OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 17 and 18 March 1993
No. prev. doc.: 4725/93 ECO 37
Nos Cion props: 9400/93 ECO 221 COM(93) 422 final SYN 287
Subject: Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data


The outcome of the discussions on Articles 18(4) and (5) to 25 is set out in the Annex.
4. Before [processing which poses specific risks] (1) to the rights and freedoms of individuals commences, the supervisory authority shall examine such processing within a [period of 15 days] (2) commencing with the date of the notification, at the end of which period the authority shall give its conclusions (3) (4).

(1) Requests by the Italian and Portuguese delegations that this processing be defined in the light of Article 8(1) of the proposal for a Directive. According to the Commission representative, processing which posed specific risks also included the processing referred to in Article 8(1).

(2) Several delegations felt this period was too short. Others suggested a reasonable period, to be determined by the Member States, to avoid the risk of tacit prior authorization if the period were too short. At the Irish delegation's request, the Commission representative explained that during this period, the controller was obliged to refrain from starting the processing operations referred to in the paragraph. For operations already in progress, a transitional period of 3 years was laid down in Article 35(2). The Italian delegation requested that the suspensory effect of the period be spelt out.

(3) Requests by the French and Italian delegations that the effect and consequences of the conclusions of the supervisory authority be specified in the light of its responsibilities as laid down in Article 30(2). The Commission representative stated that negative conclusions would not mean that the proposed processing was forbidden: in this case, the controller could proceed with the processing at his own risk.

(4) Requests by the Belgian, German, Spanish, Danish, Greek and Netherlands delegations that paragraph 4 be deleted or made optional; the German delegation pointed out that the system laid down in paragraphs 4 and 5 of Article 18 was not compatible with Article 19, as this was a negative list of special processing operations which could not be transferred into national law.

- the Irish delegation entered a reservation on this paragraph.
- the United Kingdom delegation thought it should be for Member States to lay down what processing operations had to be notified.
- the French delegation, on the other hand, thought paragraph 4 necessary; as it covered only a limited number of processing operations, the system would not give rise to too much bureaucracy. It was against the suggestion of making the paragraph option.
Article 18 (continued)

5. Member States may provide that [some of the processing operations referred to in paragraph 4] (1) shall be authorized beforehand [either by law] (2) or (3) by decision of the supervisory authority.

(1) Most of the delegations were in favour of the principle of paragraph 5, although they thought the processing operations involved should be spelt out.
(2) The Belgian delegation wanted the word "law" replaced by "national law".
(3) The Italian delegation was against the possibility of prior authorization by law. It could agree only to prior authorization by the supervisory authority.
Article 19
Simplification of and exemption from the obligation to notify

1. Member States shall provide for [the taking of measures to simplify or exempt from] (1) the obligation to notify in the case of certain [all] (2) categories of processing operation which [pose minor risks] (3) do not adversely affect the rights and freedoms of data subjects [or the existence of which cannot be unknown to the data subjects] (4). Such categories of processing include [may include] (5) the production of correspondence or papers, the satisfaction of legal, accounting, tax or social security duties or the consultation of documentation services accessible to the public.] (6)

(1) The German delegation, supported by the Luxembourg delegation, was against a general system of compulsory notification (Article 18) with provision for simplification or exemption in Article 19. However, if such a system were acceptable to the majority of delegations, it suggested replacing the second sentence of Article 19 by the following sentence, providing for an internal control system:

"Member States may also provide that there shall be no obligation to notify if the controller has appointed his own supervisory authority to ensure that data protection rules are complied with;"

The French delegation suggested that this text be preceded by: "subject to Article 18(5)".

(2) The Netherlands delegation asked that the option of simplification or exemption be extended to all categories of processing which did not adversely affect the rights and liberties of data subjects.

(3) Text suggested by the Italian delegation.

(4) Text suggested by the United Kingdom delegation. Agreement by the French and Spanish delegations. Reservation by the Luxembourg delegation.

(5) Text suggested by the Italian delegation.

(6) Request by all the delegations that the second sentence of this paragraph be deleted. Agreement by the Commission representative on this point.
Article 19 (continued)

2. (1) Simplification or exemption measures shall be adopted (either by or after consulting the supervisory authority) (2). Such measures shall particularly specify, for each category of processing operation:

- the purposes of the processing;
- a description of the data or categories of data undergoing processing;
- the category or categories of data subject;
- the third parties or categories of third party to whom the data are to be disclosed;
- the length of time the data are to be stored;
- where appropriate, the conditions under which the processing is to be carried out (3) (4).

(1) The Irish delegation asked that this paragraph be deleted, as it thought these questions were the responsibility of the Member States.
(2) Request by the German delegation that it should also be possible for simplification or exemption measures to be taken by act of law. Supported by the Belgian, Danish and French delegations, it opposed the idea of requiring the legislator to consult a supervisory authority.
In this context, the Commission representative suggested returning to this point during discussion of Article 30.
(3) The Danish, German, Irish and United Kingdom delegations were against this list, as it was too detailed.
The Belgian, French, Italian, Luxembourg and Netherlands delegations were in favour of this list.
(4) The Italian delegation asked that paragraphs 1 and 2 be grouped together, with provision for total unconditional exemption on the one hand and exemption subject to conditions on the other.
Article 19 (continued)

3. Simplification or exemption from the obligation to notify shall not release the controller from any of the other obligations resulting from this Directive, [in particular concerning the rights of the data subject] (1) (2).

---

(1) Addition requested by the Greek delegation.
(2) In response to the Presidency's question whether it was desirable to recast Articles 18 and 19, the Commission representative replied that

- a system of compulsory notification was necessary in order to harmonize national legislation in this area;
- such a system had to be selective in order to avoid excessive bureaucracy;
- by means of simplification and exemption, 80% of data processing operations could already be taken out of the notification process;
- prior authorization from a supervisory authority or the legislator had to be laid down for processing that posed a risk.
Article 20

Manual processing operations

Member States may lay down the conditions under which Articles 18 and 19 (1) are to apply to non-automatic processing operations involving personal data contained in files (2).

(1) Request by the Italian delegation that no reference be made to Articles 18 and 19 for manual processing operations.
   The Commission representative maintained that Article 20 was necessary should Member States wish to provide for a notification system for manual processing operations, but submitted the following text in place of the present Article 20:
   "Member States may lay down that non-automatic processing operations involving personal data contained in files are to be notified."

(2) The German and Netherlands delegations expressed doubts as to the relationship between Article 20 and Article 3, which already laid down that the provisions of the Directive covered non-automatic processing operations as well.
   The Italian and Greek delegations wanted this Article deleted.
Article 21
Register of notified processing operations

Member States shall provide that a register of notified processing operations must be maintained by the supervisory authority. The register shall as a minimum in the cases provided for in Articles 18 and 19, contain the information listed in Article 18(2)(a) to (f). It may be inspected by any person [subject to such restrictions as may be imposed by Member States on the same grounds as are set out in Article 14(1)] (1).

(1) The Spanish delegation was against any restriction on personal access for inspecting registers. The German delegation, however, felt there were some categories of data which by their very nature ought not to be open for inspection. The other delegations and the Commission thought it might be a good idea to refer here to the relevant provisions of Article 14 limiting the number of restrictions on the inspection of registers, once the text of Article 14(1) had been finalized.
CHAPTER III
JUDICIAL REMEDIES, LIABILITY AND PENALTIES

Article 22
Judicial remedies

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 30, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national provisions adopted pursuant to this Directive (1).

(1) The Working Party is agreed on this new wording.
Article 23
Liability

1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive \(^1\) is entitled to receive compensation from the controller for the damage suffered.

[2. Member States may provide that the controller may be exempted, in whole or in part, from his liability for damage resulting from the loss or destruction of data or from unauthorized access if he proves that he has taken suitable steps to satisfy the requirements of Articles 17 and 24.] \(^2\)

\(^1\) A difference of opinion emerged between delegations on the type of liability that should apply in this case. Six delegations (DK/D/GR/E/IRL/UK) said they would prefer to keep the concept of liability based on fault. The Belgian delegation was able to support the above delegations, but could also agree to strict liability (without fault). The Netherlands delegation was in favour of strict liability; the French and Luxembourg delegations would prefer this concept, as would the Italian and Portuguese delegations, although they made their choice subject to the burden of proof being reversed.

\(^2\) The United Kingdom delegation proposed the following alternative text, on which the Working Party has not yet commented: "Member States may provide that entitlement to compensation resulting from any breach of the requirements of this Directive is dependent upon it being demonstrated that the damage results from the controller having failed to take reasonable steps to meet the requirements of the Directive."
Article 24 (1)
Interrelationship between Article 17(4) and (5) and Article 24

1. Proposal to replace Article 17(4) and (5) of the amended proposal by the following:

"17(4) The obligations referred to in paragraphs 1, 2 and 3 shall also be incumbent on the processor (2)."

"17(5) Any person acting under the authority of the controller or the processor, including the processor himself, who has access to personal data may not disclose it to third parties without the controller's agreement, unless he is required to do so under national or Community law (3)."

(1) New text from the Commission departments to which the Working Party agreed to return at a later date.
(2) Amendments made, at the request of delegations, to clarify the processor’s obligations as regards security.
(3) Amendment made for the same reasons as in (2) concerning confidentiality. This amendment also takes account of the request for this provision to be linked to Article 24(3) of the amended proposal, which relates to the same subject.
II. Proposal to replace Article 24 of the amended proposal by the following Article 17a:

"Article 17a: Processing on behalf of the controller

1. Member States shall provide that the controller must, where processing is carried out on his behalf, ensure that security measures are taken and choose a processor who provides sufficient guarantees in that respect (1).

2. When putting into practice the processing operations laid down in the contract or legal act which binds him to the controller, the processor shall carry out instructions he receives from the controller (2).

3. The contract or legal act referred to in paragraph 2 shall be in writing (3)."

(1) Taken from Article 24(1) of the amended proposal, with deletion of the words "necessary" and "organizational" to take account of delegations' wishes that it should not change the security criteria in Article 17.

(2) Redrafted version of Article 24(2) of the amended proposal, with deletion of the reference to compliance by the processor with the national provisions adopted pursuant to this Directive, since the processor's obligation is already laid down in Article 17(5) as amended above.

(3) Taken from Article 24(3) of the amended proposal. The wording which duplicated Article 17(5) as amended above has been deleted.
Each Member State shall provide for the imposition of dissuasive penalties (1) on any person who does not comply with the national provisions adopted pursuant to this Directive.

(1) The delegations and the Commission agreed to seek a form of words flexible enough to cover all measures appropriate to the seriousness of the infringements.
Page 4, footnote 1

- Delete in the first line the words "supported by the Luxembourg delegation".

- Insert after the position of the German delegation:

"The Luxembourg delegation, while in favour of the principle of a general system of compulsory notification, with provision for simplification or exemption, said that it found the idea of an internal control system as suggested by the German delegation interesting and was prepared, if appropriate, to support that idea."