

## Data Protection and the review of EU Data Protection rules

**Data Protection is currently one of the hottest global topics.**

**The treatment of personal data, including sensitive data, needs to be taken into account with respect to the protection of fundamental human rights. At the same time, it is clear that there is a growing risk of increased disputes and conflict in this area, at a time when personal data is technically more easily accessible and can be used in more ways than ever before. E-commerce may, moreover, accelerate this negative trend.**

The issue of balancing the need for data protection and assuring its free movement could become more crucial. In this context, the JBCE, as major employers and investors in the EU, submitted its observations on the current legal framework for data protection in Europe, in the context of the European Commission's present review of Directive 95/46 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data (referred to herein as "the Directive").

**Our standpoint is as follows:**

1. The JBCE strongly supports data protection as a crucial right for individuals and an important mechanism by which businesses can maintain consumer confidence.
2. At the same time, JBCE also believes it is crucial that the legal framework for data protection in Europe works efficiently on a practical, and not just a theoretical, level and that there are presently too many divergences in the implementation of the Directive.
3. Thus, JBCE welcomes the Commission's review and believes that it presents an important opportunity to further harmonise the legal framework and increase its efficiency.

Based on these fundamental principles, the JBCE specifically addresses a number of points which are of particular

concern to Japanese companies with regard to the current Directive:

- lack of clarity in the Directive itself;
- fundamental shift in the way personal data is processed, i.e. away from the centralised model of the 1990s toward the decentralised network model;
- failure by Member States to adequately co-ordinate their implementation of the Directive; and
- in some cases, regulatory over-reaching by Member States, i.e. a tendency to go beyond the bounds of permissible national variation in implementation.

As a practical example, the JBCE focused particularly on the international transfer of human resource and customer data, as is a necessary business practice between subsidiaries in the EU and headquarters in Japan. We looked at the potential problems faced with this type of international transfer of data. In this context, the most frequently raised points were:

- First, the limitations of a legal framework for data protection based on independent government regulation;
- Secondly, the urgent need for harmonisation of the regulation, at least at EU level; and
- Finally, the importance of increased transparency and accountability in supervising and controlling data protection.

Our observations, rationally explained and based on practical cases, were convincing for the EU Commission when they wanted to involve more in case study to review the directive.

The JBCE believes that the EU Commission will find the way to achieve a better policy balance between data protection of the individual and business practice through its review of the current Directive. It also hopes that, when published, the resulting report will provide a good point of reference for policy makers, from any nation, confronted with the complexity and sensitivity of the public policy implications of data protection.

## Reform of the EU Merger Regulation

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This article summarises the key points relating to the reform of the EU Merger Regulation discussed in a seminar presented by Conor Maguire to the members of the JBCE Corporate Policy Committee, in Brussels, on 24 January 2003. The seminar, entitled 'Recent Developments in EU Antitrust Law affecting Japanese Companies', covered two other topics, namely the:

- New Regulation 1/2003 on the enforcement of the EU antitrust rules; and
- the European Commission's new Leniency Notice.

**On December 11, 2002, the European Commission ('the Commission') proposed a new EU Merger Regulation ('ECMR') to replace the current Merger Regulation (No. 4064/89/EC) that has governed the application of the EU antitrust rules to significant mergers since 1990. If the EU countries adopt them, these reforms should apply from 1 May 2004.**

### Background

In December 2001, the Commission published a Green Paper that sets the basis for the reforms. The most important changes introduced by the reforms address the procedural weaknesses in the current ECMR that were highlighted by the responses to the Green Paper and the criticisms of the European Court of First Instance ('the Court') when, in 2002, it annulled three Commission decisions prohibiting high-profile mergers.

The JBCE filed its comments on the Green Paper in March 2002.

### Key changes

The most significant changes to the ECMR process are described below.

### Prohibition test

Currently, the Commission must prohibit a merger that creates or strengthens a dominant position as a result of which effective competition would be significantly impeded. However, this 'dominance test' will be clarified so that the ECMR can also prohibit mergers creating 'unilateral effects' in highly concentrated markets.

The Commission believes that this change will also contribute to ensuring full convergence with other jurisdictions, like the US, that apply the Substantial Lessening of Competition ('SLC') test.

The clarified prohibition test is described in detail in the Notice on the assessment of horizontal mergers where the companies are actual or potential competitors on the same market<sup>1</sup>.

### Improving due process

Probably the most important aspect of the ECMR reforms concerns the wide-ranging changes that are designed to significantly enhance the rights of merging companies to defend their transaction during an in-depth ('Phase 2') case. These due process improvements include:

1. Giving the merging companies access to their competitors' adverse comments (including during a face-to-face meeting with opponents to the merger) and the opportunity to review progress on the case with senior EU officials at key moments in the case. Currently, the merging companies only see these comments much later in the case.
2. The appointment, by June 2003, of an independent Chief Economist to guide the Commission's economists on individual cases.
3. Introducing the systematic use of internal review panels in all Phase 2 investigations. These experienced EU officials would examine the conclusions of the other EU officials that are investigating the merger, to ensure that their analysis will meet the very high standards of proof set by the Court.

### Timing issues

The ECMR reforms would also change the timing of merger cases.

1. The companies will no longer be obliged to notify

their merger within 1 week of the conclusion of the agreement or announcement of the public bid (but will still be required to do so, as now, before the merger is implemented).

2. Unlike now, the Commission would allow the companies to implement a merger that initially does not cause antitrust problems before a decision has been reached.
3. The reforms also extend the time limit for deciding on complex mergers where, for example, the companies offer commitments (for example, corporate divestments) to the Commission to avoid antitrust problems.

### Comment

There is no doubt that the ECMR reforms should generally improve how JBCE companies interact with the Commission, especially when filing a complex merger.

The Commission has heard the concerns expressed by the JBCE in relation to several aspects of the reforms, not least relating to the test of when a merger must be filed in Brussels (it will remain a turnover test, globally and in the EU).

The proposed review panels and oversight by the Chief Economist should go some way to meet the frequent criticisms that the same Commission officials investigate a merger right through from filing to the end of a Phase 2 investigation.

JBCE companies should also welcome the further opportunities to understand much earlier in the case (and respond to) both the Commission's and their competitors' concerns about the anti-competitive impact of their merger in the EU.

However, JBCE companies may be more reluctant to respond to requests for information from the Commission about the impact of a merger between (for example) two EU competitors since, under the reforms, this could involve them defending these comments in a meeting with the merging companies in Brussels.

Most JBCE companies are likely to be very concerned at the possibility that they could be fined up to 1% of their annual turnover (and 5% of their daily turnover) simply because they do not fully respond to the Commission's fact-finding questionnaires about the merger between their competitors (that in a recent case exceeded 15 pages of detailed questions to answer in just over a week).

The ECMR reforms will mean that, before 1 May 2004, JBCE companies should review their internal procedures for dealing with these questionnaires from the Commission.

The reforms will put even more importance on the efficient operation of the JBCE-inspired agreement with the Commission for the creation of a register of correct contact details for merger questionnaires sent to Japanese companies.

Finally, JBCE companies filing a merger after 1 May 2004 may be concerned at the likely losses of efficiency in the investigation of their merger that the recently announced break-up of the Merger Task Force may cause.

*Members who would like to receive the text of the full seminar (including updated information since January 2003) are invited to contact the JBCE Secretariat or Mr. Maguire directly.*

## JBCE PROPOSES EU-JAPAN FDI AGREEMENT.

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**The JBCE has been actively involved in the EU-Japan Business Dialogue Round Table (BDRT), a principal organ through which top business executives from both sides send their opinions to Brussels and Tokyo for the development of a better business environment.**

This year the JBCE proposes a new policy framework, called the EU-Japan Foreign Direct Investment (FDI) Agreement, aimed at enhancing mutual foreign direct investment. Enhanced inward FDI tops both governments' lists of economic policy priorities. Knowledge is a determining factor in the soundness and growth capability of an economy, and FDI is an invaluable source of new knowledge.

The innovative nature of the proposed FDI agreement becomes clear when proposed specific measures focusing on helping facilitate cross border M&As are looked at. There are two pillars:

- Measures to optimise the return on investment; and
- Measures to support timely business development.

The former includes 0% withholding tax on dividends, royalty and interest payment between the EU and Japan and also the expansion of advance price agreements (APAs) related to transfer pricing. The latter is exemplified by various measures aimed at facilitating cross-border restructurings and by the EU-Japan social security treaty.

The JBCE hopes its opinion will lead to bold new policy initiatives and the enhanced mutual flow of direct investment.

## WEEE & ROHS IMPLEMENTATION: ISSUES OF CONCERN.

The WEEE & RoHS Directive will be transposed into national legislation by **13 August 2004**. However, there are many issues of concern to be resolved before implementation in each Member State. The JBCE has again submitted, to the European Commission and to the Member State experts, its position paper on issues of concern to be clarified at the Technical Adaptation Committee in the comitology process. A summary of the JBCE opinion is given below:

### I. Scope of the Directive (WEEE Directive)

#### 1. Category problem for dual use products

Some products are designed for dual use and clarification is needed as to which category they belong. For instance, an analyzer to measure lead content can inspect lead in blood as well as in soil. Is this analyzer classified as a medical device (Category 9) or as laboratory equipment (Category 8)? One solution in this case is to follow CE marking requirements. If classified with the Medical Devices or In Vitro Diagnostic Medical Devices, it should be included in category 9 and if classified with Low Voltage goods, it should be included in category 8.

#### 2. Definition of household use or non household use

Category 1 and 2 in Annex I A of the WEEE Directive refer to household appliances. Some benchmark mechanism is needed as to what differentiates household use from commercial use. The JBCE has proposed, for example, to draw the line between household air-conditioner appliances and office use air-conditioners.

#### 3. Independent sales of car EEE

Car audio equipment and car navigation systems clearly fall outside the scope of the WEEE & RoHS Directives, if they are integrated into the vehicles. However, it is not clear what happens if they are sold independently from the vehicles, through separate distribution channels. The JBCE urges that they should not be covered in WEEE & RoHS, regardless of whether or not they are integrated into the car at the point of sale.

### II. Free movement of goods and producer responsibility

The WEEE Directive requires the producer to provide the guarantee and to mark the appropriate identification references on the products when they are placed on the market. This raises serious problems in connection with the free movement of products. Every time they move across national borders, does each producer (importer) have to pay the guarantee and make a necessary marking? This incurs a costly logistic burden and original brand manufacturers cannot control all the problems at each point of the distribution channel. JBCE calls for a practical resolution of this problem.

### III. Information on hazardous substances

The WEEE Directive requires the producer to provide information on hazardous substances for both consumers and treatment facilities. Information for consumers concerns the potential effect on the environment and human health as a result of the presence of hazardous substances in EEE. Information for treatment facilities concerns the location of hazardous substances in EEE. The definition of hazardous substances covers some several thousand substances. If interpreted literally, this could become a disproportionate and completely unworkable requirement. Practical guidance is urgently needed.

### IV. Concentration levels of PBB and PBDE

The JBCE recommended, in its previous position paper, that maximum concentration levels of lead, cadmium, hexavalent chromium and mercury in the RoHS Directive should follow that of the ELV (End of Life Vehicle) Directive (see Newsletter N°.9, Winter 2003). We did not have a clear position about PBB and PBDE. Noting the recent amendment directive on Penta and Octa PBDE (2003/11/EC), which refers to a maximum concentration value of 0.1% by mass, we consider this limit is now the de facto limit value for PBB and PBDE. It is furthermore noted that this level permits non-destructive analysis of inspection.

## JBCE SUCCESSFULLY OPPOSES DUTCH BAN ON FLAME RETARDANT

**In March 2002, the Dutch Ministry of Housing, Spatial Planning and the Environment (VROM) introduced a ban on a brominated flame retardant known as FR 720. Ministerial Decision "Regulations FR 720 Act on Substances Dangerous to the Environment" of 1 March 2002 (the "Decision") covered the manufacture and import of the substance itself and all products containing it. The decision was a temporary measure effective immediately following its introduction (without any preparatory period) until 28 February 2003, and could have been extended for a further year.**

The two basic reasons for the ban were:

- the similarity between FR720 and another substance now being risk-assessed by the EU, which was not scientifically justifiable, and
- the fact that the manufacture of FR720 could not submit sufficient safety data, not actually required under current EU legislation.

Major trade partners including the European Commission, some EU Member States, the US and Japan raised strong concerns about the decision insisting that it was not consistent with WTO and EU rules.

FR720 is a highly effective flame retardant. It is widely used in products such as electronic equipment, waste water pipes, and kitchen hoods, and has other potential applications. Due to the ban, most users were obliged to stop using FR720, which led to a significant negative impact on the business of producers of FR720.

### Key changes

The JBCE prepared its position paper in February, which was crucial timing for the final decision by VROM, and submitted it to the Dutch Government. The major points of the position paper, which concluded that the ban should be reconsidered and withdrawn, are as follows:

1. The Dutch measure was inconsistent with applicable laws, including EC and WTO law. The Dutch

Government's justification of the ban, namely insufficient scientific basis and shift of the burden of proof of safety from the authority to the industry, would permit the Government to impose bans or other restrictions in virtually any situation.

2. The measure does not take account of substitution, which may result in a net increase of environmental and human health risks. FR 720 is known to be a highly effective flame retardant. Even if it were not unreasonable to assume that FR 720 may pose risk, if producers are not able to use FR 720, they will have to use other flame retardants. This may well be less effective (thus leading to increased fire risk) and larger quantities may be required to meet fire safety standards.
3. As the ban covers all potential applications of FR 720, including applications involving no or little risk of release and exposure, the ban is overly broad. For instance, even if FR 720, in general, poses some unknown risk, the use of FR 720 in electronic equipment is not likely to result in any negative effect.
4. The ban does not comply with the regime set up in the recently adopted EC Directive on restrictions of hazardous substances in electrical and electronic equipment (the "RoHS" Directive), which prohibits the use of two other types of flame retardant in electrical and electronic equipment. There is widespread consensus within the EU that the risk posed by FR 720, if any, is much lower than the risk arising from PBB or PBDE. There is no justifiable reason why the Dutch Government should enact a total ban on FR 720, while the RoHS Directive sets a transitional period until mid-2006 for flame retardants posing significant risks.

### VROM Final Decision

The State Secretary for VROM finally decided not to extend the ban of FR720 and informed the Dutch Parliament of the decision on 28 February 2003 (Official Gazette of 5 March 2002). The problem was solved successfully. JBCE is proud that its lobbying effort, associated with activities of other industrial and governmental organisations, may have contributed to the favourable outcome.

# JBCE Profile



The Kanji character on the left side means Europe. The colour of the logo was chosen from the national flag of Japan.

## JBCE Mission

Japan Business Council in Europe was founded in 1999 as the representative organisation for Japanese companies operating in the European Union.

JBCE's key objective is to contribute to EU public policy issues in a positive way, drawing upon the experience gained in Japan and other countries and utilising the expertise developed in specific fields, such as environmental protection and technological innovation.

JBCE welcomes the support provided by EU Member States to Japanese investments, and wishes to put forward the views of its members on legislative issues currently under debate and on the public policies issues which will shape the years to come.

JBCE wishes to become one of the business-based organisations contributing to the achievement of EU goals in areas such as competition, research and development, full employment and environmental protection.

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## JBCE Member Companies

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Casio Electronics Co. Ltd.	Nippon Steel Corporation
DAIKIN EUROPE N.V.	Nissan Europe S.A.S.
Epson Europe B.V.	PENTAX GmbH
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NEC Europe Ltd.	Victor Company of Japan, Ltd.
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