

The legal framework for the fundamental right to protection of personal data

Response by British Telecommunications PLC to the
2009 European Commission consultation

BT thanks the European Commission for the opportunity to contribute to its reflections on the future of the EU data protection regime. Our comments are provided from a dual perspective:

- BT is a major provider of data communications and storage services to businesses and public administrations both within the UK, and across the EU. A large part of the company's business outside of the UK involves the provision of service on a one-stop-shop basis to multisite, multinational companies. In this capacity it provides highly reliable and secure communications links between locations in more than 170 countries.
- BT itself is a major employer in most EU Member States, and in a number of other countries across the world.

This perspective offers a particularly clear view of the opportunities associated with increasing use of interconnected IP networks as a platform for inter and intra company data transfers. To be more specific, we believe that this development offers EU business (and public administrations) the chance to take better advantage of two interrelated trends:

- The growing importance of knowledge-based services in the economy (even in the case of a complex manufactured product such as a motor car, the largest portion of its final value can be attributed to intra and inter-company provision of services - design, HR administration, logistics management, marketing, finance, etc – all of which can be "traded" across borders via electronic communications networks).
- Segmentation of business processes and concentration of each activity in the most efficient geographic locations (this trend, termed the "Second Great Unbundling" by the OECD, includes more homeworking and the transfer of non-core tasks to specialist small and medium enterprises).

Development of "cloud computing" – specifically, processing of data at remote sites on an outsourced basis – promises to further expand these opportunities.

To sum up, there is great potential to boost productivity, competitiveness, and employment. However, full realisation of this potential depends on removal of the obstacles to a genuine Single Market which are currently found in the EU regulatory environment.

Poor implementation and enforcement of the Telecoms Framework represent the most prominent of these obstacles. During the recently-concluded Framework Review, BT has explained how these lacunae are impeding pan-EU deployment of the services needed for secure and reliable data transfer on an inter and intra company basis.

To the extent that a large part of the data being transferred within companies and between companies qualifies as personal data, a second obstacle is represented by out-of-date features of the EU's data protection regime. While BT would endorse the continuing validity of the fundamental principles embodied in the current Framework Directive, we question a number of specific aspects which give rise to disproportionate bureaucracy and compliance costs while achieving little apparent benefit for EU citizens. In particular, we would draw attention to the following points:

- **Notification of data processing.** Current requirements provide a prime example of the disproportionate bureaucracy mentioned above. BT's own experience as an employer includes an instance where efforts to rationalise EU payroll administration on an outsourced basis were delayed for more than two years. Simplification could be readily achieved without diminishing protection of citizens' rights.
- **Distinction between data controller and data processor.** Definitions of these terms in the current Framework Directive clearly do not reflect current technological and market realities. This adds significantly to the complexity of BT's contract negotiations with its major customers and suppliers, and such complexity looks likely to increase as the company moves into the cloud computing space. Certainly, where outsourcing takes place, the distinction between a data processor and a data controller is increasingly blurred. Legislation would consequently benefit from greater clarity on the two roles.
- **Applicable law and jurisdiction.** This is another area where the wording used in the current Framework Directive fails to reflect current technological and market realities, thereby adding to the complexity of contract negotiations and, in some cases, impeding the development of otherwise efficient arrangements. Cloud computing services will add to these difficulties since, in many cases, buyers of such services will be unaware where processing is taking place. Clarification of this point therefore needs to be made in conjunction with settlement of the data controller/data processor issue.
- **International data transfers.** The requirement for efficient companies to move data across borders is by no means limited to intra-EU transfers but extends worldwide. There is consequently a pressing need for the rules governing such transfers to be updated and made more practical. In this context the concept of Binding Corporate Rules is an attractive option, but can only be truly effective and more widely implemented if the regime is made simpler and more user-friendly. Equally, model contract clauses should be made more flexible, inter alia by allowing multi-party model contract clause agreements and by permitting data to be passed from processor to processor. A more efficient, and practical method of allowing companies to transfer personal data to needs to be found that continues to respect the rights of the citizen ■

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