5 Data Protection Laws and Schengen

5.1 A Plethora of Data Protection Laws

Data protection concerns have been with us for over four decades now. A plethora of privacy and data protection legislations have come into existence in the last half of the twentieth century. With the advent of modern computer technology, interest in data protection and privacy surged up in the 60s and 70s. In 1970, the first data protection law in the world was enacted in the Land of Hesse in Germany. Other jurisdictions followed and enacted national laws: Sweden in 1973, the United States 1974, Germany 1977, France and Norway in 1978 and so on. Today, every country in Western Europe has a national data protection law. The laws were a reaction to the enormous potential and capability of computer systems to collect, handle, store, and process personal information. Computers were perceived as powerful tools of surveillance in the hands of governments and private organisations and a danger to individual privacy. There was, therefore, a need to restrict the collection of personal information and stipulate principles to ensure individual protection.

At the international and regional levels, there are human rights laws that protect privacy and special data protection legislation that protect personal data. Some laws are overarching, addressing data protection in general and others are sectoral, addressing data protection in special areas such as police, health, telecommunications and Internet. Data protection has been given recognition through enactment of general instruments such as the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 (CoE Convention), the OECD’s Guidelines Governing the Protection of Privacy and Trans-border Flows of Personal Data 1981, and the EU Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 1995. The United Nations has also issued Guidelines Concerning Computerised Personal Files 1990; however the Guidelines have received relatively little attention.1 Other important instances are sectoral instruments directed to specific sectors, such as the Schengen co-operation, telecommunication, Internet, electronic commerce, police, health care and so on. At the

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national level, human rights, constitutions and statute laws protect privacy and personal data.

What follows below is a discussion of the main data protection laws at the international level and a brief comment on the national level. These laws are the primary legislative source of data protection laws. They are discussed here in anticipation of the analysis of data protection principles and interests in the next chapter. The discussion, however, is limited to aspects that deal with data protection in the police and border control co-operation with the Schengen Convention as a point of reference. The analysis also investigates the quest and development for a binding data protection instrument in the police and border control co-operation as a background material for the discussion on a police and border control (Third pillar) data protection framework in the recommendation chapter.

5.2 International Instruments

5.2.1 UN Instruments

The most important UN instrument on data protection is Article 17 ICCPR (see 3.1.). But the clearest statement on data protection principle is to be found in the case law developed under Article 17 by the Committee for Human Rights.

The UN has also issued Guidelines Concerning Computerised Personal Files; however, they have had relatively little effect on data legislation elsewhere. As regards the Schengen, despite the fact that all Schengen countries have signed and ratified the UN instruments, the instruments have little relevance and they will not be a subject for further discussion here. The focus will be on CoE and EU instruments which play a bigger role in Schengen co-operation.

5.2.2 Article 8 ECHR

In Europe, Article 8 of the ECHR is regarded as a fundamental legal basis for data protection. Although this Article is essentially a general privacy protection provision, the term “private life” has been given a broad interpretation by Strasbourg organs and goes beyond the classical privacy right to be free from intrusions into one’s private home and covers the collection of personal information (including photographs and fingerprints) and secret surveillance. In its recent cases, the ECtHR, has interpreted the term “private life” to encompass processing of personal data. The Court’s position suggests that

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2 For a detailed analysis of these laws from a general data protection perspective see Bygrave L. A. (2002), chapter 2.
3 See 4.1 above
4 Ibid.
5 See also, Justice: The Schengen Information System: a human rights audit, p. 32.