OUTCOME OF PROCEEDINGS
of: Working Party on Economic Questions (Data Protection)
on: 12 and 13 November 1991

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Subject: Protection of individuals in relation to the processing of personal data in the Community and information security

1. The Working Party on Economic Questions (Data Protection) held its 9th meeting on 12 and 13 November 1991. The meeting was devoted to a discussion of key issues arising from Chapters II and III of the proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data and was based on a working document (Working Document No 11) drawn up by the Chairman of the Working Party.

2. Introducing the Working Document No 11 the Chairman of the Working Party indicated that the previous discussions of the Working Party had shown that the development of the Internal Market would lead to an increase in the transborder data flow and that there would consequently be a need for a harmonisation of the rules on data protection to ensure this flow of data. The point of departure for the discussion of the Working Party would therefore be that the Directive should cover all requirements involved in the run-up to the Internal Market. Once agreement was achieved on this premise, the Working Party would have to focus on the means of arriving at the target.
I. Principles of implementation

3. Reacting to the first set of questions entitled "Principles of implementation" set out in Working Document No 11, note was taken of the following interventions:

The United Kingdom delegation indicated that the basic principles for data protection contained in the Council of Europe Convention was a useful starting point for the discussions of the Working Party. Whether these principles should be supplemented by further principles as proposed by the Commission was, however, a matter to be discussed.

The Directive should, in the UK delegation's view, set out the principles of data protection agreed upon as well as an obligation for the Member States to implement them. The way in which implementation was carried out should, however, in the United Kingdom's view, be left to the Member States.

The level of protection should be an agreed standard, i.e. a safety net not preventing the States who so wished to go beyond this common standard. If these rules were clear and precise the scope of interpretation, for example by the European Court of Justice, would be limited.

4. The Danish delegation agreed that the premise for the discussion of the Working Party was to create a system which would contribute to the establishment of an Internal Market. In order to ensure the exchange of data across borders it was necessary to establish common principles with a high level of data protection. The Danish delegation agreed that the principles in the Council of Europe Convention was a good point of departure and that it should be examined whether there was a need for additional principles to those contained in Article 16 of the draft Directive.
As to the degree of detail of rules the Danish delegation was of the opinion that the proposal by the Commission contained too detailed and bureaucratic rules.

The Danish delegation agreed that the Directive should allow any Member States, who so wished, to go further than the agreed standard. A problem in this respect was, however, that the Representative of the Commission on several occasions had indicated that the fact that a Member State had gone beyond the minimum protection required by the Directive could not be an obstacle to the free transborder flow. In the Danish delegation's view this seemed to be a logical defect in the proposal by the Commission.

The Belgian delegation agreed that an attempt should be made to go further than the rules provided for in the Council of Europe Convention but it did not think that the proposal by the Commission left a sufficient flexibility for the Member States to implement these principles. In the proposal by the Commission great importance had, for example, been attached to the notion of consent (see also point 20 below). In the Belgian bill this option had not been chosen because the notion very often would not be sufficient, bearing in mind that there would always be means of achieving such a consent. In the Belgian delegation's view different possibilities than those proposed by the Commission should be given to Member States in order to arrive at the results sought.

In respect of the consequences of establishing a minimum Directive with the possibility of Member States establishing stricter rules without this being an obstacle to the free flow of data, the Belgian delegation questioned whether this was at all feasible.
The French delegation agreed that the Directive should go beyond the principles contained in the Council of Europe Convention and would have to contain rules in respect of, for example, independent control bodies and responsibility of data controllers.

To ensure the free flow of data within an internal market it would, however, not suffice to set out in the Directive principles corresponding more or less to those of the Council of Europe Convention but it would be necessary to have a sufficient degree of harmonization of the rules implementing the principles. These rules would furthermore have to be precise in order to limit their scope of interpretation. As regards the question whether a Member State should be able to go further in its protection and provide a higher level than that foreseen in the Directive, the French delegation was not opposed to such an approach. The French delegation questioned, however, the usefulness of such an approach as more severe rules could only be used internally and not to prevent the transborder flow of data. The French delegation furthermore pointed out that more strict rules in some Member States than in others would lead to a distortion in competition. For all these reasons the French delegation was in favour of having a high level of harmonization in all Member States.

As regards the specific question as to whether the "Cassis de Dijon" ruling criteria could be relied upon in order to reconcile certain differences in national law with the need of the Internal Market, the French delegation was not convinced that this ruling was relevant as it concerned goods.

The Netherlands delegation indicated that the Communities were developing in such a manner that it would be a mistake not to go beyond the scope of the Council of Europe Convention. Also it had to be borne in mind that the purpose of the Directive contributing to the creation of an internal single market was different from that of the Convention.
The Netherlands delegation agreed, however, with the Belgian delegation that the measures proposed by the Commission in order to implement certain principles might not be the only ones and that less bureaucratic rules putting less burden on industry should be envisaged.

8. In the German delegation's view the purpose of the discussion of the Working Party should not be to arrive at the lowest level of protection on which agreement could be reached. As the protection of data involved fundamental principles of protection of private life, care should be taken when attempting to remove the barriers existing to the free flow of data between the Member States. In the German delegation's view the principles of the Directive and those of the Council of Europe Convention should not be very different and as far as the question of degree of detail in the Directive was concerned the German delegation agreed that the rules which were not of great importance could be deleted.

The Directive should also, in the German delegation's view, set a general framework for areas in which the Member States could set stricter rules than those generally applicable by virtue of the Directive. Those stricter rules would not only be valid within the Member States but also apply in relation to the transborder flow of data.

9. The Italian delegation indicated that the discussions of the Working Party had shown that there was a need to go beyond the rules of the Council of Europe Convention in order to arrive at a high level of protection and that additional points as, for example, the creation of supervising authorities would have to be included in the Directive. In the Italian delegation's view the time had, however, come not to speak in general terms on the general principles on which everybody agreed but to examine the individual measures proposed in order to see if they were necessary or not.
10. The Luxembourg delegation indicated that discussions of the Working Party had seemed to indicate that certain delegations were in favour of establishing a system with three different levels of protection:

- a high level for the Member States who so wished;

- a level applicable to the flow between Member States of the EC; and

- a level for the transfer of data outside the EC.

The Luxembourg delegation was against creating such a differentiated protection system which would run contrary to the principles of a single market. If there were to be a free flow of data it was necessary to establish a high and equivalent level of protection and not minimum rules which would prevent certain states from submitting data to other Member States with the risk that these data then be submitted to third states.

11. The Portuguese delegation indicated that it agreed that the Council of Europe Convention was a good point of departure but that additional rules concerning the supervisory authorities, responsibility and transborder flow of data would be necessary. The Portuguese delegation agreed with the Luxembourg delegation that the Directive should establish an equivalent protection of data avoiding any distortion of competition. Whereas it was necessary to have convergence on the substantive-material rules, certain differences could, however, in the Portuguese delegation's view, be allowed in respect of certain formal criteria.
II. Public and Private Sectors

12. Discussing the questions set out by the Chairman under the second heading of Working Document No 11 entitled "Public and private sectors", note was taken of the following interventions.

13. The French delegation explained that a distinction between the private and public sectors existed in the French data protection law. The French delegation was, however, not convinced that such a distinction was still valid as the postulate that data subjects needed better protection from the public sector rather than the private had proven to be inexact. Furthermore, the limits between the private and public sectors were often unclear and would lead to different distinctions being drawn in the different Member States with a consequential distortion of competition. As an alternative to the distinction between the public and private sectors proposed by the Commission, a different approach was put forward by the French delegation. This alternative approach which would substitute Chapters II and III of the Directive is set out in Working Document No 12.

14. The Italian delegation agreed with the French delegation that it was not easy to make a distinction between the public and private sectors. Instead of setting up rules based on a distinction between the public and private sectors it would be more appropriate to highlight certain specific rules limited for the public sector based on requirements of ensuring a continued flow of data between public bodies and avoiding bureaucratic burdens for this sector.

15. The German delegation agreed with the French and Italian delegations that a distinction between the public and private sector was not necessary and that as a principle the same level of protection should be provided for both sectors.
As regards the French delegation's suggestion for a new approach, the German delegation felt that such an approach of a purely procedural nature would be difficult to reconcile with the present structure of the Directive. Furthermore it would not be compatible with the existing German law.

16. The United Kingdom delegation agreed with those delegations who felt that in general a distinction between the public and private sectors would not be necessary. The UK delegation did not exclude, however, that in a detailed directive there would be a need in certain special cases to have special rules for special sectors.

17. The Danish delegation stated that it had hitherto been of the opinion that a distinction had to be made between the public and private sectors. The statement made by the French delegation had however opened new perspectives. Referring to the suggestion made by the French delegation in Working Document No 12, the Danish delegation was particularly attracted by the distinction made between sensitive and non-sensitive data to which the Danish delegation attached great importance. Should the suggestions by the French delegation, however, lead to more bureaucratic rules than those proposed by the Commission, the Danish delegation would be more reluctant in its attitude (see also point 45 below).

18. The Greek delegation indicated that it was not convinced by the arguments which had been put forward for deleting the distinction between the public and private sectors. In the Greek delegation's view there were circumstances in which there might be the need to have derogating rules for the public sector. As far as the difficulties in drawing a demarcation line between the two sectors, the Greek delegation was convinced that one could have confidence in the rulings of the European Court of Justice should questions of interpretation be brought before it.
III. Consent of the data subject

19. The Commission representative explained that although the consent of the data subject was mentioned in several provisions of the proposal for a directive, it was only one among several criteria for determining the legitimacy of processing of personal data, and by no means the main one. Similarly, the right of objection was given only in limited circumstances. He asked delegations to state their experience of the application of national law with regard to the role of consent of the data subject.

20. The Belgian delegation explained that the authorities in Belgium had deliberately chosen not to take consent as the basis in the draft law being prepared, except in relation to certain categories of sensitive data. The draft law provided a right to object, but this was subject to a number of conditions.

21. The Danish delegation explained that consent played a role in the Danish system, but was not a crucial factor; wherever there was a requirement of consent, there was also an exception to this requirement.

In the private sector, Denmark distinguished between sensitive data, confidential data, and data that were neither sensitive nor confidential; sensitive or confidential data could not be recorded without the consent of the data subject, while data that were neither sensitive nor confidential could be recorded without his consent under normal circumstances. There was no specific provision for the data subject to request the erasure of data relating to him. The supervisory authority could require the erasure of data recorded unlawfully.
In the public sector, the consent of the data subject was not required for the recording of data; however, the consent of the data subject was required for communicating sensitive or confidential data from the public to the private sector, unless it was required for a scientific or statistical survey.

22. The German delegation explained that the consent of the data subject was a basic concept in Germany, and that the data subject also had a right of appeal. No data could be processed under German law, in either the public or the private sector, without either a legal basis or the consent of the data subject. Consent must be in writing and explicit, and the data subject must be aware of the consequences of giving his consent. Consent was required for using data collected in the public sector for a different purpose from that for which it had been collected, as well as for communicating sensitive data to a third party.

23. The Greek delegation stated that Greece had not yet adopted a law on the processing of personal data, but a preliminary draft had been under discussion for some time. This contained a distinction between particularly sensitive personal data, which could not be processed unless a derogation was accorded by the Council of Ministers; sensitive personal data, which could be processed only with the prior written explicit consent of the data subject; and ordinary personal data, for which no consent was required.

With regard to the proposed directive, the Greek delegation considered that a reasonable solution would be to require consent solely in respect of sensitive data, while allowing a right of objection a posteriori in respect of non-sensitive data.

24. In Spain too, legislation had not yet been passed on the processing of personal data, but a draft law was under discussion. This would in principle require the consent of the data subject for the automatic processing of personal data, but...
there would be exceptions to this principle. Data concerning a
person's ideology or religious beliefs could not be processed
as a result of a clause in Spain's constitution. Under the
draft law, certain sensitive data could only be processed if
this were authorized by a special law or if the data subject
gave his consent, although the term "sensitive data" was not
used as such. Consent would not be required for the collection
of data from sources accessible to the public or where the data
where necessary for the conclusion of a contract. The passing
on of data to a third party would be subject to a number of
conditions, one of which was the consent of the data subject.

25. The French delegation stated that under French law, data
processing in the public sector required the authorization of
the supervisory authority, but not the consent of the data
subject; however, the data subject could request correction of
the data relating to him. In the private sector, consent was
not required, but the data subject had the right of objection
if he had a legitimate interest; it was for the supervisory
authority, and ultimately for the courts, to determine whether
or not he had a legitimate interest. Absence of objection was
deemed to constitute tacit consent. As far as sensitive data
was concerned, the definition of it in French law corresponded
for the most part to that of Convention No 108. The collection
and recording of sensitive data were prohibited without the
consent of the data subject, unless they were considered to be
in the public interest after consultation of the supervisory
authority. Consent had to be explicit and written, and the data
subject must be aware of the consequences.

26. The Irish delegation explained that consent was not a
main principle under Irish law, which went more in the
direction of implied consent than explicit consent. Provision
was made for the data subject to request the rectification or
erasure of data relating to him. No distinction was made
between the public and private sectors. The term "sensitive
"data" was not used as such, but the contents of Article 17 of the proposed directive and of Article 5 of the Council of Europe Convention were covered in Irish law.

27. The Italian delegation stated that a draft law had been prepared, which dealt with the question of consent in great detail. Consent was not provided for in respect of non-sensitive information. Two categories of sensitive data were dealt with: data relating to race, religion, political or trade union affiliations could be processed only with the express consent—which must not necessarily be in writing—of the data subject, unless they had been collected on his initiative; for data relating to health, alcohol consumption and sexual behaviour, it would be possible to derogate from the requirement of consent if the data were needed by the health authorities. Consent would also be required for the communication of data to third parties, subject to certain exceptions.

28. The Luxembourg delegation explained that under Luxembourg law, the concept of consent was replaced by more objective guarantees. A data base could not be constituted without prior authorization: in the public sector this authorization must be in the form of a law or regulation, and in the private sector ministerial authorization was required; in both cases, the supervisory authority had to be consulted. At the time of collection of data, the data subject had to be informed along the lines of Article 13(1) of the proposal for a directive. The collection and processing of sensitive data (concerning political, philosophical, religious or trade union affiliation, the data subject's private life or his racial origins) were strictly prohibited, subject to a few specific exceptions.

29. The Netherlands delegation explained that consent did not play a major role under its law. The erasure of data could be sought where they were not necessary for the purpose for which the file had been constituted. The data subject had the right
to object to the recording of sensitive data. Information could be communicated to third parties without the data subject's consent, but he had the right to object.

The Portuguese delegation stated that under Portuguese law, consent was not required for processing personal data for strictly personal use, for strictly commercial purposes, for purposes of daily administration, for the payment of membership subscriptions, or by public services acting under a law. Explicit consent was required for processing confidential and sensitive data. The data subject had the right to object to the processing of data for a purpose other than that for which it had been collected, and to the use of data for direct marketing purposes.

The United Kingdom delegation stated that the basic approach of the United Kingdom law was that data processors must observe the principles contained in the Council of Europe Convention. These principles were amplified by the guidance notes of the supervisory authority (the Registrar) on how these principles should be applied in practice. In addition, the Registrar encouraged the various sectors to draw up codes of conduct in cooperation with him. The United Kingdom system was based on the approach that where the data subject could reasonably be expected from the context to be aware of the processing of data concerning him, his explicit consent was not necessary; where on the other hand the processing of data concerning the data subject was not obvious, the processor had to inform him and give him sufficient information to enable him to make an informed decision as to whether or not he should give his consent. The data subject had the possibility of opting out where the data was to be used for a purpose other than that for which it had been collected. The United Kingdom had no special category of sensitive data for data processing purposes; the usual rules of medical confidentiality applied in respect of medical data. The United Kingdom delegation considered that the definition of sensitive data in the proposed Community Directive was very broad.
32. The Chairman’s first impressions following this exchange of information were that despite the differences between the national systems, consent tended to be less of a basic principle than a means of ensuring a fair balance; that where provision was made for consent, it was subject to conditions or exceptions; that consent appeared to play a greater role in relation to sensitive (or confidential) data than in relation to non-sensitive data.

33. The Commission representative considered that all the systems had in common a concern to enable the data subject to have some control over the use of data relating to him, the main considerations being the extent to which the data subject was in a position to give his consent freely, and the sensitive or non-sensitive nature of the data. In his view, the Commission needed to reflect further on how the proposed directive should take account of the various systems.

IV. Notification procedures

34. The Chairman noted that in earlier discussions, a tendency had emerged in favour of avoiding unnecessary bureaucracy where possible. In this context he invited the Working Party to consider to what extent the controller of the file should be obliged to notify the data subject, the supervisory authority or the public of certain acts, and to what extent the aims of such notification (transparency with regard to the data subject and the public, and enabling the supervisory authority to fulfil its task) could be achieved by other means.

35. The Irish delegation stated that the Irish law deliberately avoided universal notification to the data subject, in favour of an obligation on the controller of the file to inform the data subject on request whether data concerning him was processed and, if so, which data. The Irish
law also avoided universal registration with the supervisory authority, requiring registration only in respect of certain categories of data.

36. The German delegation considered that there should be an obligation to notify the data subject where data concerning him which was held by a public authority was to be communicated to the private sector; the data subject should have the opportunity of opposing such communication. However, it considered that it was more important to notify the supervisory authority than the data subject. It was in favour of a general obligation for controllers of files in the public sector to notify the supervisory authority, but considered that such notification was not so important in the private sector.

37. The Danish delegation stated that under Danish law, all public sector files had to be registered with the supervisory authority, while in the private sector there was such a requirement only in respect of files containing confidential or sensitive data. The data subject had to be notified only if he was recorded as a bad debtor. The Danish delegation considered that the obligation in Article 9 of the proposed directive was out of all proportion to the need to protect the rights of the individual.

6. The United Kingdom delegation considered that an obligation on the controller of the file to notify the data subject when the file was opened, as proposed in Article 9, or to notify the supervisory authority, would prove cumbersome in practice; it would prefer a provision requiring the controller of the file to supply information to either of them on request. This delegation would also prefer a registration system for sensitive data and for data used for sensitive purposes.

36. The Greek delegation suggested that the requirement to notify either the data subject or the supervisory authority should be limited to sensitive data.
40. The Luxembourg delegation considered that the question of notifying the data subject arose only where the data were collected from another source, and not where they were collected from the data subject himself. However, it considered that it would be more efficient to notify the supervisory authority rather than the data subject, allowing the latter the possibility of consulting the central register held by the supervisory authority.

41. The French delegation reacted favourably to the ideas put forward by the Luxembourg delegation. It also drew attention to the suggestions contained in the note which it had submitted to the Working Party (see Working Document No. 12 and points 43 to 51 below).

42. The Netherlands delegation felt that notification of the data subject should be limited to cases where he would not otherwise be aware that data concerning him was being processed, and that notification of the supervisory authority should be limited to sensitive data. This delegation could also envisage an obligation to notify the data subject where the controller of the file intended to communicate data to a third party.

Suggestions by the French delegation

43. In the context of its discussion on notification procedures, the Working Party held an initial exchange of views on the suggestions contained in Working Document No. 12 submitted by the French delegation.

44. The Greek delegation considered that if the national law provided an obligation for the controller of the file to notify the data subject that data concerning him were being processed, the courts would interpret such a provision as being applicable only where this was not obvious to the data subject.
35. The initial reaction of the Danish delegation to the suggestions by the French delegation was favourable.

The Netherlands delegation considered that no notification was necessary in the cases covered by point 1 of the note by the French delegation. It considered that the opinion system under point 2 was more important with regard to the public sector than the private sector. With regard to the authorization system under point 3, it considered that it should be applied only in respect of very sensitive data, and with the possibility of appeal to a court; it could envisage an alternative to this authorization system whereby the supervisory authority could apply to a court for an order prohibiting processing of a particular file.

47. The Luxembourg delegation reacted favourably to the suggestions by the French delegation. It questioned whether the obligations in respect of notifications should be the same in all Member States, or whether there should be a Community obligation to notify in respect of certain categories of data or files, with an option for Member States to provide an obligation to notify in respect of other categories of data or files. It also questioned whether there should be a specific obligation to notify in respect of data that were communicated from one Member State to another.

49. The United Kingdom delegation saw the suggestions by the French delegation as constituting a useful and constructive contribution. With regard to the category of data dealt with under point 1, it would prefer a declaration system to automatic notification. It considered that the status of the supervisory authority's opinion under point 2 would have to be made clear. As to the authorization system under point 3, it considered that decisions of this nature should be taken at parliamentary level and that the role of the supervisory authority should be to interpret these decisions and ensure their proper implementation.
49. The Portuguese delegation also reacted positively to these suggestions. It considered that point 1 would apply to the great majority of files. It shared the doubts of the Netherlands delegation with regard to point 2. It considered that the decisions under point 3 were of the type that would normally be taken by a State authority, and agreed with the Netherlands delegation that they should be subject to appeal to a court.

50. The German delegation considered that the systems under points 2 and 3 went far beyond mere notification.

51. The Chairman invited delegations to continue to reflect on the suggestions put forward by the French delegation.

**Future work**

52. It was agreed that the Working party would continue to examine Working Document No 11 at its next meeting.