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CARFAX

The Transposition into UK Law of EU Directive 95/46/EC (the Data Protection Directive)

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This paper considers the factors which are required to be taken into account in transposing the EU Data Protection Directive into UK law, in the light of the Directive's objects, the options available to the UK government and the UK Data Protection Registrar's views. The choice between primary and secondary legislation, the extent to which the UK's 1984 Data Protection Act requires adaptation and the significance of the Directive's object of protecting the right of privacy are discussed. The Home Office consultation, and the Registrar's response, are referred to, and some outstanding uncertainties are considered.

With the Directive's deadline for transposition set at 24 October 1998, the UK's legislative process has some way to go. Draft legislation has not yet been published, though the government has announced its intention of going no further than is necessary to comply with the Directive. This still leaves uncertainty about the extent to which the 1984 Act will need to be amended. The Registrar favours a wider review of the 1984 Act's provisions, in the light of experience gained since it came into force and taking into account changes which, though not essential to implementation of the Directive, may be desirable.

The Directive's Objects

Article 1 of the Directive states its first object to be the protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data. Its second, related, object is to prevent any restriction or prohibition of the free flow of personal data between member states of the Union for reasons connected with the protection to be provided under the first object.

Recital 1 to the Directive sets out further justification for these two related objects, including promoting democracy on the basis of fundamental rights recognised in the constitutional laws of the member states and in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Recital 7 links and explains the two objects—of protection of the right to informational privacy and the avoidance of restrictions on free flows of personal data between member states—as being aimed at removing obstacles to the pursuit of economic activities at Union level. Recital 10 states that the approximation of national laws sought by the Directive must not result in any lessening of the protection they afford but must seek to ensure a high level of protection within the EU.

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In other words, protection is to be provided to the highest standard available under any national law within the Union, and is not to be a compromise or average of national protections. At the same time, member states are to be left margins for derogation in implementations of the Directive.[1]

A general limitation to the degree of their respective or harmonization which the Directive can achieve as between the laws of the member states is implicit in the concepts of EU competence and subsidiarity. This limitation is recognized by article 3(2), which provides that the Directive shall not apply to the processing of personal data in the course of any activity which falls outside the scope of EU law. Although the article gives as examples those activities provided for under Titles V and VI of the Treaty on European Union, and processing operations concerned with state security and activities of the state in areas of criminal law, these are examples only and the Directive gives no definition of the scope of EU law in this context. This direct limitation, and other choices and possible derogations allowed to member states by the Directive, together create substantial opportunities for divergence between national laws transposing the Directive. These divergences may defeat the objective of providing a harmonized EU law of informational privacy if member states do not cooperate in the process of transposition of the Directive into their respective national laws, and if in consequence different states adopt different options open to them under the Directive in ways which fail to develop into cohesive EU-wide norms.

The existing mechanism under Treaty 108 for correspondence and meetings between the respective designated authorities of the member states under the Convention can aid the process of cooperation and can complement the Directive's Community Implementing Measures (Chapters VI and VII of the Directive): cultural and constitutional differences may nevertheless represent barriers to harmonization, which could be trivial but might be serious. At this stage, it is not possible to predict the outcome: too much depends on the legislative processes and the development of policies within each of the member states.

This paper looks at progress so far in the UK, but even there no clear picture of the ultimate form of the new law has yet emerged. The Directive lays down a tight deadline of 24 October 1998 for national transposition.[2] It is expected that a draft UK law may be published during the first half of 1997, so that, in a year's time, the shape of the UK's prospective transposition of the Directive will have become more apparent.

The UK Government's Options

The UK's law of data protection is largely contained in the Data Protection Act 1984 ('the 1984 Act') and regulations made thereunder. In addition to the 1984 Act, there are other UK statutory provisions regulating the use of personal data in certain limited circumstances; for example, providing a right of access to information contained in the files of credit reference agencies,[3] a right of access to personal files held by certain authorities[4] and rights of access to medical reports and records.[5]

Although recent judgments in the House of Lords have referred to a right of privacy,[6] it is generally accepted that English law does not recognize any such general right:[7] the 1984 Act itself makes no reference to privacy. This contrasts with the Directive's object of protecting informational privacy as a fundamental right of natural persons. If the UK fails to recognize this objective in its transposition of the Directive into UK law, there is a risk that the UK may be in breach of its obligations under the European Treaty, so raising the possibility of claims before the European Court of Justice against the UK government for damages for breach of European law under the *Francovich* principle.[8]

For these reasons, it seems likely that the UK's implementing law will refer expressly to a right of informational privacy, in order fully to reflect the Directive's object of protecting that right.

The Directive accords broadly with the provisions of the 1984 Act, though in some significant respects going beyond it. This conformity is attributable to both the 1984 Act and the Directive having a common antecedent in the Council of Europe's 1981 Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data ('Treaty 108'). There is therefore no inherent need for the UK government to abandon the 1984 Act; there is, however, a need to modify and extend its provisions.

The UK's Data Protection Registrar, appointed under the 1984 Act, is already the designated authority in the UK for the purposes of article 13 of Treaty 108. The 1984 Act provides that the Secretary of State may by order make provisions as to the functions to be discharged by the Registrar in that capacity, and the Data Protection (Functions of Designated Authority) Order 1987(9) came into force on 1 January 1988. The order provides for cooperation by the Registrar with other national designated authorities, and for the Registrar to give assistance to non-UK residents in exercising subject access and other data protection related rights in the UK. There is therefore already a precedent, and mechanism, for international cooperation by the Registrar with other national authorities designated under Treaty 108, which principle may be extended.

The statutory title of the Data Protection Registrar may be changed to reflect the Directive's requirement for national supervisory authorities to be appointed with extended functions.[10] The Registrar has suggested that the title 'Information Privacy Commissioner' should be adopted. The Directive requires that national supervisory authorities shall have investigative powers. Only limited, and the Registrar says inadequate, powers are available under the 1984 Act. This may change, though concerns have been expressed about the risk of such powers leading to a risk of self-incrimination by those who may be subject to them.

A difficulty which faces the UK government, in common with the governments of other member states, is the mode of transposition of the provisions of the Directive into UK law. Broadly, there are two alternative options:

- to redraft the provisions of the Directive in English statutory language, based upon the Directive's text but not adopting it literally; or
- to adopt and enact the text of the Directive.

Each of these courses carries both advantages and risks. Enactment in statutory English of the Directive's provisions, as far as they are clear and unambiguous, may help those concerned with compliance with and application of the new law. Parliamentary draughtsmen can use expressions which are familiar and which have been subject to judicial interpretation in the UK courts, can resolve uncertainties implicit in the Directive's text and can order and express provisions in a way which will enable them to be more readily applied by those responsible for compliance and by the courts. These are all advantages. The disadvantage comes when clear UK statutory language is used to express concepts which are unclear or which are ambiguous in the text of the Directive, or which extrapolate provisions of the Directive to a point which may be said to exceed the Directive's terms. The better the parliamentary draughtsmen's work in resolving uncertainties, the greater the clarity of the resulting UK statute and the greater the potential risk of a statute being challenged before the European Court of Justice for failing fully and effectively to implement the Directive. If such a challenge were to be mounted, there is a risk that the

European Court of Justice might apply the UK law, not as written in the UK statute, but as it would have been written had the statute faithfully reflected the requirements of the Directive as construed by the European Court of Justice.[11]

The alternative course of enacting the text of the Directive has directly opposite advantages and disadvantages. It is simpler to reproduce the terms of the Directive verbatim, leaving the courts to decide what those terms mean, and to do so pre-empts the risk of challenge of the UK law itself before the European Court of Justice, since UK law will then precisely reflect the Directive's terms. But this course leaves to the UK courts, and ultimately to the European Court of Justice, the difficulty of determining the precise meaning of the Directive's text.

In EU terms, the transposition into each national law of the precise text of the Directive could improve the process of harmonization. As decisions on the meaning of the text are made by the European Court of Justice, those decisions would be reflected in the law of each member state. This possible advantage may prove more apparent than real: whether or not any particular uncertainty in the Directive's text will come before the European Court of Justice will depend upon chance. A greater disadvantage may accrue from each member state's not adopting the Directive's text nationally: different countries may interpret latent uncertainty in the text in opposite ways, so establishing national law provisions which conflict with the laws of other member states but which are claimed to comply with the Directive. That way, the risk of disharmony is increased, with consequent risks that national supervisory authorities may be obliged to restrict or prohibit the free transfer of personal data between particular member states on the ground that the law of a transferee state is said to be in breach of the Directive.

The Home Office Consultation Paper

This paper, published in March 1996, set out the UK government's general approach to the Directive. It reviewed the Directive's provisions, pointed out uncertainties and invited comments. It opened with a helpful summary of the paper, and a list of questions on specific issues.

The paper makes plain the government's intention that the UK's data protection regime should be the least burdensome for business and other data users, while affording necessary protection for individuals. The thrust of the paper was towards simplification, cost savings and certainty. The paper contained no reference to privacy. Much of the detail in the paper was directed to terminological uncertainty in the terms of the Directive, and how resulting difficulties may be resolved.

In many cases, clear indications were given as to the government's views. For example, the paper stated that the government intended to go no further in implementing the Directive than was absolutely necessary to satisfy the UK's obligations under European law, and that it would consider whether any additional changes to the current data protection regime were needed so as to ensure that it did not go beyond what was required by the European Directive and the Council of Europe Convention. All this suggests that, simplification apart, review of the UK's data protection law either in broad policy terms or in detail will not be a priority and that, to the extent that the present law may be defective in protecting the rights of individuals, improving protection is also not a priority.

The paper represented a thorough review of the Directive, including its perceived weaknesses and in-built uncertainties. Comments were widely invited and, except where indications of current government views were made clear, questions were posed in open terms. The paper included as an annex a copy of the Directive. Consultation has been

thoroughly and fairly made, with almost four months allowed for response. Coupled with the Registrar's own papers (see below) public debate has been promoted. To what extent this has stimulated meaningful public response remains to be seen.

The Data Protection Registrar's Views

Following publication of the Home Office consultation paper in March 1996, the Registrar published her own 'Questions to answer' on the Directive and subsequently in July her own 'Our answers'. Read together with the Home Office paper, these publications give a series of related views, from the Registrar's standpoint, of the Directive's requirements and how they might best be met in the context of existing UK law and practice under the 1984 Act, and in the light of experience gained under the Act.

The Registrar gives paramount importance to the Directive's implications for privacy with respect to the processing of personal data. She also stresses the need for a seamless data protection regime in the UK. By this, she means a comprehensive UK law of data protection which revises and improves on the provisions of the 1984 Act, in the light of experience since it came into force, and which applies the Directive's requirements to all data protection-related activities in the UK, including those which are specifically excluded by, and from, the Directive as being outside the scope of EU law.

Although amendment to the 1984 Act is possible by statutory instrument under the UK's European Communities Act 1972, any such amendment can be effective in UK law only to the extent that it is necessary to transpose the Directive into UK law. It follows that, without some form of primary legislation, a statutory instrument under the European Communities Act cannot change provisions of the 1984 Act to the extent that the Act's provisions affect processing outside the scope of Community law.

There are two objections to the use of a statutory instrument without primary legislation:

- that the scope of EU law is difficult to define, so that there will be uncertainty as to which activities are to be regulated exclusively under the 1984 Act in its original form, and which activities are to be regulated under the Act as amended to comply with the Directive.
- that some of the activities of some bodies, such as the police, may fall within the scope of EU law and other activities of those bodies may fall outside that scope, in many cases in relation to the same items of personal data. The result would be that different regimes would apply according to the nature of the activity, which in some cases may have a dual purpose.

Some form of primary legislation is, in the Registrar's view, therefore necessary. She will prefer a considered review of the whole of the 1984 Act but, if parliamentary time or other considerations make such a review impractical, she sees the possibility of a short statute giving powers to make such regulations as are either necessary fully to implement the Directive or desirable to change provisions of the 1984 Act not strictly necessary to implementation of the Directive.

The Directive's definitions are commented on by the Registrar, including in particular the definition of 'personal data'. This definition extends to include information relating to any identifiable natural person, and an identifiable person is one who can be identified, directly or indirectly. Identification need not be by the controller of the data, and to determine

whether a person is identifiable, account is to be taken of all the means likely reasonably to be used, either by the controller or by any other person, to identify that individual.[12]

The Registrar stresses the reference in the Directive's recital 26 to means of identification 'likely reasonably to be used'. She suggests that there is scope for some interpretating provision which will set out those matters to be taken into account and list those means 'likely reasonably' to be used. Unless some practical and readily applicable interpretation is available, the broad nature of the Directive's definition of 'personal data' could result in an impossible burden on controllers, who will be unable to discover which of the data held by them are personal data.

The Registrar comments on the issues of applicable law covered by the Directive. There are likely to be difficulties when a controller is established in more than one member state. Article 4 provides that the applicable law is to be the law of the place of establishment of the controller: when a controller is established in more than one place and in more than one member state, it is unclear which law is to apply or how inconsistencies between competing laws are to be resolved. Ultimately, this must be adjudicated by the European Court of Justice.

Generally, the Registrar is in favour of retaining the structure and content of the 1984 Act except to the extent that change is either necessary or desirable. Some changes are necessary to conform the 1984 Act to the Directive: others are desirable on other grounds, and include changes to processing outside the Directive's scope but which, for consistency, should be regulated in conformity with the Directive's principles.

Current Uncertainties

At the time of writing (January 1997) neither the form nor the content of the necessary transposing UK legislation had yet been published. The period for public consultation formally closed on 19 July 1996, and some form of draft legislation is expected to be available during the first half of 1997. Prediction is hazardous, but it is possible that a short enabling Bill will be proposed, giving authority to the Secretary of State to make statutory instruments to the extent necessary to transpose the Directive and to consolidate and amend the 1984 Act in detail. Amendments could then be drafted in detail, but without full parliamentary scrutiny, to apply the Directive's provisions to processing not within the scope of EU law and to the extent desirable to modify other provisions of the 1984 Act.

There are many uncertainties implicit in the terms of the Directive's text. Transposing those uncertainties literally into a new UK statute will defer their resolution until they are brought before the UK courts, or ultimately the European Court of Justice. Meanwhile, other decisions may have been made and policies set on unsure grounds. To resolve the paradox of uncertainties implicit in the terms of the Directive, and the risk that unambiguous UK statutory provisions duly adopted may be challenged before the European Court of Justice, some aspects of the Directive may be transposed in the form of principles, to be developed and applied by the UK supervisory authority. This would allow flexibility and avoid the need for radical statutory change if the supervisory authority's interpretations are subsequently challenged or require further development.

There is also uncertainty about the effect of Article 4 of the Directive on applicable law where a data controller is established in more than one member state. A rule will be required to determine, in those circumstances, which national law is to apply and, where national laws conflict, which is to take precedence.

The Directive's prohibition of the processing of special categories of sensitive data[13] is in certain cases to be subject to unspecified 'additional safeguards', 'appropriate guarantees' and exemptions on 'substantial public interest grounds' subject to the provision of 'suitable safeguards'. Since medical data and data revealing racial or ethnic origin are included in this prohibition, its effect is potentially widespread. The requirements for these exemptions may be expressed in general terms, leaving the supervisory authority free to settle appropriate standards to fit particular circumstances. This may avoid commitment but could create potential uncertainty for those concerned with processing of sensitive data. The greater the flexibility reserved to the supervisory authority, the greater the burden on the authority and the uncertainty for data controllers: conversely, detailed statutory rules may be as difficult and impracticable in application as broad principles, but without the opportunity for ready modification.

The Registrar makes specific reference to the Sensitive Data Decree made under the Dutch Data Protection Act as a model for additional safeguards applied to particular cases.

Codes of practice, themselves approved under the Directive but referred to as codes of conduct, may prove the best vehicle for the gradual evolution of satisfactory norms of reasonable protection, holding the balance between protecting the privacy of the individual and allowing legitimate processing by data controllers.

There are a number of uncertainties in relation to exemptions. The Registrar has made suggestions for new exemptions from subject access in relation to employment references and a controller's future staff requirements. Part of the justification for these proposals for new exemptions relates to the need to protect the rights and freedoms of data controllers. An area of particular uncertainty and concern arises from the Directive's provisions[14] permitting limited exemptions for processing of personal data solely for journalistic purposes or the purpose of artistic or literary expression. The Registrar recognizes that requirements relating to fair and lawful obtaining and processing of data, accuracy of data and subject access raise policy issues for journalists and the media. However, she does not consider that special rules should be applied to those processing personal data for journalistic purposes or for the purposes of artistic or literary expression. Maintaining a balance between the right of informational privacy and the right of freedom of speech raises important issues of policy on which decisions are still to be made.

Conclusions

Notwithstanding the substantial amount of detail contained in the Directive, and its outstanding uncertainties, the Directive's provisions do not depart so fundamentally from the existing provisions of the 1984 Act as to require its wholesale repeal, or even a major recasting of its main features. This derives from the common parentage of both the 1984 Act and the Directive in Treaty 108.

Changes are needed to the 1984 Act, but they can be accommodated by appropriate revision. This has a double advantage:

- the steep learning curve which has been needed to achieve familiarity with the concept of data protection and the provisions of the 1984 Act need not be abandoned; and
- practical experience gained in the 1984 Act's operation over the past decade can be usefully applied in making changes where they are desirable and in implementing new requirements under the Directive in a practical and constructive way.

As the Directive has made plain, data protection is an aspect of privacy. Although the full concept of privacy as 'a right to be let alone' is not encompassed by the Directive, the fundamental right to privacy with respect to the use of personal data is central to the Directive's objects. It is now time for the UK to recognize that right, and to transpose the Directive in support of it. Under the 1984 Act, the UK complied with its obligations under Treaty 108 by creating a framework to regulate the use of automatically processed information relating to individuals and the provision of services in relation to such information but without any express reference to privacy or any broader control over the use of personal information.

The international aspects of the Directive are not so much concerned with its transposition into the law of the respective member states as with the ability of the Union to persuade the rest of the world to adopt standards of protection for personal informational privacy which will be adequate by comparison with those now required to be adopted under the Directive. How effective this European Union initiative will be remains to be seen: but, at the least, Europe has produced a model which the rest of the world can adopt. Individuals, whether in Europe or elsewhere, need protection for their informational privacy: Europe has shown the way.

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Notes

1 Recital 9.
2 Article 32: the Directive was adopted on 24 October 1995.
3 Consumer Credit Act 1974, section 158.
4 Access to Personal Files Act 1987.
5 Access to Medical Reports Act 1988 and access to Health Records Act 1990.
6 See Lord Hoffman and Lord Griffiths in *R v Brown* [1996] 1 All ER 545.
7 The position is different under the law of Scotland, where rights of privacy have been recognised by the courts.
8 *Francovich v Italian State* 1991 ECJ case C-60/90.
9 SI 1987 2028.
10 Article 28.
11 *Marleasing v La Comercial de Alimentacion SA* ECJ case C-106/89.
12 Article 2(a) and recital 26.
13 Article 8.
14 Article 9.