

**COMMISSION'S SECOND-STAGE CONSULTATION ON THE PROTECTION OF
WORKERS' PERSONAL DATA**

UNICE'S REPLY

1. On 30 October 2002, the European Commission launched a second stage consultation of social partners on the protection of workers' personal data, in accordance with article 138, paragraph 2 of the EC Treaty¹.
2. In this consultation, the Commission
 - pleads in favour of establishing a European framework on data protection in the field of employment, complementing directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
 - sketches out the scope of such a framework, specifying that it should cover the processing of personal data, whether it is collected within the current employment relationship, during the recruitment process or kept after termination of the employment relationship, whether it is carried out by the employer, workers representatives or employment agencies, irrespective of the medium involved to circulate information;
 - asks the social partners for their opinion on the content and scope of the envisaged European framework or to inform the Commission whether they intend to open negotiations in accordance with Articles 138 and 139 of the Treaty.
3. The framework envisaged by the Commission would set out principles for the collection and processing of the following categories of data:
 - sensitive data, such as concerning racial or ethnic origin, political opinions, religion or beliefs, sex life, criminal convictions, etc.;
 - health data;
 - drug testing data;
 - genetic testing data;
 - monitoring and surveillance.
4. Employers need to process data concerning their employees on a daily basis in order to fulfil their obligations, in particular as prescribed by law, and to manage their business. The submission and processing of workers' personal data is an important issue. Directive 95/46 ensures high quality protection for workers. Acting in accordance with this directive involves complex tasks, to which employers give full attention.
5. UNICE does not believe that detailing out application of the general principles of directive 95/46 in the employment context in the way suggested in the Commission document will assist employers in these complex tasks. On the contrary, excessively complex and

¹ UNICE published its reply to the Commission's first-stage consultation on the protection of workers' personal data on 30 October 2001

detailed sets of rules could hamper the development of information technology in Europe. UNICE fears that the proposed initiative could lead to further bureaucracy in companies, bridle the possibility to adjust to rapid technological changes and prove counterproductive for both companies and workers.

6. UNICE continues to question the need for the framework envisaged by the Commission for the following reasons.
 - Firstly, it is not sufficient to refer to “a clear trend” towards clarification of the data protection principles in the employment field in both member states and international organisations to justify a new Community directive. Neither the studies presented so far by the Commission (in the absence of its official report on implementation of directive 95/46 foreseen in its article 33), nor the two Commission consultation documents provide convincing evidence about shortcomings in the existing legislative framework in the employment field. Employers stress that it is a matter of good governance to review and analyse the implementation of existing legislation before new initiatives are proposed at Community level.
 - Secondly, as the Commission rightly points out, the issue of data protection is closely linked to other issues and can therefore be regulated in member states by different sets of rules, depending of the nature of the data concerned and the possible impact of data processing (constitutional law, criminal law, labour law, collective agreements etc.). A balance is struck in each member state between rights and obligations of both workers and employers. This diversity should be respected and not be undermined by detailed EU principles specific to the employment field, over and above existing EU legislation.
7. In addition to what was already mentioned in its reply to the Commission’s first-stage consultation on the protection of workers’ personal data, UNICE has strong objections to a number of elements in the framework of principles outlined by the Commission.
8. Therefore, UNICE does not intend to open negotiations in accordance with Articles 138 and 139 of the Treaty on the basis of the principles set out in the Commission document. In addition, the following elements should be taken into consideration
 - Firstly, since in many cases employers are obliged by law to collect or process data on their employees, some issues dealt with in the Commission’s consultation paper are not the exclusive competence of social partners. This is the case, for example, with regard to the collection and processing of health-related data for social security purposes.
 - Secondly, issues which would fall in the area of the social partners negotiating competences, such as monitoring and surveillance, are already adequately covered by directive 95/46 and directive 90/270 on visual display units². For this reason, UNICE/UEAPME, CEEP and ETUC chose to refer to the legal obligations stemming from directive 90/270 in their agreement on telework.
9. Directive 90/270 recognises the employer’s prerogative for deciding on the establishment of mechanisms of surveillance and monitoring. In addition, it strikes the right balance between the employers and workers interests by
 - requiring that the monitoring or surveillance mechanisms established are proportional to the goal pursued;

² Council Directive 90/270/EEC of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment

- foreseeing an obligation for the employer to inform workers of the existence of such monitoring or surveillance mechanisms;
- not ruling out the possibility for employers to restrict the use of IT equipment to professional purposes only.

10. Concerning monitoring and surveillance, UNICE disagrees with the Commission proposals which could lead to a restriction of the use of companies' equipment for professional purposes only. Companies can have very good reasons for restricting the use of their equipment to professional purposes only. These reasons can be, for example, to avoid damage by viruses or to check that illegal material is not introduced on a network for which the company has the overall responsibility. UNICE is therefore strongly opposed to the addition of new restrictions to the employers' prerogatives such as

- prohibiting monitoring of all private files and communications by the employer, irrespective of whether use of work tools for private purposes was allowed or not by the employer;
- banning routine monitoring of individual e-mail or internet use;
- checking by national data protection supervisory authority prior to the introduction, modification or evaluation of any system likely to be used for monitoring and surveillance.

11. Finally, UNICE would like to stress that any new Community initiative on data protection in the field of employment should be geared towards improving the implementation of existing legislative instruments. There is a real need for information and transparency about existing national regulations concerning data protection in EU member states. In UNICE's view, the exchange of information and discussions between national data protection authorities in the framework of the Article 29 working party³ is the appropriate way to improve implementation of directive 95/46 and to avoid inconsistencies, provided the Article 29 working party engages in a more open and transparent dialogue with interested parties⁴.

Conclusion

12. To sum up, European employers are opposed to the specific directive on a European framework aiming at personal data protection in the employment context envisaged by the Commission. As they already explained in their reply to the first-stage consultation, they believe that directives 95/46 and 90/270 already ensure a high degree of protection of workers throughout Europe. Detailing out the application of the general principles of directive 95/46 in the employment context in the way suggested by the Commission would prove counterproductive for both companies and workers.

13. Furthermore, UNICE insists on the need to issue the report from the Commission to the Council and the European Parliament on implementation of directive 95/46. Any new initiative at the Community level must build on the analysis of the implementation of existing legislation. It is also crucial that the diversity of national rules and the balance struck in member states between rights and obligations of both workers and employers is respected.

³ 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

⁴ See paragraphs 10-13 of UNICE's preliminary comments on the implementation of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data of 24 October 1995

14. UNICE does not intend to open negotiations in accordance with Articles 138 and 139 of the Treaty on the basis of the principles set out in the Commission consultation document.
15. Any new Community initiative on data protection should be geared towards improving the implementation of existing legislative instruments. In UNICE's view, the exchange of information and discussions between national data protection authorities in the framework of the Article 29 working party is the appropriate way to improve implementation of directive 95/46, provided the Article 29 working party engages in a more open and transparent dialogue with interested parties.
16. UNICE may complement the views expressed in the present reply to the Commission's second consultation document with additional comments as the debate evolves.