

Data protection at crossroads?¹

Peter J. Hustinx

President, Data Protection Authority

(College bescherming persoonsgegevens), The Netherlands

The main subject of this year's symposium – “Identity and Anonymity in a networked world” – gives rise to a host of questions, including those raised by the organizers in the session on the future of data protection in Europe: how will data protection develop in Europe? Will law and technology interact effectively in order to protect privacy and how? Will the European concept stand the test or will there be an adjustment to the American concept? Some of these questions will be answered at least partially, but as everyone knows, predicting the future is difficult and doomed to fail.

At the same time, there can be no doubt that data protection in Europe is at crossroads, due to the choices that have to be made to ensure that it continues to protect the fundamental rights and freedoms of European citizens in the most effective way. Let me explain the situation in a few points, and in doing so, suggest an answer to some of the main preoccupations. It may be that the situation is less dramatic and more inviting than some would think.

As to the legal framework, there are three important developments that need to be taken into account. Firstly, the results of the discussions in the Convention under the chairmanship of Mr. Giscard d'Estaing concerning a constitutional framework for Europe. An integral part of the text adopted by the Convention and presented to the European Council in June 2003 was the Charter of Fundamental Rights as adopted in december 2000 in Nice. It is quite likely that this part of the text will be accepted in the final version without further change. This means that Article 7 would still provide for a right to respect for private and family life and Article 8 for a separate right to the protection of personal data. The first provision corresponds with Article 8 of the European Convention of Human Rights. The second provision is the outcome

¹ Summary of speech at 8th Symposium on Privacy and Security, 22 October 2003, Zürich

of a development that first resulted in the Council of Europe Convention on Data Protection, which has now been ratified by thirty member states, and that continued with the adoption of Directive 95/46/EC for the protection of personal data. The central elements of this directive (i.e. lawful processing, rights of data subjects, and independent supervision) have been laid down in Article 8 of the Charter.

The second development is that the EC Court of Justice in Luxembourg recently delivered its first decision about the meaning of Directive 95/46/EC.² The case dealt with a law in Austria which provides for the communication of detailed personal data on salaries of certain staff in the public sector to the Court of Auditors as well as to the public, to put pressure on the level of these salaries. Several organisations resisted the law and argued that it violated Directive 95/46/EC. The decision of the Court is interesting for a number of reasons. It makes clear that the directive has a wide scope and applies to processing of personal data in the public sector of any member state. The Court also analyzes the relation between the directive and Article 8 ECHR. The processing of personal data by an employer does not raise questions under Article 8, but the communication of data to third parties does and needs a justification under that provision. Since the directive only allows lawful processing, this is also important under the directive. The EC Court finally indicates that the relevant provisions of the directive can be invoked by interested parties in a national court. This means that many more decisions may be expected in the future.

The third important development is the report of the European Commission on the evaluation of Directive 95/46/EC. The Commission concludes in its report of 15 May 2003 that there are no reasons to propose amendments to the directive. Because most countries have been late with implementation, there is still insufficient experience with the application of the directive. Although the Commission feels that the directive has reached its main goals – i.e. ensuring a free flow of personal data and a high level of protection – its positive effects have not been fully realized, due to remaining differences between the national laws of member states. This is why the report contains a workprogram for 2003 and 2004. The Commission will enter into discussions with member states to promote changes in the national law where these are needed. The Commission expects supervisory authorities to contribute, both in the Article 29 Working Party and elsewhere. At the end of 2004, the situation will be evaluated again.

² Judgment of 20 May 2003 in Case C-465/00 (Rechnungshof / Österreichischer Rundfunk e.a.)

This brief overview of the legal framework suggests that the existing framework will remain rather stable, at least in the short and medium long term. However, there is no reason to be complacent. The report of the Commission clearly indicates that there is still a lot to be done in terms of raising awareness of the public and responsible organisations, and of promoting compliance and active enforcement, where necessary.

The report of the Commission gives no reason to believe that the principles and concepts of data protection are no longer relevant and workable. The contributions from different sectors clearly suggest otherwise. The report also mentions that there has been a remarkable shift in the prevailing attitude in many organisations which are active in the processing of personal data, especially in the private sector. In contrast with a few years ago, there is much emphasis on the need to make data protection effective in daily practice and business processes. In the Netherlands, we have noticed a similar development and this has led to a greater emphasis on data protection as ‘critical success factor’ for various kinds of government policies and for the delivering of products and services depending on the availability of personal information.

The Dutch Data Protection Authority has developed a systematic approach, which is built on an integration of four ‘policy tracks’: raising awareness, development of rules, technology and enforcement, in each relevant sector. Each year, we try to find the most appropriate balance in our activities with respect to these sectors. In our strategy, we explicitly aim at a second line position, which allows considerable flexibility for self-regulation and other activities designed to improve data protection in practice. To encourage good behaviour and to discourage other conduct, we have been increasing our efforts in the area of investigations and enforcement. It is essential in our view, that supervisory authorities are able to be selective and set priorities. In the preparation of these decisions, we use a model or scale based on risk assessment: where are the greatest risks of serious problems and who is best placed to address these problems? This also means that we try to recruit other stakeholders and work with them where possible.

In my view, the European model of data protection has all ingredients to properly deal with new situations. Both technological change and global challenges can be addressed adequately from this perspective. However, like most endeavours, it takes imagination and a cooperative spirit. In the light of the legal framework, this should at least provide inspiration when making the necessary choices to find a sensible direction.