Introduction

BULLESBACH, Alfred; GIJRATH, Serge; PRINS, Corien; Poullet, Yves

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INTRODUCTION

1. General comments. European regulatory involvement might be found in the two key legal questions linked with the development of information society services, that is, the legal framework needed for the development of e-transactions and the protection of individual freedoms likely to be called into question by this development. That distinction will structure this commentary. The first part will analyse the texts regarding Data Protection, mainly the two Directives enacted in that field, the second one is dedicated to the multiple texts which regulate the electronic transactions and operators including the e-payment transactions and e-money issuers and definitively the peculiarities of the transactions concluded with consumers. Definitively ancillary issues ought to have been commented. Therefore, certain matters, subject to the so-called 'third pillar' have an impact on the development of the information society. One pinpoints the fight against computer crime and the limits imposed on the freedom of expression as regards the needed protection of minors or the illegal and harmful content. But these peripheral matters have been judged as too far from the purposes pursued in this commentary. As regards the two chosen topics, it might be noted that no subject escapes European jurisdiction. Subjects such as electronic signatures, the security of electronic payments and consumer protection requirements fall obviously under this European jurisdiction with the aim of constructing a single and unified European market. If European intervention in the protection of freedoms is also justified since the enactment of the European Treaty of Amsterdam, this intervention might have previously received only an indirect justification in that by retaining different national data protection regulations there was a danger of creating barriers to intra-European traffic. All the EU initiatives are based on the Treaty provisions, which enable the EU authorities to coordinate Member State laws with regard to the free movement of goods and services (art. 45, 47(2) and 55) and the establishment of the internal market (art. 95). Insofar as the e-commerce is without frontiers, the Commission has argued easily that its intervention was necessary notwithstanding the two European principles of subsidiarity and proportionality, which fix major limits to the competence of the EU interventions. If the number and the scope of the European interventions are noteworthy, the problem of the rapidity as regards the procedure needed for adopting a Directive under the co-decision procedure mechanisms raises concerns as regards the necessity to respond quickly to the needs of rapid technological evolution. That explains the frequent recourse by the Commission to a certain number of alternative softer methods of regulation like recommendations (e.g. Communication and Recommendation of 9 July 1997 on electronic means of payment), communications (e.g. Communication of 2 December 2003 on a new legal Framework for payments in the internal market) and even the Commission's Working document like the 'EU Blueprint on mobile payments'. It might also be underlined that

most of the Directive provides for review, amendment process or short-term revision (two or three years). No doubt, the relevant provisions laid down in the Lisbon Treaty (which came into force on 1 December 2009) will have an impact on intervention procedures and the position of relevant actors at a European level. Finally, in this edition, two Regulations that impact on electronic commerce have been included: the Rome I Regulation on the law applicable to contractual obligations, and the Rome II Regulation on the law applicable to non-contractual obligations. Without a doubt, in the ever increasing international environment for electronic commerce, these regulations will be and continue to be of major importance.

PART I. DATA PROTECTION DIRECTIVES

2. International origins. One important international regulatory basis for the Data Protection Directive is the European Convention regarding the automatic processing of personal data of 1981. Based on the ECHR, the Council of Europe wanted to protect the individual against the dangers of processing technology characterised by automation. Driven by the intention of tackling potential trade barriers by means of an international regulation, the General Assembly of the OECD adopted the OECD Privacy Guidelines on 4 December 1990. In contrast to the Council of Europe, the OECD did not present any binding document under international law, but rather restricted itself in making proposals to its member states for common principles on processing personal data and for cross-border data exchange. In the Declaration on Transborder Data Flows accepted on 11 April 1985, the OECD Minister Committee reiterated the guidelines, at the same time emphasising the interest of the OECD in unobstructed information exchange. The UN Guidelines adopted in 1990 contain recommendations and were addressed not only to individual States, but also contain regulations on processing personal data in the context of international State organisations.

3. Data protection recognised as a basic right. Connecting data protection with fundamental rights and freedoms has been confirmed and reiterated again and again in discussions on data protection. One important example is the Charter of Fundamental Rights approved in 2000 under the Treaty of Nice. This fundamental text, which does not present any direct mandatory rules but might be considered as a first attempt to define the constitutional rights of the European citizen, includes two provisions with respect to privacy. Art. 7 is more or less a copy of art. 8 of the European Convention regarding the automatic processing of personal data. It is dedicated to the protection of family live, domicile and enacts the secrecy of private communications and in this way translates the traditional conception of privacy as the defence of one's intimacy. Curiously, art. 8 establishes a distinct Human right: the right to Data Protection, that must be considered apart from this Treaty as a Human right separate and complementary to privacy. Art. 8

reasserts the four major principles of all Data Protection laws. First principle: all personal data and not only sensitive data are covered by this new Human right. Second, new subjective rights are granted to the data subjects as the right to access and to rectify erroneous data. Third, certain limitations, like fair collection and data quality, are imposed on the data controllers. Fourth, in order to balance the data controllers interests and liberties and the data subjects liberties, specific reference is made to the role of the Data Protection Authority. New relevant provisions are laid down in the Lisbon Treaty. The Lisbon Treaty is in force since 1 December 2009. The Treaty gives everyone, including third country nationals a new right to data protection, enforceable before a court. It obliges the Council and European Parliament to establish a comprehensive data protection framework. The Treaty has acknowledged that this right is a precondition to enjoy many other fundamental rights and freedoms as well as being a prerequisite to ensure the structural growth of the Information Society. Art. 8 of the Charter of Fundamental Rights provides for every individual the right to data protection.

4. Purposes of the Data Protection Directive. On the one hand, the Data Protection Directive is to protect individual persons whose personal data are subject to processing and, on the other hand, to allow free flow of personal data. Thus the intention is to contribute to the establishment and functioning of the internal market and at the same time to protect the privacy of the persons affected and thereby their fundamental rights. This divergence between the different interests, which is also expressed in the heading of the Data Protection Directive, has existed from the very start. Even though the Parliament had expressed its support for a uniform regulation on the processing of personal data as early as March 1975, it was only in 1990 that the Commission presented a corresponding draft directive as a result of increasing pressure. This pressure resulting from the increasing enactment of national data protection legislation and the emerging conviction that legal requirements on processing personal data are necessary for the protection of individuals' capacity to act and participate and thus their fundamental rights.

5. Important elements. Due to the existing national regulations, the Data Protection Directive represents more a combination of existing concepts than an innovation of new solutions. Here there is the danger that the interpretation of the various elements takes place against the background of the national law from which the idea originated. Important content components in respect to fundamental rights include the reduction of data processing to the unavoidable, creating the highest possible level of transparency by means of information obligations to individuals and registration requirements, the control of the processing by individuals and institutions and requirements for transborder data transfer. Although the decisions are not legally binding, the Article 29 Data Protection Working Party comprising of one representative from each Member State's national authority, the European Data Protection Supervisor and a representative from the Commission as supranational

instance make an important contribution to the interpretation and uniform application of the Data Protection Directive.

6. Transposition into the national law. All EU Member States transposed the Data Protection Directive into national law. With Member States given maneuvering power in implementing the Data Protection Directive, there are considerable national differences in the detail. With the Lisbon Treaty a new debate about a general data protection framework has started to overcome some existing differences and divergences with regard to more consistent and effective protection of individuals.

7. Further measures. In addition to the 1990 Proposal for a European Parliament and Council Directive concerning the protection of individuals in relation to the processing of personal data, the Commission adopted an entire package of measures the object of which was the protection of individuals against the dangers of data processing. Among other instruments, the Commission adopted a proposal for a European Parliament and Council Directive Concerning the Protection of Personal Data and Privacy in the Context of Public Digital Telecommunications Networks, in Particular the Integrated Services Digital Network (ISDN) and Public Digital Mobile Networks. By including this Directive in its package of measures, the Commission indicated its opinion that consistent data protection also requires ongoing detailing of the general processing requirements by area-specific regulations. The Telecommunications Data Protection Directive was enacted on 15 December 1997. It was replaced by the 2002 Directive on privacy and electronic communications, which modifies quite deeply the provisions of the former insofar as it intends to take fully into account the internet environment, which has been modified in the context of the Telecom-Package Review by a new Directive of 26 October 2009 usually quoted as the e-Privacy Directive. Although it is often asserted that the new Directive simply particularises and completes the general Data Protection Directive, it might be underlined that the new instrument is enlarging considerably the scope of the previous data protection texts by including protection of the legal persons, by going into much more detail on concepts related to the conservation and use of location and traffic data and by tackling the issue of unsolicited e-mail and cookies. Furthermore, it imposes new obligations to internet access providers and publicly available network operators including using RFID technology and notably since 2009 it prescribes certain obligations in case of security breaches. Finally, it creates a possibility to impose standards on the manufacturer of terminal equipment in order to ensure their privacy compliance.

PART II. E-COMMERCE DIRECTIVES

8. Electronic Commerce. In the past decade, EU regulators have initiated several harmonisation efforts in the field of electronic commercial transactions and contracts concluded over the internet. The overall ambition of these efforts was to create a common legal framework for e-commerce activities that would both warrant an adequate level of consumer protection and facilitate cross-border e-commerce transactions. The efforts have resulted in three landmark Directives, the Distance Selling Directive, the e-Commerce Directive and the Directive on Electronic Signatures. In addition, e-commerce related reforms have been initiated in areas such as internet taxation, jurisdiction, a 'dot-EU' top-level domain and privacy. Also, the EU adopted regulatory measures in the area of electronic financial services and actively promoted the creation of mechanisms for alternative (electronic) dispute resolution. Thus, a Directive on Distance marketing of consumer financial services was enacted 23 September 2002. This Directive as well as the Distance Selling Directive increase the transparency of the provider, create new obligations as regards the delivery of the terms and conditions of their offer, give the consumer a period of time for reflection and withdrawal and finally provide for effective and adequate dispute resolution mechanisms. Finally, the European Commission expressly encouraged the e-commerce sector to implement self-regulatory initiatives to complement the regulatory framework (codes of conduct, trustmarks). Despite these and other initiatives, there is still considerable divergence among the national laws of the Member States. The European Commission considers this to be problematic, because among other reasons this divergence is likely to have a negative impact on the level of consumer protection in the Internal Market. In order to remedy to face that challenge, an European Commission proposal for a Directive on consumer rights is presently in discussion. and certain more normative texts have been adopted. So the EU Directive 2005/29/EC of May 2005 about unfair commercial practices and the Regulation 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws dated from 27 October have been enacted. Electronic Money is another essential factor in the development of e-commerce. The Directive 2009/110/EC of 16 September 2009 on the taking-up, pursuit and prudential supervision of e-money amends a previous directive dated from 2006 and imposes certain uniform European rules as regards the market access and certain surveillance by national authorities. Directives have been recently adopted in that field. The fight against terrorist financing and money laundering explains the Directive 2006/60/EC on the prevention of the use of financial system for such purposes.

9. International framework for e-commerce. e-Commerce is inherently global in nature. As a result, the particularities of electronic forms of transaction have an impact on the many international conventions, rules, and trade practices that deal with issues of international trade. Of particular importance for the use of electronic communications and signatures are the Model Law initiatives of the United Nations Commission on International Trade (UNCITRAL). The objective of the Model Laws in the area of e-commerce and electronic signatures is to enable, or to facilitate, the use of electronic communications for commercial transactions and to ensure equality of treatment

for users of paper-based forms of communication and of electronic forms of communication. Thus, the Model Law on electronic signatures provides, for example, practical standards against which the technical reliability of electronic signatures may be measured. By providing a model regulatory framework, the Model Laws offer guidelines to countries which want to develop a legal framework for e-commerce. In the summer of 2005, UNCITRAL adopted the draft Convention on the use of electronic communications in international contracts. The UNCITRAL working group on electronic commerce had been working on the document since Spring 2002. At a worldwide level, mention must also be made of the OECD initiatives. The 1998 Ottawa Conference of the OECD Ministers stressed that member countries should consider the possibilities of harmonising national legal frameworks at an international level and consequently further stimulate the creation of a truly cross-border electronic environment. Among other things, member states were called upon to give favourable consideration to the UNCITRAL Model Law on E-commerce and take a non-discriminatory approach to foreign authentication. In setting an example for a minimum international standard on consumer protection in the area of e-commerce, the OECD issued the Consumer Protection Guidelines in December 1999. Also, the EU, together with other governments (including the US), is working on the harmonisation of the framework of the Hague Conference on Private International Law to take the specifics of electronic communications and commerce into account. In 1992, at the urging of the US, the Hague Conference – a treaty drafting body with 62 member states – began work on drafting a new Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Although the members have been working on the new jurisdiction treaty for more than a decade, many complex questions remain on the agenda. The key reason for the failure to reach an agreement appears to be the development of electronic commerce. By now, the US delegation has successfully persuaded the Hague Conference to address a much narrower set of issues than deliberated in the early stages of the drafting process. In addition, this edition includes a concise discussion of the relevant provisions regarding competition law in the Treaty of the European Union.

PART III. PUBLIC SECTOR INFORMATION DIRECTIVE

10. Public sector information. Among the many EU initiatives in the area of IT regulation is the Directive on the re-use of public sector information. Undoubtedly, the principle reason for putting in place this European legal regime is the high economic value of the large collections of information and data held by the different national public sector bodies. The European Commission conducted a survey in 2006, which estimated the overall market size of public sector information in the European Union at EUR 27 billion. Thus, it is not surprising that it is the European Commission's firm belief that, in drawing upon public sector information as raw material, a highly valuable European-

wide market for information products and services can be established, which in turn will encourage cross-border 'added value' use of such data. In creating such a market, the private sector should be allowed to fully benefit from the enormous economic potential of data collection held by the public sector. Also, private sector initiatives should not be hindered by unfair competition from public sector bodies selling their own information at market. Thus, a key reason for pursuing regulatory effort regarding public sector information is to eliminate distortion of fair competition on the European information market. On 7 May 2009 the European Commission published a Review of the Directive (COM (2009) 212 final). As regards the potential of the Directive, the Commission concluded that it has introduced the basic conditions to facilitate the re-use of public sector information throughout the EU.

PART IV. OTHER RELEVANT IT DIRECTIVES

11. Transparency. The creation of an internal market involves the prerequisite that all obstacles to the free flow of information services be progressively abolished. Among these obstacles appear legal or regulatory barriers and adoption of national diverging technical standards. Apart from this increase in so-called harmonisation legislation, Europe is introducing mechanisms aimed at preventing variations in the national systems when new standards or new regulations are adopted in Member States. In that respect, the Directive on transparency is noteworthy. Taking the view that the harmonisation of rules might not be decreed a priori by the European Union insofar as these rules might be premature or too risky, the Directive introduces a Community level system of control and coordination of any relevant national measure. This system prevents fragmentation of the internal market and offers to the Commission the possibility to enunciate certain proposals and if necessary to block certain initiatives.

12. Legal protection of services based on, or consisting of, conditional access. An increasing number of television or internet services are encrypted for many reasons, the main one being their financial viability. In order to fight against piracy which circumvents encryption techniques and leads to losses for service providers and, if national legislation against that piracy exists, to harmonise their provisions notably to create a common market of decoders and decoding services, a specific directive has been enacted. This Directive does not apply to services encrypted for reasons other than ensuring payment of a fee insofar as other legal provisions exist if the system is designed to prevent copying copyrighted content or to ensure confidentiality of private communications. The Directive defines two major concepts: 'conditional access' and 'illicit devices'. It introduces an obligation on the Member States not to restrict the free movement of conditional access products or services and to prohibit the manufacture, import, sale and possession of illicit devices through effective, dissuasive and proportional sanctions. It must be noted

that the first Report on the implementation adopted by the Commission on 24 April 2003 acknowledges the lack of effectiveness of the protection offered by the Directive as regards piracy on the internet. The Commission does not propose amendments to the present Directive but rather suggests vigorous efforts from all interested parties and law enforcement authorities to combine their efforts to fight piracy. At the same time, the Commission recommends that the service providers use the technical means available for conditioning the access to pay-services under reasonable, non-discriminatory and clear conditions throughout Europe.