Working Party on Economic Questions (Data Protection)  
Brussels, 26 April 1991  
SN 1852/91 (ECO)  
ORIG. EN

WORKING DOCUMENT No 2

Origin : Irish Delegation

Subject : Comments on Chapter IV of Draft Directive : Rights of Data Subjects

General

1. As this chapter is concerned with the rights of data subjects, it would seem that it should be confined to article 14, which deals with those rights, and article 15, which deals with exceptions to them. The remaining articles in the chapter - nos. 12 and 13 - are concerned with the application of the principle set out in article 16.1(a) - fair and lawful processing/collection of personal data - and should perhaps be located after that article when the draft directive is being restructured.

2. But the need for including articles 12 and 13 may be questioned. The data protection principle with which these two articles are concerned deals with concepts - fairness and lawfulness - that are easy to understand and apply and its detailed application would seem to be best left to the national data protection authorities, in conjunction with the Working Party on the Protection of Personal Data to be set up under article 27. That applies also to the detailed application of the other principles set out in article 16.1. Indeed, if it is necessary to give a detailed interpretation of one data protection principle in the directive, there could be an equal case for doing the same for some at least of the other principles, e.g. the principle that data shall be adequate, relevant and not excessive in relation to the purposes for which they are stored. But all such detailed provisions as to how the principles are to be applied do not appear to be necessary and seem out of place in a general directive. (It would be useful to provide for the exceptions to the principles e.g. "incompatible" disclosures of information where required to prevent loss of life or serious injury.)
3. Apart from what is said above about the need for having an article of this kind in a general directive, the article seems to be unnecessarily elaborate and it could be unduly restrictive in its application. For example, where information for processing is collected directly from the data subject, the data subject would already have been supplied, in accordance with article 13.1, with the particulars referred to in article 12(a) and (b). And it could be impossible for some data controllers, e.g. sellers of mailing lists, to disclose all potential recipients of the data.

4. If the article is to be retained, a flexible provision would seem to be more appropriate, e.g. a provision requiring Member States to specify in their law the circumstances in which a consent would be a valid consent for the purposes of the directive.

Article 13

5. This article also seems to be unnecessarily elaborate, particularly in so far as it concerns data supplied by a customer in the ordinary course of a business relationship. In accordance with article 16.1(b) data must be stored for specified, explicit and lawful purposes and used in a way compatible with those purposes. Breaches of this provision are punishable by sanctions. The great majority of firms use the information supplied by their customers strictly for purposes compatible with the business and the customers could have no objection to such use. Indeed most of them would already be aware of the matters mentioned in subparagraphs (a), (d) and (f) of paragraph 1. Subparagraphs (b) and (c) would not apply anyway. As it stands, therefore, paragraph 1 seems to impose in many cases an unnecessary layer of paperwork on the business community.
6. It might be better to concentrate on the small minority of data controllers who do not observe the compatibility principle rather than to impose a burden on all of them. Data controllers could be required to furnish free of charge to any enquirer a description of the personal data kept by them, the purposes for which the data are kept and the persons, or categories of persons, to whom they may be disclosed. This requirement would not impose any significant burden on data controllers as in practice very few data subjects would ask for this information.

7. As regards notifying each data subject, every time he supplies information, that he has rights of access and rectification (subparagraph (e)), the provision of adequate publicity regarding these and other rights seems to be more a function of the national data protection authority.

8. Paragraph 1 of the article refers to the provision of information to individuals from whom personal data are collected whereas the note on this article in the explanatory memorandum refers to data obtained from the data subject himself. Moreover, it is not clear how the paragraph will apply, say, to information about individuals' creditworthiness collected by a credit reference agency from a sole trader or a company. Is the agency obliged to inform each of the individuals of the matters specified in the paragraph?

9. If it is appropriate to include a provision such as paragraph 2 in a directive which is concerned only with activities coming within the scope of community law, it is suggested that it would be better to allow a derogation "in the interests of protecting State security, public safety, the monetary interests of the State ... etc.", as in article 9.2 of the 1981 Convention, and also in the financial interests of the Communities. The expression "maintenance of public order" in paragraph 2 appears to have a more limited scope than this. Also, paragraph 2 might be expanded to cover, say, the activities of a private detective agency engaged by an employer to detect suspected leakages of confidential business information. Again, this could be achieved by following article 9.2 of the Convention and invoking the need to protect the rights and freedoms of others.
Article 14:

Paragraph 1

10. The explanatory memorandum says, in effect, that under this paragraph a data subject can oppose the processing of data relating to him (only) when it is being unlawfully processed. If this is so, the provision is hardly necessary. If it is retained, it would be desirable to define "legitimate reasons", as the explanatory memorandum is stated not to have any evidential standing.

Paragraph 2

11. The object of this provision seems to be achieved by the requirement in article 16.1(a) that personal data must be processed fairly and lawfully. If the paragraph is to be retained, its full scope and implications would need to be clarified, so as to ensure that it could not, as expressed, be interpreted so as to interfere unduly with legitimate business operations. Does it apply to a report, prepared on a word processor, on the conduct of a member of a data controller's staff? Does it inhibit the elimination of applicants for posts who do not have the requisite qualifications? When the directive is applied by Council resolution to non-community law areas, will this paragraph limit such matters as profiling of suspects in criminal investigations, procedures for determining eligibility for social welfare benefits etc.

12. The fact that this paragraph is confined to automatic processing emphasises that the dangers to the privacy of individuals primarily arise from the computerisation of data and the possibilities of linkage etc. that that provides.

Paragraph 6

13. It is suggested that "marketing" should be substituted for "market research and advertising". "Marketing" includes both these activities as well as direct marketing.
14. It would seem desirable to introduce some time limit, say 12 months, on the liability of data controllers to notify third parties of corrections to personal data.

15. The data subject should also have the right to be informed of the third parties who have been so notified.

Article 15:
Paragraph 1
16. As stated in paragraph 12 of Working Document No 1, data kept for the purpose of safeguarding national security are outside the scope of the directive (v. article 3.1) and so the references to it, and also to defence, in this article appear to be inappropriate.

17. In general, it might be preferable to adopt the wording of article 9 of the Convention and provide that exceptions may be allowed where they are provided for by national law and constitute a necessary measure in a democratic society in the interests of protecting a member state's security etc. and of protecting the data subject or the rights and freedoms of others - with a reference also to the financial interests of the European Communities.

18. The following comments are based on the existing wording of the article.

19. The article should apply to all data, not just data kept in the public sector.

20. If article 14.2 is retained in its present form, an exception should be allowed to that provision where the profiling is carried out for the purposes of a criminal investigation or other legitimate activities.

21. The exceptions should include cases where access to data would be likely to prejudice the international relations of a member state or of the Communities, e.g. despatches from ambassadors abroad.
22. In subparagraph (e), "paramount" should perhaps be "substantial", the term used in the explanatory memorandum. If so, the reference to "duly established" would seem to be unnecessary.

23. Presumably paragraph (g) would restrict the right of access in the following cases for reasons relating to the rights and freedoms of others:

(1) where access to the data would prejudice the interests of the data controller in relation to a claim made against him, e.g. an estimate by an insurance company of its liability under a claim;
(2) where access would prejudice prison security or maintenance of order and discipline; and
(3) where a claim of legal professional privilege could be maintained in relation to the data.

24. Back-up data, which of its nature is likely not to be up-to-date or accurate, should also be excepted from the right of access.

Paragraph 2
25. This paragraph should not entitle the supervisory authority to examine data relating to national security. In any case, the subject matter of this paragraph is covered by article 26.2.

Paragraph 3
26. It is suggested that the following be substituted for the words after "statistical": "or research information therefrom but only where the results of the statistical or research work are not made available in a form that identifies any of the data subjects".