UNICE
THE VOICE OF BUSINESS IN EUROPE

Ref: F:\social\06_SAC\16 data protection\PP final.doc

30 October 2001

UNICE POSITION ON COMMISSION'S FIRST STAGE CONSULTATION ON THE PROTECTION OF WORKERS' PERSONAL DATA

I./ Introduction

1. On 28 August 2001, the European Commission launched a first stage consultation of social partners on the protection of workers' personal data. The purpose of this exercise is to consult the social partners, in accordance with article 138, paragraph 2 of the EC Treaty, on the possible direction of a Community action on the protection of workers' personal data.

2. In the field of data protection, the general Directive 95/46/EC[1] already fully applies to workers' personal data. However, the Commission argues that, given the specific nature of the employment relationship and considering the general nature of the Directive, there may be a need for detailing out the application of the principles in the employment context.

3. In parallel, a proposal for a new Directive was adopted by the Commission[2], which aims to adapt and update the existing provisions of Directive 97/66/EC[3]. However, this directive, dealing with the security and confidentiality of communications, is only marginally relevant for the relationship between employers and employees.

4. The Commission identifies several issues for which action at European level could be needed:
   - consent, as a means for legitimising the processing of data;
   - access to and processing of medical data;
   - drugs testing and genetic testing;
   - monitoring and surveillance of workers' behaviour, correspondence etc.

5. UNICE believes the submission and processing of workers' personal data is an important issue that deserves full attention. Minimum standards put in place in EU member states are important to remove the obstacles to flows of personal data as well as to ensure the protection of these data.

6. However, UNICE fails to see the need for or the added value of a new action on the protection of workers' personal data at Community level. In particular, European

[1] Council Directive 95/46/EC adopted on 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
[2] Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM (2000) 385 final) adopted on 12 August 2000;
[3] European Parliament and Council Directive 97/66/EC adopted on 15 December 1997 on the processing of personal data and the protection of privacy in the telecommunication sector;

employers do not believe there is a need for detailing out the application of the general principles of Directive 95/46 in the employment context.

II./ General comments

On the need for a specific application of the general principles of Directive 95/46 in the employment context:

7. Firstly, UNICE believes that, as a general principle, regulation should only be used if there is no alternative. This principle applies also at European level. The need for and extent of regulation should be assessed on the basis of the proportionality and subsidiarity principles. This precise and thorough assessment is a prerequisite to any proposal for Community action.

8. The document of the Commission on the protection of workers' personal data does not refer to any assessment of the situation in member states. Therefore, no specific problems or current lack of regulation could be highlighted. It is not sufficient that the Commission refers to the protection of workers' personal data as "a clearly important issue at national level" to justify further action in this field.

9. Secondly, as the Commission rightly points out, some member states have adopted legislation transposing Directive 95/46 and some are still in the process of adopting it. As a consequence, the report from the Commission to the Council and the European Parliament on the implementation of the Directive 95/46, foreseen in its article 33, has not yet been issued. It is therefore premature to identify any problem in the implementation of the Directive that could plead for specific action in the employment field.

10. Furthermore, it should be borne in mind that a predictable framework of regulation is not only crucial for individuals and companies, but it is also a prerequisite for member states to allow for efficient enforcement of Community law.

11. Thirdly, for years, business has been calling for a timely and thorough evaluation, including an economic impact assessment, of the likely effect of an administrative measure on business. European employers are concerned that the Commission focuses only of workers' needs and does not take any notice either of benefits for workers from employers' processing of personal data, or of the supplementary burden that new regulation could put on companies.

12. UNICE hopes the Commission would agree that workers also benefit from employers' processing of personal data. For example, without up-to-date sickness records, companies would have no record of absence so that, on the one hand, workers could not receive sickness benefit and, on the other hand, management might not become aware of health and safety issues affecting the workforce. Interests on the employers' side and workers' need for protection must be taken into consideration in a balanced way. Employers notably use personal data to fulfil legal obligations stemming from health and safety frameworks. This benefits the worker concerned as well as his colleagues.

13. European employers therefore believe that Directive 95/46, which already fully applies to workers, is sufficient to ensure a high quality protection of workers' personal data throughout Europe. The document of the Commission is not backed up by any assessment either of the situation in member states, or of the implementation of Directive 95/46. The Commission fails to bring forward evidence that a Community action is needed for specific application of the general principles of Directive 95/46 in the employment context.

On the need for an initiative at Community level:

14. UNICE believes the arguments of the Commission referring to cross-border mobility of data and workers and global economy to be too weak to justify an action at Community level.

15. Firstly, European employers do not consider that a different treatment of workers' personal data within the EU creates barriers to the free movement of information and by extension to the free movement of workers within the internal market. Indeed, article 4 of the Directive 95/46 deals with the issue of cross-border transfer of data in a satisfactory way.

16. Secondly, European employers question the Commission's assertion that different treatment of workers' personal data in the different member states would create unequal conditions for recruitment of workers and hence hamper the free movement of workers in Europe. In any case, no evidence is put forward by the Commission to back this view.

17. Thirdly, it is European employers' view that the current high Community standards of protection for workers stemming from Directive 95/46 are sufficient to cover all employees, including those who work in companies active in different member states.

18. Therefore, UNICE does not share the analysis of the Commission on a need for further legislative action at Community level and is concerned that a further initiative at this level would interfere with the obligations or rights stemming from national labour law and collective agreements.

19. The issue of data protection is closely linked to other issues such as health and safety at work (e.g. medical data), workers' involvement (e.g. membership of trade unions), anti-discrimination (e.g. data revealing racial or ethnic origin, political opinion) depending on the type of data, which is processed. These issues are dealt with in different ways from country to country and, potentially, from sector to sector across Europe. What is considered "appropriate and proportionate" varies in different circumstances, sectors and countries.

20. It is therefore important to allow for national diversity, for different methods of work according to types and sizes of companies and for different expectations across sectors and countries. UNICE believes that a Community-level "one size fits all" approach over and above existing EU rules is unlikely to meet these requirements.

21. Furthermore, a new Community initiative in the form of legislation would not, by its very nature, be flexible enough in its implementation and could not be amended quickly enough to keep up with rapid change in the world of work.

22. On the contrary, instruments like self-regulation, voluntary agreements, codes of practice, guidelines, etc., have proved to be effective mechanisms providing rapid assessment, decisions, and implementation, while ensuring a high level of protection for workers. Social partners at national level would be in a better position to address problems as and when identified.

23. However, UNICE recognises that there is a real need for information and transparency about existing national regulations concerning data protection in EU member states. Furthermore, UNICE calls on the Commission to encourage exchange of information and best practice between national data protection authorities in the framework of the Article 29 Committee[4]. European employers would for example suggest that the Committee addresses the issue of the cost-effectiveness of practices, having particular regard to the

[4] The working party on the protection of individuals with regard to the processing of personal data, composed of representatives of the supervisory authorities of the member states, was set up by Article 29 of Directive 95/46/EC;

situation of SMEs. This work could then be used to spread information and raise awareness on this issue in member states.

III./ Specific comments

24. UNICE does not share the analysis of the Commission on the five issues listed in its document.

25. As regards consent as a means for legitimising the processing of data, European employers are concerned that the Commission appears to assume that workers or prospective workers are likely to be pressured and ill-informed when giving consent. It should be emphasised that other means are foreseen in Directive 95/46 for legitimising processing of data. Indeed, in article 6 and 9 of the Directive, conditions are listed for the processing of data in order to ensure a high quality protection to the individual. Furthermore, European and national legislations provide adequate protection to avoid discrimination while processing workers' personal data.

26. The issue of medical data is sufficiently dealt with in several European directives, ensuring for example that medical data on individuals is exchanged on the basis of medical secrecy between the employer and the individual concerned and that medical assessment on recruitment is related to the need to adapt the workplace to the individual for health and safety purposes. The processing of medical data, per se, is of limited value in improving health and safety standards unless it is linked with workplace monitoring. The issue of medical monitoring is specified in various directives dealing with ionising radiation, chemicals, physical and biological agents. The retention times for information are specified, as are the objectives and, often, the methods of medical surveillance.

27. The issues of drugs testing and genetic testing are separate, but are both closely linked to health and safety matters and should be dealt with as such. UNICE regrets that the Commission does not seem to take into consideration the real need to ensure safety at work and the need to fulfil existing legal obligations in this field, which both justify testing. UNICE feels that it is important to consider the problem of drugs testing not only from the point of view of the worker being tested, but also from the point of view of his/her colleagues and other individuals, who could be harmed if the worker were unfit for duty and were for example to cause an accident.

28. Concerning genetic testing, flexible rules should be developed because of the necessity to follow rapid scientific changes in this field. Given these rapid changes, the potential application of these tests to employment relations is an issue that will be more efficiently dealt with at national level.

29. European employers believe that there are no cross-border aspects concerning data processing following drugs testing and genetic testing that cannot be covered by existing rules. A new initiative at Community level is therefore not needed.

30. Finally, UNICE believes that article 6 of the Directive 95/46 makes it possible to deal with the issue of monitoring and surveillance of workers' behaviour, correspondence, etc., in a satisfactory way. It should be borne in mind that an employer might need to monitor employees at work for several reasons to minimise the risks for workers, customers, visitors and the company itself. For example, an employer may collect location data to avoid accidents or he may use surveillance mechanisms to prevent harassment of colleagues or outsiders (sexual, bullying, racial, religious, etc), to prevent the introduction of pornography into the workplace or to prevent defamation, particularly of customers, competitors and suppliers. National and international (e.g. ILO code of practice) safeguards already exist which ensure that workers' rights (e.g. right to privacy) and employers' interests are taken into consideration in a balanced way.

31. European employers would also like to recall that, contrary to what the Commission seems to indicate through its examples, monitoring is not the same thing as access to data for general good management. A certain amount of access to files is part of the normal management processes of firms. For example, it is generally accepted as best practice for someone, such as a secretary, to have access to colleagues' paper and electronic files and diaries. In this way that person can answer client queries in the employee's absence on holiday, on training courses, in meetings, etc., but can also answer queries from the employee him / herself when out of the office.

32. Thus, in the view of European business, the Commission provides no evidence of a need for action at European level on the five issues listed. The general principles of Directive 95/46 ensure high quality protection to workers and regulate cross-border transfer of data in a satisfactory way. In this framework, specific solutions could be found at a more decentralised level to match needs as and when identified.

IV./ Conclusion

33. To sum up, European employers are opposed to a new legislative initiative of the Commission regarding workers' personal data protection. They believe that Directive 95/46, which already fully applies to workers, is sufficient to ensure high quality protection of workers' personal data throughout Europe and defines efficient instruments to cope with cross-border transfer of data (Question 1).

34. The document of the Commission is not backed up by any assessment either of the situation in member states, or of the implementation of Directive 95/46. As a consequence, the Commission fails to bring forward evidence that a Community action is needed for specific application of the general principles of Directive 95/46 in the employment context (Questions 2 and 3).

35. UNICE is also concerned that a further initiative at this level would interfere with the obligations or rights stemming from national labour law and collective agreements. A new European legislative initiative would lead to more legal uncertainty and would have a negative impact on the implementation of national legislation.

36. Furthermore, UNICE calls on the Commission, on the one hand, to prepare a report to the Council and the European Parliament on the implementation in member states of the Directive 95/46 and on the other hand to give more emphasis and public awareness to the work done in the framework of the Article 29 Committee (Questions 4, 5 and 6).

****