns & BMA*)

Principles for Processing Data (Article 7)

There was general agreement that this provision, setting out the conditions under which processing may take place, would prove helpful to both data subjects and businesses. However, the *CBI*, whilst welcoming the extension to include processing where it is in the general or legitimate interests of the controller, or of a third party to whom the data are disclosed, considered that provision should be made for on-going relationships to enable processing to continue without repetitious obtaining of consent.

Notification to Supervisory Authorities (Article 18)

It is proposed that there should be provision at National level for simplification of or exemption from the obligation to notify the authorities (i.e. the DP Registrar). The condition under which the notification exemption covering manual data is to apply are also to be defined at national level. Great care will be required to ensure that reducing the effort related to notification does not increase the queries and consequent workload for the data users (*BCS*).

3. LOW IMPACT

Definitions (Article 2)

The definition of a "natural person" is inadequate. (*CBI*)

The inclusion of deceased persons is inappropriate and will lead to confusion (*NCC, CBI*) although the White Paper on Open Government already considers inclusion of the personal records of deceased.

Disclosure to a Third Party (Article 12)

the data subject must be informed of disclosure (ECD)

However, this does not apply where the data subject has already been informed that data are, or may be disclosed. There were no objections to the principle, although flexibility will be required (*Hoskyns*).

Exemptions to the Right of Access (Article 14)

There are several conditions under which the right of access is restricted. These include national security, defence and public safety. It is recommended that the avoidance of fraud should be included in this category (*CBI & BBA*). It is recommended by *Liberty* that where the right of access is denied, the reason must be given to the data subject. However, such a right could undermine the exemption (*Hoskyns*).

Codes of Conduct (Articles 28 & 29)

It is proposed that Member States encourage the development of Codes of Conduct by trade associations, both on a national and a community basis. There was general agreement in favour of this proposal.

Exercise of Rule Making Powers (Article 33)

It is proposed that the Commission should adopt such technical measures as are necessary to apply the Directive. There is a feeling that it would be more appropriate for the Commission to recommend such measures to the EC Parliament rather than being dictatorial (*CBI & BBA*).

Final Provisions (Article 35)

The Directive sets the date of 1st July, 1994 for Member States to bring into force the legislation necessary to comply with the Directive. This could be rather optimistic as the Directive is still being considered for modifications and

improvement. In addition, a 3-year period is provided with respect to processing operations begun before that date to be compatible with the Directive requirements. Bearing in mind the inclusion of manual data, this date could be totally unrealistic (*CBI & BBA*).

The Way Forward

The detailed comments of the Organisations and Companies who have assisted with this report (listed in the separate appendix) are available via the House of Commons Library (contact Mrs J. M. Wainwright, Computer and Technical Services) or direct from EURIM.

Many have representatives and/or personnel based in Brussels in direct contact with the EC and wish to work with Parliamentarians to ensure both sound directives and subsequent national implementation which do not introduce or accentuate bureaucratic rigidity and which minimise any detrimental effects without reducing the practical protection of the individual.

For details of EURIM and its activities, please contact Philip Virgo, EURIM Finance and Planning Executive, 2 Eastbourne Avenue, London, W3 6JN.

APPENDIX TO EURIM BRIEFING NO. 1

List of Organisations Providing Responses

Requests for views and comments on the draft Directive were sent to a range of Companies and Organisations, plus a selection of individual advisors. The selection was based on ensuring a wide representation of Companies and Organisations within the UK.

Not all of those approached were able to respond. Some referred to their views which had been given as written and/or oral evidence to the House of Lords Select Committee, and advantage has been taken of responses contained in the Report of the Select Committee. Others stated that their views were adequately represented by others (e.g. CBI).

Input Received

The following Organisations responded direct:

AT&T
The Post Office *
BT (see CBI view) *
Telewest
Hoskyns
IBOS
The Press Association
IDPM
Barclays Bank
Thomas Cook see CBI view) *
IBM
ICI (see CBI view)
FEDIM
Readers Digest
NCC
Clifford Chance
British Bankers Assoc
CBI
Data Protection Registrar
EXXEL
Home Office
Tarlo Lyons
Federation Bancaire (via BBA)
Stratus Computers Ltd.
NatWest Bank (see BBA view)
IBM Computer Users Association

Organisations marked * responded verbally

The following refer to their submission to House of Lords Select Committee Report

Consumers Association *
Liberty *
British Computer Society
British Medical Association *

Copies of the responses from the following organisations is available from the EURIM administration.

Name of Organisation	No. of Pages
----------------------	--------------

(Index to be prepared)

The EC Draft Directive is obtainable from EC London Office, Storey's Gate

Reference No.:8460/90 (COM(90)314)

Full Title: Commission Communication on the protection of individuals in relation to the processing of personal data in the Community and information security.

Reference No.: 9400/92(COM(92)422)

Full Title Amended draft Directive on the protection if individuals with regard to the processing of personal data and on free movement of such data.

The House of Lords Select Committee Report is obtainable from HMSO

Reference No.:HL Paper 75-1

Full Title: House of Lords Session 1992/93 20th Report Select Committee of the European Communities Protection of Personal Data Report.