

A Business Guide to Changes in European Data Protection Legislation

Cullen International



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Our special thanks are due first to Professor Yves Poulet not only for his leadership of the CRID team during the preparation of this guide but also for his own legal analysis of the flexibility in Directive 95/46/EC (Part III.B of the Guide). While still with the CRID, we must also express our warmest thanks and admiration to his young colleague Sophie Louveaux. Sophie is a highly talented lawyer who was not only instrumental in producing the Article-by-Article description of the General Directive (Part III.A of the Guide) but also managed to produce Juliette, a beautiful baby girl, very shortly afterwards! Sophie also provided valuable support to Cullen International during the development of the Article-by-Article description of the Telecommunications Directive.

Our sincere thanks are also extended to the following two busy senior officials of the European Commission, both of whom have taken time out from their busy schedules to write a foreword to this guide:

Mr Ulf Bruehann is Head of Unit in DG XV, whose responsibilities at the European Commission include data protection. He is one of the principal authors of Directive 95/46/EC - or what we refer to for convenience in this guide as the 'General Directive'. He will be familiar to many readers of this book as an acknowledged expert in the data protection field.

Mr Jean-Eric de Cockborne is Head of the Telecommunications Legislation Unit in DG XIII of the Commission responsible for the sectoral Directive 97/66/EC - the so-called 'Telecommunications Directive'. Mr de Cockborne has long been a leading figure in the telecommunications field and now heads the team which has a pivotal role

in the development of telecommunications legislation in the European Community.

Finally, we would like to express our appreciation to all those friends of Cullen International, whose privacy we will respect, who have been kind enough to provide their expert comments and criticism during the preparation of this guide. May their personal data always be protected!

Bernard C. Cullen
Chairman, Cullen International

FOREWORDS

The appearance of this thorough business guide to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data is to be welcomed.

Thanks to the political impetus given by the Heads of State and Government meeting in Corfu in June 1994 and the determination of the successive French, German and Spanish presidencies as well as of the European Parliament which approved, on second reading, the common position adopted by the Council, subject to seven minor amendments, this Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data was unanimously finally adopted by Council on 24 June 1995, the United Kingdom abstaining once again, and countersigned by both the Presidents of the Council and of Parliament on 24 October 1995.

It is the first regional legislation in the world to deal with the protection of privacy with regard to the processing of personal data; it is also the first piece of legislation in the Union to deal directly with human rights.

The instrument, which was subject to the new co-decision procedure applicable since the entry into force of the Union Treaty and the accession in 1995 of Austria, Finland and Sweden, was adopted without Parliament and the Council taking up opposite stances, a sufficiently rare occurrence for it to warrant emphasis by the Commission, and a reflection of the priority and seriousness with which it was treated.

The Council and Parliament confirmed the approach proposed by the Commission which is based on the experience of Member States and the search for a framework which could be adapted to the needs of future modernization: a clear and stable instrument which sets out all the basic principles capable of ensuring equivalent protection throughout the Union:

- irrespective of the sector of activity (public or private)
- and the information technologies used (automated or not)

- regardless of the location of data processing operations in the Union
- and applicable to all forms of data processing, including sound and image.

I can certainly share the view of the authors that this Directive is of great significance to the business world. It will have an impact on the information-handling practices of economic operators throughout the Community, from the smallest family business to the largest multinational. However, the overall effect of the Directive will, I am confident, prove to be very positive for business. Although during the five years of hard negotiations on the text certain industries expressed concern about the potential costs which might result from some of the provisions being discussed, by the time of its final adoption a growing industry consensus was emerging that the Directive, with its emphasis on sound information management and communication practices, would actually help business by fostering consumer confidence in their data processing activities. In short, for companies concerned about customer relations, data protection makes good business sense.

The Directive brings particular benefits for two sorts of businesses. First for those at the cutting edge of the information society, consumer confidence in data processing is particularly important. Demand for on-line services, although growing rapidly, remains fragile, and concerns about privacy and security are real restraining factors for citizens who might otherwise be keen to make the move into cyberspace. The existence of a Community-wide regulatory framework to protect individuals is therefore a crucial facilitating factor to the development of mass demand for information society services.

Secondly for all businesses operating in more than one national market, the Directive will greatly simplify the regulatory environment in which they operate. The harmonisation of existing national laws of course means that the rules applicable in different Member States will be broadly similar. But in addition, the Directive's provisions governing national applicable law (Article 4) will put an end to the current system in which a multiplicity of national laws can apply to the same processing operation. Once the Directive is transposed into national legislation, businesses need only be concerned by the law of the country in which they are established. For a company offering services across national frontiers within the Single Market, this will cut through a substantial amount of red tape.

I must of course point out that I do not necessarily endorse all the detailed interpretation of the Directive's provisions given in this guide, and cannot rule out the possibility that the Commission will take an entirely

different view on the meaning of the text to that given here. In particular I would dissent from some of the interpretation given to the definition of personal data processing, which implies that the notion is more restricted than I believe it to be. Definitive interpretation of the Directive can, of course, only be given by the European Court of Justice.

These caveats aside, however, this business guide remains a serious contribution to the debate about the detailed application of this important Directive, and a very useful analytical tool, particularly in its electronic version which is characterised by extensive use of hyperlinks between corresponding provisions. I would therefore have no hesitation in recommending it to anyone who has interest in this subject.

Ulf Bruhann

Head of Unit 'Free movement of information and data protection,
including international aspects'

DG XV of the European Commission

Telecommunications Data Protection Directive

This comprehensive Guide on European data protection legislation is very timely as it is published shortly after the adoption of the second Directive on protection of data and privacy, the Telecommunications Data Protection Directive. This Directive is expected to have a significant impact both in terms of economic development and on private life. Although it is by nature sectoral, the services it covers concern nearly all individuals and businesses: a recent report of the Commission shows that in most Member States, nearly 90% of homes have a telephone. Telecommunications services are also the backbone of the information society and the vector of a whole new range of services, such as access to the Internet. They offer considerable economic opportunities but present also substantial challenges in respect of the protection of privacy.

The Telecommunications Data Protection Directive is not limited to particularising for the telecommunications sector the provisions of the general Directive. It goes beyond its objectives in three respects: it aims at ensuring the free circulation not only of data but also of telecommunications equipment; it covers privacy issues not directly linked to data processing, such as the provisions protecting from unsolicited calls; it provides for protection of legitimate interests of legal persons in addition to the rights of natural persons. It is because of these broad objectives that, contrary to the general Directive, the telecommunications Directive had to be the subject of a conciliation between Parliament and Council.

The Commission's decision to propose a specific Directive was based on the fact that new telecommunications networks give rise to specific requirements concerning the protection of personal data and privacy of the user, and that a sound development of new telecommunications services depend to a great extent on consumer confidence. The fact that Member States were developing divergent positions in that area made it also indispensable to introduce rapidly harmonised provisions in order to allow

for the full establishment of a Community-wide market in telecommunications services and equipment. These objectives were shared by the other Community institutions. Back in 1988, the Council called for steps to be taken to protect personal data, in order to create an appropriate environment for the future development of telecommunications in the Community. The European Parliament has also stressed at various occasions the importance of appropriate measures to ensure the protection of data privacy in the light of future developments in telecommunications.

The telecommunications Data Protection Directive must be seen in the context of the wide-ranging telecommunication policy that the European Union has pursued in order to promote the development of that sector. It has in particular adopted a number of Directives which led to the suppression of the telecommunications monopolies and established a harmonised regulatory framework. In this context, data protection is considered as one of the essential requirements justifying obligations that can be imposed on telecommunications operators in order to ensure the proper functioning of the networks.

The Open Network Provision (ONP) Framework Directive specifies that data protection may include protection of personal data, the confidentiality of information transmitted or stored, and the protection of privacy. The ONP Framework Directive provides that the Commission may determine itself, in agreement with a regulatory committee, the rules for the uniform application of essential requirements. The Commission has chosen to propose a Council and Parliament Directive rather than adopting this procedure because data protection touches the fundamental rights of the citizens.

There are several examples of the complementarity between the Telecommunications Data Protection Directive and the telecommunications legislation. For instance, the ONP voice telephony Directive includes the right for subscribers to receive itemised bills, while the Telecommunications Data Protection Directive includes safeguards to ensure that such bills adequately protect the right to privacy of both the calling and the called parties. Similarly, the ONP voice telephony Directive gives users a right to have an entry in directories while the Telecommunications Data Protection Directive provides that they also have the right not to be mentioned in directories, and that where a fee is charged therefore, it should be cost oriented and should not act as a disincentive for the exercise of this right.

The unusual length of the adoption procedure results from a combination of factors: the initial 1990 proposal had to be modified to take into account the new principle of subsidiarity. After the submission

of a revised proposal in 1994, discussions were suspended until the adoption of the General Directive, in order to ensure coherence between the two texts.

After conciliation between the Parliament and Council, it was finally possible to reach satisfactory compromises on politically sensitive issues. These relate in particular to the protection of the legitimate interest of legal persons, the conditions for recording conversations in the course of lawful business practice, and the possibility to impose a fee in order not to be listed in the telephone directory.

The coming into force of Telecommunications Data Protection Directive should be beneficial for all sectors of the industry. The services side will benefit from the suppression of restrictions on the transmission of data and the manufacturing side from the provisions guaranteeing the free-circulation of terminals. It should also promote the development of new services, thanks to the obligations protecting users not only in respect of the processing of data, but in respect of protection against intrusion into private life.

Jean-Eric de Cockborne
Head of Unit Telecommunications Legislation
European Commission

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