

EURIM Briefing No 12

July 1996

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The EU Data Protection Directive

Practical and Political Issues

Introduction

This Briefing is EURIM's response to the Home Office's Consultation on the EU Data Protection Directive and a contribution to the debate thereby generated. It examines how the UK can best comply with the requirements of the Directive and at the same time provide a better environment in which matters of data protection and privacy can be addressed.

EURIM has, from its inception, been actively concerned with data protection issues. Our first Briefing, in 1994, provided a digest of members' responses to the Second Draft Directive and in June 1995 we published an updating position paper. This showed that some points of concern had been removed in the revised draft but other important ones remained.

Both these documents were concerned primarily with the interpretation and implications of individual clauses in the Directive. The original Briefing did, however, emphasise that:

"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..."

That concern still exists and this briefing takes a broader look at the nature of data protection legislation and associated regulatory powers. This is also an opportunity to look beyond the provisions of the Directive and existing legislation and to consider what would be the best infrastructure to achieve the declared objective of ensuring the free flow of personal data while protecting the individual's right to privacy.

Summary of Conclusions

1. The Data Protection Registrar's function should be reviewed. The role should be more that of a Parliamentary Commissioner (Ombudsman) than a business Regulator, particularly in respect of complaints regarding Government Departments.
2. The reporting lines and positioning of the Registrar's Department should be reviewed.
3. The advisory role of the Registrar should be enhanced and her ability to charge fees should be de-linked from registration alone and become variable and work related.
4. Registration could remain, but re-engineering of the system is required to make it simpler and more successful.
5. Primary legislation is highly desirable. There are potential dangers of confusion should the 1984 Act regulation and that arising from the Directive exist separately. Primary legislation would remove these dangers and would be needed in any case to effect any structural or administrative changes. Failure to do this could create greater confusion for data users and data subjects.
6. Legislation must take account of the implications of advancing technology.
7. The current programme to simplify the operation of the 1984 Act must continue.

Registration

There is general agreement that the current registration process is unduly cumbersome but, as it is defined in the Act, major changes would need fresh legislation. Under-registration is a serious issue. The Registrar's office has developed ways within the current requirements of helping those applicants with more straightforward data uses, but we consider that the Registrar should be empowered to re-engineer the registration process completely.

Some believe it would be better not to have registration at all but to enact legislation which made it an offence to contravene certain measures. On balance we believe that registration should remain, that it should be as simple as possible and that there should be convenient public access to the register.

The objective should be to make registration much simpler, rather than to extend drastically the exempt categories. Some superficially obvious candidates for wider exemption (such as small companies and sole traders) may hold extremely sensitive data.

Advice

An important part of the Registrar's current role is to give advice and we believe this feature should be maintained and maybe enhanced. Much can be achieved by providing explanations and help in complying with the Data Protection Principles. Users will need specific guidance to comply with the Directive.

Consideration could be given to a sliding scale of fees related to the level and complexity of advice required and/or work done and delinked from the current "registration" basis.

Trans-Border Data Flows

There is concern about restrictions in the Directive on exchanging data only with countries whose data protection arrangements are deemed to be "adequate". There is very real doubt as to whether the United States' system would meet the EU's adequacy criteria, although individual companies based in the US might well meet all the requirements.

We support the suggestion that the EU Data Protection Commissioners collectively should make decisions in this area.

The need for Primary Legislation

EURIM believes that primary legislation should be introduced. As a minimum it must incorporate the Principles of the 1984 Act with appropriate amendments governing registration and the requirements of the EU Directive. Unless that happens, the 1984 Act will have to remain on the Statute Book because the Directive deals only with matters that are within the EU competence. Without the "seamless" approach of a single Act legal and administrative confusion will result.

Primary legislation will also enable advantage to be taken of the extensive derogations in the Directive to provide an approach which minimises the identified adverse effects for UK organisations and companies.

This is also an opportunity to look beyond current definitions and practices. Technological advances bring new and different ways of mis-using data and invading privacy. Things that could not previously be "name-linked" now need to be brought within the aegis of data protection. (One example is CCTV surveillance systems where sound and images are stored alongside data from a swipe card.) Where such technology is concerned, the Law will always tend to lag. The need is for enabling legislation that can respond to each new situation as it arises.

With the rapidly emerging universality of access to data in the Information Society the application and implications of the Principles of Data Protection need to be reviewed.

The Role of the Registrar

The Data Protection Registrar's role is not like those of the Regulators of the de-nationalised industries and should be regarded more as that of a Parliamentary Commissioner.

EURIM considers that the Registrar should continue to answer to Parliament, not least because complaints to the Registrar are increasingly likely to be about the use of data by the State. The Home Affairs Select Committee may not be the appropriate body to receive reports from the Registrar. Consideration should be given to transferring this responsibility to another or a new Select Committee.

EURIM will welcome changes that both simplify and update the way in which data protection is regulated in the UK. The requirement to adopt the European Directive should be made the opportunity to introduce other improvements. The Data Protection Registrar will continue to be needed and should remain answerable to Parliament, but with functions that will change over time.

ANNEX

Key points from the earlier EURIM papers relating to specific Articles in the Directive:

Copies of the EURIM Briefing No. 1 on the Second Draft Data Protection Directive and the 1995 Position Paper can be obtained from *Pauline Carpenter at the EURIM Secretariat (telephone/fax: 0181 309 5724)*

Article 2: **Explicit/Implied Consent**

National legislation requires very careful drafting to ensure that marketing opportunities are not over-restricted whilst at the same time data subjects have a clear option to be excluded from unwanted mail and similar contacts.

Articles 2, 3 and 32: **Manual Data**

There is still some confusion as to what constitutes manual data. EURIM believes that only structured files should be included in national legislation.

Article 15: **Automated Decision Making**

The use of automated profiling techniques for marketing could still be affected.

Article 18: **Notification to Supervisory Authorities**

EURIM would be concerned if national legislation required that certain or all non-automatic processing operations involving personal data were to be subject to notification.