OUTCOME OF PROCEEDINGS
of: Working Party on Economic Questions (Data Protection)
on: 30 January 1992

No. prev. doc.: 10503/91 ECO 208
No. Cion prop.: 8460/90 ECO 158 - COM(90) 314 final - SYN 287

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 11th meeting on 30 January 1992 during which it continued its discussion on certain key issues arising from the proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data. The discussions of the Working Party were based on Working Document No 14 (SN 1080/92) drawn up by the Chairman of the Working Party.

A. Concept of files

2. Addressing the question whether the concept of "files" should be retained or whether the concept of "processing" should be preferred (see page 3, point 3 of Working Document No 14), note was taken of the following interventions:

3. The Greek delegation stated that the Directive should cover all data of a personal character requiring protection regardless of whether this data was contained in files or not.
4. The Netherlands delegation indicated that it was for using the concept of file in the Directive but on the understanding that this notion could be given a wide interpretation based on certain common denominator elements. If the concept of "file" was to be omitted in the Directive, as had been suggested at previous meetings, the Directive would have to contain concepts referring to a duration factor in relation to the data.

5. The German delegation agreed with the Netherlands delegation that a solution be found which in the light of the differences existing in the present national laws, took these into account leaving a certain latitude to the Member States.

6. The United Kingdom delegation indicated that data protection essentially centred on the processing and communication of data and that a definition in the Directive to a certain extent would depend on whether manual data was included under its scope. The Directive should, in any event, clarify that it covered data which were dispersed as the word "file" seemed to indicate, that the data was kept in one place and that in the case of manual data being included under the scope of the Directive that individual pieces of data were not covered.

7. The Irish delegation, referring to Working Document No 1 recalled that it had proposed to delete in Article 1 the words "contained in data files". These words would be unnecessary if, as proposed by the Irish delegation, manual files were excluded from the scope of the Directive.

8. The Italian delegation recalled that the main aim of the Directive was to achieve an adequate level of protection in the Member States in order to fulfill the aim of the creation of a common market. Although accepting flexible criteria for data storage, the Italian delegation stressed the need for the Directive to concentrate on collections of data which were connected or could easily be connected.
9. The Danish delegation indicated that one of the weaknesses of the Commission's proposal was that the concepts were not clear. In the Danish delegation's view it would, taking into account the great differences existing between the legislations in the different Member States, at least at present, be difficult to go beyond the file concept set out in the Council of Europe Convention.

10. The French delegation stressed that the Directive should harmonize legislation and leave no doubt as to its exact scope. The Directive should cover the processing of data including the collection of data. Manual data should fall within the scope of the Directive, possibly under a more flexible regime.

11. The Spanish delegation stated that the Directive should cover all personal data contained in files defined as an organised group of data which was processed disregarding the way they had been collected or set up.

12. The Portuguese delegation indicated that the Directive should cover processing of data, i.e. not only data kept in files in the strict sense of the word.

B. Determination of the concept of processing

13. Addressing the question whether the concept of processing covered data collection and communication to third parties, and in the latter case, which third parties, note was taken of the following:

14. The United Kingdom delegation indicated that the question of processing should be viewed in the same way as had been done in the Council of Europe Convention and reference was made to page 14, paragraph 31 of the explanatory memorandum to the Convention.
Addressing specifically the question of collection of data, the United Kingdom delegation suggested that a distinction be made between the following four cases:

- the case where data had been collected but not put into a collection;

- the case where data had been collected and had been put into an organised list (for example, telephone list), but where there was no intention to process;

- the case where data had been collected and put into an organised collection – intended for processing – but which had not actually been processed, and

- the case where data had been collected and processed.

Whereas the first two cases would fall outside the scope of the Directive, the last two cases would be covered by the Directive.

Addressing the question of communication of data, the United Kingdom delegation indicated that if a specific procedure were to be set for communication of data, a specific definition of the concept would have to be established. Otherwise communication would be covered by processing in a general way.

As regards the question of whom should be considered as third parties, the United Kingdom delegation felt that such persons were those falling outside the sphere of a company or the person controlling the file, but not for example the staff of a company.

15. The Netherlands delegation stressed that the concept of collection was ambiguous and that a distinction should be made between collection of data designed to be processed and data which were collected but were not intended for processing. As,
furthermore, not all communication of data was automatic, the collection of data and the communication would have to be defined in their own right.

As to defining third parties, the Netherlands delegation indicated that specific problems would arise in this respect in the public sector.

16. The German delegation indicated that when making a distinction between collecting and processing data, the Council of Europe Convention formed an adequate basis.

17. The Greek delegation indicated that the aim of the Directive was to protect privacy. With this as a starting point, the protection should start by the collection of data and end by the communication. Collection and communication should, therefore, be looked at as part of processing.

As to who was to be considered as a third party, the Greek delegation felt that a distinction should be made between the public and the private sector.

If data were communicated from one ministry to another, the other ministry would most likely have to be considered as a third party. In the private sector a daughter company of a multinational firm would also be a third party.

18. The French delegation indicated that processing covered collection and communication of data. Special rules for the collection and communication could, however, be foreseen.

19. The Danish delegation agreed with the French delegation that processing included the collection, internal use and communication of data but felt that a distinction would have to be made between the rules governing the collection and communication of data. Whereas the criteria for collection and internal use could be the same, one would, as far as
communication was concerned, have to distinguish between the kind of data in question – for example whether they were sensitive or not.

20. The Italian delegation recalled that when discussing Article 2 of the draft Directive, it had been agreed that the Directive should also cover the collection of data and not just communication of data. Reference was further made to point 3 of the discussion paper by the Chairman (Annex to 10503/91) which indicated that the principle of fair collection had to be supplemented by other principles.

21. The Spanish delegation favoured a wide concept of processing including all types of operations, i.e. collection, storage and communication.

As to the question of third parties, the Spanish delegation indicated that it had a flexible attitude.

22. The Portuguese delegation stated that processing was to be considered globally, including collection and communication of data. As to the question of third parties, the Portuguese delegation, having no definitive view, was convinced that it was necessary to search for a flexible concept.

C. Methods of applying the lawfulness criteria

23. Discussing the methods of applying the lawfulness criteria and addressing, in particular, the question whether the responsibility of assessing and applying the lawfulness criteria always rested first and foremost with the controller of the file or whether the responsibility, in some cases, rested with the supervisory authority (see Working Document No 14, page 2, point 2), note was taken of the following interventions.
24. The United Kingdom delegation recalled its approach according to which processing should be lawful and not unlawful, unless certain conditions were fulfilled.

If criteria for lawful processing were to be set up, these should be clear so that the data user who would be bearing the first responsibility, could operate within a clear law. Any necessary assessment of the law could be done by way of codes of conduct and then left to the data users.

Giving the authority responsibility in certain cases presupposed that the authority had given some sort of clearance, a procedure which gave rise to problems for the United Kingdom delegation.

25. The German delegation indicated that the responsibility should remain with the user of the data but that there would, in certain circumstances, be a possibility of sharing responsibility, for example if a notification had taken place to the controlling authority. The German delegation stressed, however, that the Directive should not introduce a mandatory notification system but leave a certain latitude to the Member States as to how the data protection systems were controlled.

26. The Danish delegation indicated that the data protection rules should be clear and that the user, if the clear rules had been infringed, should first and foremost be responsible. Addressing the question of a responsibility of the controlling authority, the Danish delegation referred to Working Document No 12, drawn up by the French delegation and indicated that it was against a general authorization system which would entail a large amount of bureaucracy.

27. In the Greek delegation's view it was not possible to speak of a distribution of responsibility as the user would have one kind of responsibility and the authority another and
that, consequently, the aim of the Directive should be to determine the responsibility of respectively the user and the authority.

28. **The Italian delegation** agreed that the main responsibility would be on the user of the file but that there might be situations in which the authority would have to share this responsibility. In the Italian delegation's view it was difficult to imagine situations where the authority would be solely responsible.

29. **The French delegation** indicated that whatever control system was established, the user would always be responsible. In for example the third category of cases mentioned in Working Document No 12 concerning sensitive data in relation to which a prior authorization for processing had been suggested, the user would remain responsible for the way he used the data after he had received the authorization for processing.

30. In the Portuguese delegation's view the user should in certain cases not be solely responsible but share the responsibility with the authority.

D. Listing of sensitive data

31. Addresssing the question whether the Directive should contain a list of sensitive data and, if so, what nature such a list should have, note was taken of the following interventions:

32. **The Danish delegation**, referring to Working Document No 13, page 2, indicated that in Danish law a description of sensitive data was given. This description was, however, not exhaustive but set out examples of what sensitive data could be. In the Danish delegation's view it would not be possible in a Directive to set out an exhaustive list of sensitive data.
33. In the Greek delegation’s view sensitive data could not be described by criteria; consequently a specific enumeration of sensitive data would have to be made.

34. If a distinction was to be made between sensitive and other data, the essential point for the United Kingdom delegation would be to examine the purpose to which the data was put, i.e. whether it could harm a person’s reputation, finances or prospects in life. On this basis a short list could be established, leaving it to Member States, on the basis of any possible particular sensitivity, to add to the list.

35. In the French delegation’s view it would not be possible to go back on what had been agreed upon in respect of Article 6 of the Council of Europe Convention. The Directive should consequently contain a list of data which by their nature were sensitive, disregarding the use they might be put to.

The French delegation had no difficulty with the list proposed by the Commission in Article 17 of the draft Directive and queried whether it would be advisable to set a non-exhaustive list. If Member States were given the possibility to go beyond the list set in the Directive, this might impede the free flow of data that the Directive aimed at achieving.

36. As all data in principle could be sensitive, depending on different factors, it was necessary, in the Netherlands delegation’s view, to adopt a very careful and flexible approach and inspiration could, for this purpose, be taken from the Council of Europe Convention.

As to the problem mentioned by the French delegation concerning the free movement of data, if only a minimum list was established the Netherlands delegation suggested that a solution to this problem could be found by taking inspiration from the criteria set out in the "Cassis de Dijon" ruling.
37. The German delegation was of the opinion that the Directive should contain a minimum list leaving it to Member States to make additions, especially in areas which would not affect the creation of a single market.

38. The Portuguese delegation felt that if the establishment of a list would create difficulties it could accept setting out a list of criteria or concepts to be used in all Member States to determine whether data were sensitive or not.

E. Convergence or equivalence of methods

39. Addressing the question of whether the internal market required the convergence or equivalence of applied methods, discussion in particular centred on the difficulties certain delegations would have in implementing parts of the suggestion put forward by the French delegation in Working Document No 14. In this context the French delegation stressed that the main point was to find procedures which gave an equivalent protection to individuals disregarding where the processing of the data took place. The French delegation invited those delegations who had difficulties in accepting in particular part 3 of its proposal to reflect on alternative possibilities, giving the same guarantees as that proposed by the French delegation.

F. Territorial application

40. Assuming that whatever criteria and methods used the effects of applying them would differ from one Member State to another and taking into account in particular the problems arising from trans-border data processing, the Working Party held a brief discussion on, for example, what law should apply when personal data had been collected in a State different from where the controller of the data was located, or the case where processing formed part of an administrative cooperation. In this context, note was in particular taken of an intervention by the Netherlands delegation who in light of past experience
suggested that instead of attempting to find common applicable international private law rules, the question be solved by bilateral agreements.

41. For a number of delegations the proposal put forward by the Netherlands delegation seemed cumbersome and surrounded by difficulties, and for the French delegation the only solution lay in creating equivalent protection in the Member States.

42. The Representative of the Commission referring to Article 4 of the draft Directive, admitted that this article might need to be reviewed in the sense that greater stress be put on the place where the controller of the file was resident.