

DATA PROTECTION LAWS IN THE EUROPEAN UNION

PROFESSOR DOUWE KORFF
London Metropolitan University

Federation of European Direct Marketing



Direct Marketing Association



CONTENTS

Preface	xi
1 <i>Introduction</i>	1
i. General	1
ii. Legislation History of the Directives, Review of the Framework Directive, and Probable Future Legislative Developments	4
Legislative History of the Directives	4
Review of the Framework Directive	6
Probable Future Legislative Developments	7
iii. Aims and Purposes: The Directives' "Constitutional" Status	8
Protection of Personal Data	9
iv. Definitions	10
<i>Data Subject</i>	10
<i>Identifiable Person</i>	10
<i>Personal Data</i>	10
<i>Processing of Personal Data</i>	
<i>Disclosure</i>	12
<i>Personal Data Filing System</i>	12
<i>Controller</i>	12
<i>Processor</i>	12
<i>Third Party</i>	12
<i>Recipient</i>	13
<i>The Data Subject's Consent</i>	13
v. A New Core Concept: Processing	13
<i>Notes</i>	14

2	<i>Scope of the Framework Directive</i>	18
	i. The Directives' Limitation to Matters within the Scope of Community Law; the Wider and Implementation by the Member States	18
	ii. The Directives' Applicability to Automated Processing of Personal Data and to the Processing of Personal Data in Otherwise "Structured" Manual Filing Systems	19
	Systems and Operations Covered	19
	Limited Temporary Exemptions	21
	iii. Remaining (Permanent) Exemptions	22
	Introduction	22
	"Purely Personal" Processing	22
	Processing for "Journalistic, Artistic, or Literary" Purposes	23
	Processing for the Purpose of Historical Research	25
	iv. Territorial Scope of the Directives (the Question of "Applicable" Law): Extraterritorial Effect of the Directives on Non-EU Data Controllers	25
	The Situation Concerning Controllers Established in the EU/EEA	25
	The Situation Concerning Controllers Not Established in the EU/EE	29
	<i>Notes</i>	30
3	<i>Data Protection Principles and Criteria for Lawful Processing</i>	34
	i. Principles and Criteria Concerning the Processing of Non-Sensitive Data	34
	The Data Protection Principles	34
	GENERAL	34
	PURPOSE SPECIFICATION AND LIMITATION	35
	FAIRNESS	37
	The Data Processing Criteria	38
	GENERAL	38
	CONSENT	39
	CONTRACT	40
	BALANCE	42

Contents

ii. Sensitive Data &c Sensitive Processing	44
Special Rules on the Processing of the Main Categories of "Sensitive Data":	44
IN-PRINCIPLE PROHIBITION	44
MISCELLANEOUS EXCEPTIONS FOR NON-COMMERCIAL PURPOSES	44
CONSENT	45
NOT-FOR-PROFIT ORGANIZATIONS	46
Special Rules on the Processing of Data on Criminal Convictions et al.	47
Special Rules on the Use of National Identification Numbers and Other "Identifiers of General Application"	48
Restrictions on the Taking of Fully Automated Individual Decisions	48
IN-PRINCIPLE PROHIBITION	48
LIMITS OF THE PROHIBITION: WHAT KINDS OF DECISIONS ARE COVERED	49
EXCEPTIONS TO THE PROHIBITION	51
Restrictions on Other Processing Operations "Likely to Present Specific Risks to the Rights and Freedoms of Subjects"	54
iii. Implications for the Direct Marketing Industry	55
The Necessary First Step: Clarifying One's Operations	55
General	55
SPECIFYING THE PURPOSES OF THE PROCESSING	56
CLARIFYING THE CRITERIA THAT "LEGITIMIZES" THE PROCESSING	56
IDENTIFYING THE CONTROLLER	58
LIST OWNERS, LIST BROKERS AND LIST USERS	58
COOPERATION BETWEEN COMPANIES	58
Some Specific Types of Operations	59
USING CUSTOMER- (MEMBER-, SUBSCRIBER-, DONOR-) GENERATED DATA FOR ONE'S OWN MARKETING	59
CLEANING AND QUALITY CONTROL OF LISTS	60
RETAINING DATA FOR SUPPRESSION FOR DEDUPLICATION PURPOSES	61
DISCLOSING CUSTOMER DATA FOR MARKETING BY OTHERS (RENTAL, SALE, EXCHANGE), CONTRACTUAL, AND/OR IN-HOUSE ARRANGEMENTS	61
HOST MAILINGS	63
FILE ENHANCEMENT; GEO- OR PSYCHO-DEMOGRAPHIC OVERLAYS; DATA MATCHING/LINKING OF DATABASES	64
ANALYSIS AND PROFILING: THE USE OF ANONYMOUS OR STATISTICAL DATA FOR RESEARCH PURPOSES	65
CREATING ALL-PURPOSE "DATA WAREHOUSES" OR "DATA MINES"	66
<i>Notes</i>	61

4	<i>Informing Data Subjects</i>	71
i.	General	71
ii.	Informing Data Subjects When Data Are Obtained Directly from Them	72
	General	72
	INFORMATION THAT MUST ALWAYS BE PROVIDED	72
	ADDITIONAL INFORMATION THAT MAY HAVE TO BE PROVIDED WHEN INFORMATION MUST BE PROVIDED	74 77
iii.	Informing Data Subjects When Data Are Not Obtained Directly from Them	78
	General	78
	INFORMATION THAT MUST ALWAYS BE PROVIDED	79
	ADDITIONAL INFORMATION THAT MAY HAVE TO BE PROVIDED WHEN THE INFORMATION MUST BE PROVIDED	80 80
iv.	Collecting Some Data from the Data Subject and Additional Data Otherwise	83
v.	Exceptions (Exemptions and Restrictions)	85
	Specific Exceptions to the Duty to Inform	85
	GENERAL EXCEPTIONS	87
vi.	Implications for Direct Marketing	87
	Informing Data Subjects of the Identity of the Controller and the Purposes of the Processing	87
	Informing Customers of the Use by a Company of That Company's Own Basic Sales Data for Its Own Marketing	88
	Informing Customers of the Use by a Company of Other Internal Data on Them for Its Own Marketing	89
	Informing Customers of the Use by a Company of Additional Outside Data for Its Own Marketing	89
	Informing Customers of Disclosure of Their Customers' Data (Lists) to Third Parties for Direct Marketing Purposes by Those Third Parties	89
	Informing Data Subjects of the Use of Basic Data Bought-in from Other Companies for Direct Marketing Purposes	90
	Informing Data Subjects of the Use of Publicly Accessible Data on Them for Direct Marketing	90
	Informing Data Subjects Who are Not Customers of the Use of Extensive Data or "Profiles" on Them for Direct Marketing	91
	<i>Notes</i>	91

5	<i>Rights of Data Subjects</i>	94
	i. Substantive Rights Set Out in the Framework Directive	94
	Rights Old and New	94
	WITHOUT CONSTRAINT AT REASONABLE INTERVALS AND WITHOUT EXCESSIVE DELAY OR EXPENSE	95
	THE RIGHT TO CONFIRMATION OF WHETHER ONE'S DATA ARE PROCESSED BY A PARTICULAR CONTROLLER AND TO OBTAIN DETAILS OF THE PROCESSING IF THEY ARE	96
	THE RIGHT TO BE GIVEN A COPY OF ONE'S OWN DATA	96
	THE RIGHT TO HAVE ONE'S OWN DATA RECTIFIED, ERASED, OR BLOCKED AS APPROPRIATE	97
	THE RIGHT TO HAVE THIRD-PARTY RECIPIENTS OF SUBSEQUENTLY CORRECTED, ERASED, OR BLOCKED DATA INFORMED OF THE RECTIFICATION, ERASURE, OR BLOCKING	98
	THE GENERAL RIGHT TO OBJECT	98
	THE SPECIFIC RIGHT TO OBJECT TO DIRECT MARKETING USE OF ONE'S DATA	99
	THE ALTERNATIVE REQUIREMENTS OF THE FRAMEWORK DIRECTIVE CONCERNING THE SCOPE AND SUBSTANCE OF THE RIGHT TO OBJECT TO DIRECT MARKETING USE OF ONE'S DATA	100
	THE (ALTERNATIVE) CONDITIONS ATTACHED TO THE RIGHT TO OBJECT TO DIRECT MARKETING USE OF ONE'S DATA	101
	THE RIGHT TO NOT BE SUBJECT TO FULLY AUTOMATED "SIGNIFICANT" DECISIONS BASED ON A "PERSONALITY PROFILE"	102
	ii. Additional Data Subject Rights and Rights of Legal Persons Contained in the Telecommunications Data Protection Directive and in the Directive on Privacy and Electronic Communications	103
	General	103
	FIELDS OF APPLICATION OF THE SUBSIDIARY DIRECTIVES	105
	ADDITIONAL DEFINITIONS	105
	<i>Electronic communications network</i>	107
	<i>Public communications network</i>	107
	<i>Electronic communications service</i>	107
	<i>Public communications network</i>	108
	<i>User</i>	108
	<i>End User</i>	108
	<i>Consumer</i>	108
	<i>Subscriber</i>	108
	<i>Traffic data</i>	108
	<i>Location data</i>	108
	<i>Communications</i>	109
	<i>Call</i>	109

<i>Value-Added Service</i>	109
<i>Electronic mail</i>	109
THE RIGHT TO BE INFORMED OF SECURITY RISKS	109
THE RIGHT TO CONFIDENTIALITY OF COMMUNICATIONS	111
RESTRICTIONS ON THE USE OF TRAFFIC DATA	113
NEW RESTRICTIONS ON THE PROCESSING OF LOCATION DATA IMPOSED BY DPEC	117
THE RIGHT TO RECEIVE NON-ITEMIZED BILLS	118
THE RIGHT TO PREVENT CALLING-LINE AND/OR CONNECTED LINE IDENTIFICATION AND CALL FORWARDING	119
RESTRICTIONS ON THE CONTENTS AND ON THE USE FOR DIRECT MARKETING PURPOSES OF DIRECTORIES OF SUBSCRIBERS TO TELECOMMUNICATIONS (OR ELECTRONIC COMMUNICATIONS SERVICES)	120
RESTRICTIONS ON THE MAKING OF UNSOLICITED DIRECT MARKETING CONTACTS WITH SUBSCRIBERS THROUGH VARIOUS MEANS	125
iii. Exceptions (Exemptions and Restrictions)	130
iv. Implications for the Direct Marketing Industry	134
The Right to "Opt In" or "Opt Out" of Direct Marketing Use of One's Data (Summary)	134
MAILING, TELEPHONE, FAX AND EMAIL PREFERENCE SERVICES	136
THE RIGHT TO NOT BE SUBJECT TO "SIGNIFICANT" AUTOMATED DECISIONS BASED ON A PERSONALITY PROFILE (SUMMARY)	137
CONFIRMATION OF THE USE OF PERSONAL DATA FOR DIRECT MARKETING PURPOSES	137
PROVIDING A COPY OF DATA USED FOR DIRECT MARKETING PURPOSES (INCLUDING INFORMATION ABOUT SOURCES)	138
CORRECTING, ERASING OR "BLOCKING" DATA USED FOR DIRECT MARKETING PURPOSES	138
<i>Notes</i>	139
6 <i>Supervision, Notification and Enforcement</i>	145
i. The National and European Supervisory Authorities	145
Background	145
THE FRAMEWORK DIRECTIVE'S REQUIREMENTS AS TO THE NATURE, STATUS, FUNCTIONS, AND POWERS OF NATIONAL DATA PROTECTION AUTHORITIES	146
THE EUROPEAN REGULATORY SYSTEM	147
ii. Notification (Registration) of Processing Operations	147
iii. Prior Checking of "Risky" Operations	151

iv. Individual Remedies	152
General	152
THE JUDICIAL REMEDY OF ART. 22 OF THE FRAMEWORK DIRECTIVE	152
TFIE RIGHT TO COMPENSATION FOR DAMAGES	153
ADMINISTRATIVE REMEDIES	154
CLAIMS SUBMITTED TO THE NATIONAL DATA PROTECTION AUTHORITIES	155
v. Enforcement Powers of the National Data Protection Authorities	157
vi. Sectoral Self-Regulation and Codes of Conduct	159
<i>Notes</i>	166
7 Transborder Data Transfers	169
i. Background	169
ii. The "Free Zone" for Data Transfers within the EU and the EEA	170
iii. The European Regime for Transfers of Personal Data to Non-EU/EEA ("Third") Countries	171
General	171
Determining Whether There Is "Adequate" Protection	172
GENERAL	172
ADEQUACY OF THE SUBSTANTIVE RULES	174
EFFECTIVENESS OF THE SUPERVISORY AND SNFORCEMENT SYSTEM	175
TAKING INTO ACCOUNT SPECIFIC RISKS	176
ADEQUACY OF PROTECTION IN STATES PARTY TO THE COUNCIL OF EUROPE CONVENTION	177
PROVIDING ADEQUATE PROTECTION THROUGH SECTORAL (SELF-) REGULATION	180
THE PROCEDURE FOR ASSESSING ADEQUACY ("COMITOLOGY")	183
CHARACTERISTICS OF THE FIRST FINDINGS OF "ADEQUACY" AND RELATED WORKING PARTY OPINIONS	187
REMAINING AMBIGUITY	190
Transfers to Third Countries with "Adequate" Protection	192
Transfers to Countries without "Adequate" Protection	193
GENERAL	193
MANDATORY EXCEPTIONS	193
DISCRETIONARY EXCEPTIONS (NATIONALLY APPROVED CONTRACT CLAUSES ETC.)	194

Contents

EUROPEAN SUPERVISION OVER THE GRANTING OF EXCEPTIONS	195
STANDARD EUROPEAN CONTRACT CLAUSES	195
CLAUSES COVERING CONTROLLER-TO-CONTROLLER TRANSFERS	199
CLAUSES COVERING CONTROLLER-TO-PROCESSOR TRANSFERS	210
INTRA-CORPORATE RULES (INTRA-CORPORATE DATA PROTECTION CODES OF CONDUCT)	221
iv. Applying the New European Regime to Transfers of Personal Data from the EU to the USA: The "Safe Harbor" Arrangements	248
Background	248
WHEN SAFE HARBOR ARRANGEMENTS ARE NOT NEEDED	249
WHEN SAFE HARBOR ARRANGEMENTS CAN AND CANNOT BE USED	251
USING SAFE HARBOR PRINCIPLES AS PART OF CONTRACT CLAUSES	255
SUBSTANTIVE REQUIREMENTS OF THE SAFE HARBOR	257
RIGHTS OF DATA SUBJECTS UNDER THE SAFE HARBOR ARRANGEMENTS	268
THE RIGHT OF ACCESS AND CORRECTION	269
THE RIGHT TO COMPENSATION	275
EXCEPTIONS AND DEROGATIONS FROM THE SUBSTANTIVE SAFE HARBOR REQUIREMENTS	277
THE GENERAL EXCEPTION CLAUSE	279
INTERNAL MEASURES REQUIRED TO IMPLEMENT THE SAFE HARBOR ARRANGEMENTS	281
EXTERNAL SUPERVISION AND ENFORCEMENT OF THE SAFE HARBOR ARRANGEMENTS	283
<i>General</i>	283
<i>Individual Redress</i>	285
<i>General "Consequences" and "Sanctions" Relating to Non-Compliance</i>	287
<i>Cooperation with EU Data Protection Authorities</i>	289
<i>Exemptions from the Procedural Requirements of Safe Harbor Arrangements</i>	292
FLOW TO JOIN SAFE HARBOR ARRANGEMENTS	292
THE CONSEQUENCES OF LEAVING THE SAFE HARBOR	295
PRELIMINARY EVALUATIONS OF THE OPERATION OF THE SAFE HARBOR	296
Notes	302
About the Author	317
Index	318