COVER NOTE

to note from: Permanent Representation of France, signed by Jean-François DOBELLE
dated : 17 March 1993
to : President of the Council of the European Communities

No. Cion prop.: 9400/92 ECO 221 COM(92) 422 final SYN 287

Subject: Amended proposal for a Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Delegations will find attached a note from the French authorities concerning Article 16 of the above amended proposal and use of the concept "profile" in France.

Encl.: note dated 17 March 1993
NOTE FROM THE FRENCH DELEGATION

CONCERNING ARTICLE 16(1)
OF THE AMENDED PROPOSAL FOR A DIRECTIVE
AND USE OF THE CONCEPT "PROFILE"
IN FRANCE
(ARTICLE 2 OF THE FRENCH LAW OF 6 JANUARY 1978)

The profile method uses computer processing capacity to classify individuals according to characteristics defined beforehand.

This method, which is useful in all cases where individuals need to be evaluated, has come to be applied in many sectors (risk evaluation in the insurance and banking sectors, behaviour evaluation for the purposes of employment, health care, recruitment of personnel, etc.) and is being increasingly applied as processing becomes more sophisticated.

To counter risks of misuse (i.e. transfer to computers of decision-making authority concerning individuals), Article 2 of the French Law concerning data protection provides as follows:

"No administrative or personal decision involving assessment of human behaviour may be based solely on automatic data processing which defines the profile or personality of the individual concerned."

Scrutiny of this Article reveals the differences between the French Law and Article 16(1) of the amended proposal for a Directive; these differences need to be spelled out in order to avoid ambiguity in the description of examples of application of this Article by the French supervisory authority:

- the French text lays down a general ban, whereas the Directive, through its Article 16(1), confers upon the person concerned a right which he may exercise, or not, at his discretion;
- the French text covers all types of decision, whereas the Directive targets only decisions detrimental to the person concerned;

- the French text relates to decisions involving behaviour assessment, and the amended version of the Directive no longer does so;

- the French text refers to the person's "profile or personality", whereas the second version of the Directive refers to "personality profile".

EXAMPLES OF APPLICATION OF ARTICLE 2 OF THE FRENCH LAW

In France this Article has enabled the supervisory authority to take preventive action against a number of processing systems which, on account of their reliance on profiles, could involve certain dangers to individual freedom.

CNIL (National Data Processing and Liberties Commission) has taken such action in various sectors, the principal ones being:

- employment;
- health care;
- banking.

Regarding employment, CNIL has received numerous complaints about the use of specialized systems assessing the personality profile of job-seekers or employees by means of psychological tests.

Companies using software of this kind define a post to be filled and the software produces the psychological profile of the ideal candidate for the post. The system then designs an ad hoc test to assess candidates' personality and intelligence.
Candidates have to reply to a large number of questions (often between 200 and 500) and 10 to 40 personality criteria are tested. Some systems also take account of the time needed by a candidate to reply to certain questions. Thus, candidates are marked according to their score in relation to the pre-established ideal profile.

In an administrative statement, CNIL took the opportunity to point out that no decision concerning selection of candidates involving assessment of human behaviour could be based solely on computerized data processing which determined a candidate’s profile or personality.

When asked to vet a processing system of this kind, CNIL examines decision-making procedure from this angle, requiring a statement from those applying the system that the profile description or related particulars do no ineluctably produce an irrevocable decision in regard to the individual concerned.

In the health care and social security sector, CNIL has dealt with several cases in which it saw fit to give a reminder of Article 2.

When it comes to the control of health care expenditure, it ensures that no decision drawing on an assessment of the behaviour of dispensers of health care or health service users is based solely on computerized processing which analyses their behaviour on the basis of information given by them to social security funds.

However, CNIL does not forbid the use of such processing as a basis for assessing the various parties involved in the health system. Thus, several processing systems used by French social security funds produce assessments of health care dispensers which constitute genuine profiles that can be compared with that of the "ideal" dispenser. However, CNIL is adamant that, inter alia, funds may not rely solely on these processing systems when taking decisions regarding the persons concerned.

In much the same way, CNIL drew on the above Article when examining a processing system designed to preselect children who might require medico-social treatment.
This system, using a model composed of medico-social risk factors and taking account of 170 separate data, was designed to enable doctors or social services to target monitoring and assistance at selected families.

When CNIL vetted the system, Article 2 of the above Law enabled it to ensure that the decisions selecting the families were not based solely on data processing and to make it clear that every case had to be judged on its merits. Such examination is, in fact, the only way of checking whether processing results, based on a mode of determinist reasoning which is not infallible, are relevant, and of identifying which kind of medical or social action needs to be taken, where appropriate.

CNIL’s attention was also drawn to a processing system designed to convert a set of computer-recorded medical data on people in old age into a graph depicting their degree of independent ability and mobility.

The system was designed to enable a nursing team to assess the extent to which those in their care were dependent on them and to use this information as a basis for sharing the nursing duties required for each person in the home.

A further aim was to create optimum nursing conditions for those concerned.

Here too, CNIL has reminded project leaders that their processing system must not lead to automatic decision-making in regard to those concerned.

In the banking sector, CNIL has addressed problems relating to the scoring system and to so-called "behavioural segmentation", whereby the customers of an institution or company are classed in homogeneous customer categories (segments) on the basis of observed conduct.

Banks set segments using various data, such as the use of a particular product of the bank, purchase of a particular service, bank balance and cash flow, frequency of use of a bank card, etc.
Each customer is classed in a segment of which all the characteristics are known. This segmentation allows the institution to gear its strategy and commercial policy accordingly.

As these techniques produce a behaviour profile for each customer as a user of the bank's services, CNIL makes sure that credit institutions do not base decisions regarding customers solely on their "score" or on their belonging to a particular segment, but on a comprehensive study of their file.

CNIL does not deny companies the right to class customers on the basis of relevant criteria, but nonetheless insists that such processing may not lead to decisions following as a matter of course.

The above (non-exhaustive) list of examples of application of Article 2 of the French Law illustrates the context and spirit in which the French supervisory authority applies the concept of "profile".

As may be observed, CNIL does not forbid profiling (except in the case of court decisions, for which one of the articles of the French Law completely forbids the use of such methods).

Also, it should be emphasized that although France has long been alone in applying a provision of this kind, there is no evidence - subject to closer study - to suggest that processing systems producing profiles or identifying personalities have developed more slowly here.

Most French banks use the scoring method for granting credit, recruitment units conduct tests to assess candidates' personality, etc. However, action by the French supervisory authority seems to have prevented misuse of such processing systems.
COMMENTS ON ARTICLE 16(1) OF THE AMENDED PROPOSAL FOR A DIRECTIVE

In view of the experience briefly described above, France favours the inclusion of a provision on the lines of Article 16(1) in the future Data Protection Directive, even though the current wording of that Article, particularly the concept "profile of personality", calls for some comments.

In fact, that expression seems to cover only personality testing, whereas our experience suggests a need to cover also those cases where the profile relates not to an individual's personality, but to his behaviour towards, for instance, a particular financial product. Accordingly, we consider a reference to "profile or personality" to be more appropriate.

It should be noted that the current wording of Article 16(1) does not prohibit the use of modern techniques to assist decision-making which rely on the establishment of individual or collective profiles.

The French delegation's intention is not to request that the relevant passage be amended accordingly or that such interpretation be placed on it (the current wording would rule this out anyway).

France is perfectly aware of the advantages of the processing systems at issue: they have become essential to the smooth operation of companies and administrations alike. In some cases, they also make for a more reliable, objective and complete service producing decisions nearer the wishes of those concerned (for instance, educational guidance can be geared more closely to pupils' desiderata, which generally involve a choice of three different establishments or streams).

It should also be noted that the wording of Article 16(1) is much less broad than that of the corresponding Article of the above French Law.

Indeed, as it does not impose a general ban, a person subjected to an adverse decision based solely on processing which draws up a personality profile will not be able to invoke it until after the event.
Moreover, contrary to the French provision, invoking it will be possible only in respect of decisions affecting individuals. Thus, the Directive will not ban the use of the scoring method for deciding whether to grant a credit but, where refusal is being considered on the basis of the score obtained, will simply impose manual examination of the person’s file.

Accordingly, and in view of our experience in this area, we do not consider that the text at issue is likely to hinder the smooth functioning of companies or administrations.

It does, however, offer individuals a basic guarantee that adverse decisions against them will be the outcome not of simple automatic processing, but of a process involving human and personalized assessment of their case.

We therefore believe that it strikes a fair balance between the freedom for companies and administrations to choose the operating methods which they consider most efficient and every individual's right not to be subjected to automatic decisions excluding all human evaluation. Finally, we believe that it enhances decision-makers' sense of responsibility.