OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)

on: 15 and 16 July 1993

No. prev. doc.: 7695/93 ECO 173
No. Cion prop.: 9400/92 ECO 221 COM(92) 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

1. At its meeting on 15 and 16 July 1993, the Working Party on Economic Questions (Data Protection) started to examine Articles 1 and 2(a), (b), (c) and (d) during the second reading of the abovementioned proposal for Directive on the basis of a proposal for a compromise from the Presidency (7695/93 ECO 173).

2. Under the general remarks, the German and United Kingdom delegations upheld reservations on the legal basis (see 7132/93) and several delegations pointed to the administrative and financial burdens occasioned by detailed rules such as those provided for by the Directive. The Danish delegation furthermore stated that such rules (particularly those provided for in Articles 10 to 16) were incompatible with the principle of subsidiarity referred to in the Maastricht Treaty and that such incompatibility could not be resolved by the inclusion of a recital as suggested by the Commission representative. With reference to the data processing objectives referred to in Article 6(1)(b), a number of delegations requested that it be stated that in order not to impede police work, police records should not fall within the scope of the Directive.
In this connection, the Presidency suggested that the Council Legal Service be requested for its opinion on whether Article 6(1)(b) could provide for the possibility of altering the objectives.

At the close of this exchange of views prior to the detailed examination of the enacting terms, the Presidency:

- noted that there was broad consensus in the Working Party on the need for such a Directive;

- gave a reminder that the subsidiarity requirement could not constitute a pre-condition but rather a principle to which the Working Party would constantly refer throughout the examination of each of the provisions of the Directive;

- noted that, on the basis of the experience relating to the implementation of Convention No 108, the fears concerning the cost and bureaucracy resulting from such provisions had also proved unfounded in practice;

- wished to find a satisfactory and appropriate solution to the problem of manual files.

3. The Annex contains the outcome of the discussions on the text of the Articles.
CHAPTER I

GENERAL PROVISIONS 1.2

Article 1

Object of the Directive

1. In accordance with this Directive, Member States shall protect the [fundamental] (1) rights and freedoms of [natural] (2) (3) persons, and in particular their right to privacy, with respect to the processing of personal data.

(1) Doubts expressed by the German and United Kingdom delegations about this term; the German delegation, referring to the problem concerning the legal basis, held that the Directive should provide only for the protection of private rights.

(2) At the Danish delegation's request, the Working Party accepted the inclusion of the following statement in the Council minutes:
"The Council and the Commission note that the laws on the protection of legal persons regarding the processing of data relating to them are not affected by this Directive.".

(3) In reply to the Italian delegation's request for the insertion of the following words: "whatever his nationality or residence" (see Article 1 of Convention 108 of the Council of Europe), the Commission representative proposed that recital No 2 (9400/92, page 45) be amended as follows:
"Whereas data-processing systems are designed to serve society; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental freedoms and rights, notably the right to privacy and whereas they must contribute to economic and social progress, trade expansion and the well-being of individuals.".
Article 1 (continued)

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States (\(^4\)) for reasons connected with the protection afforded under paragraph 1 [by having recourse to more restrictive national provisions] (\(^5\)) (\(^6\)).

\(^4\) The Danish, German and Italian delegations raised the question of incompatibility between the free movement of data between Member States and the national provisions providing for a higher degree of protection adopted pursuant to Article 5 of the Directive.

\(^5\) Alternative text suggested by the German delegation to resolve the problem referred to in footnote 1 (in German: "unter Berufung auf schärfere nationale Schutzvorschriften").

\(^6\) The German delegation suggested the inclusion of the following paragraph 3:
"Specific provisions of Community law and international agreements relating to the protection of personal data concluded between Member States pursuant to those provisions shall take precedence over the provisions laid down in this Directive."
Article 2

Definitions

For the purposes of this Directive:

(a) "personal data" means any information relating to an identified or identifiable (1) natural (2) person ("data subject") (3), an identifiable person is one who can be [reasonably] (4) identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity (5)(6).

(1) The United Kingdom delegation called for the inclusion of the word "living" before the word "natural".
(2) The United Kingdom delegation suggested the words "reasonably identifiable".
(3) Request by a number of delegations (DK/D/E/IRL/NL) to incorporate the text of Article 2(a) of Convention 108 of the Council of Europe and to delete the second part of the text (an identifiable person ...... or social identity); the United Kingdom delegation could endorse this position if the word "reasonably" (see previous footnote) was added to the second line.
(4) Reservations by the Italian and Luxembourg delegations on this word.
(5) Request by the French delegation to specify in a recital that identification through sound and picture was excluded from the scope of the Directive.
(6) In the light of the delegations' comments the Commission representative suggested the following text:
"(a) "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."
Article 2 (continued)

[Data presented in statistical form, which is of such a type that the persons concerned can no longer be identified, are not considered personal data] (7).

(b) "processing of personal data" (8) ("processing") means any operation or any set of operations which is performed upon personal data, whether or not by automatic means such as [collection] (9), recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

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(7) Broad consensus on deletion of this paragraph.
(8) The German delegation stressed that the definitions of data processing given in Articles 7 and 18 were different and favoured the definition contained in Article 2(c) of Convention 108.
(9) Doubts expressed by several delegations (DK/IRL/UK) on this term; the Danish delegation could accept it if it were specified that not all forms of data collection were covered by the generic term "processing", which only covered collection of data intended for automated or non-automated processing and put into files.
Article 2 (continued)

(c) "personal data file" ("file") means any structured set of personal data [relating to several persons] \(^{(10)}\) which is \(^{(11)}\) accessible according to specific criteria, whether centralized \(^{(2)}\) \(^{(12)}\) or geographically dispersed \(^{(2)}\) \(^{(13)}\).

(d) "controller" \(^{(14)}\) means any natural or legal person, public authority, agency or other body which [ultimately] \(^{(15)}\) determines the purpose and [objective] \(^{(16)}\) of the processing of personal data [or, where processing is the result of national or Community legislation, the entity responsible for implementing such legislation \(^{(17)}\) \(^{(18)}\)].
Note from the Danish delegation

concerning the relationship between the 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 (COM(92) 422 - SYN 287), and the Community Directives on government procurement etc. (national security considerations)

1. Article 1(2) of the 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 (hereinafter referred to as "the data protection Directive") provides that "the Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection [of the rights and freedoms of natural persons] afforded under paragraph 1".

Article 2 of the Directive co-ordinating procedures for the award of public supply contracts (Directive 77/62 and subsequent amendments) states that the Directive does not apply to supplies which are declared secret or when their delivery must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.

It is similarly laid down in the Directive relating to the co-ordination of procedures for the award of public service contracts (Directive 92/50, Article 4(2)) that the Directive does not apply to services which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of that State's security so requires.

2. The Danish delegation wishes to raise the question whether there should not be a similar addition to Article 1(2) of the proposal for a Directive on data protection, so that Article 1(2) would read as follows:

"Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1 unless the processing has been declared secret or must be accompanied by special security measures in accordance with the laws, regulations or
administrative provisions in force in the Member State concerned or the protection of the basic interests of that State's security so requires”.

(The wording of the addition is based on Article 4(2) of Directive 92/50 on public service contracts).

3. The reasons for the Danish delegation's question are as follows:

Under the Danish Law on records held by public authorities, measures must be taken for the disposal or destruction of records which contain data of special interest to foreign powers in case of war or similar circumstances. It is clear from the explanatory memorandum which accompanied submission of the Law that the provision in question applies inter alia to records which an occupying power or a power which has invaded part of the country would be especially interested in, for example in order to rapidly and effectively take control of general administration. Among the major country-wide administrative systems to which this provision applies is Denmark's Central Population Register (CPR), which has recorded basic data on all individuals living in Denmark since 1968.

The steps taken under the provision to ensure its enforcement constitute a specific measure within the overall national emergency plan.

If copies of these records or any part thereof were to be held abroad, it would not be possible for the competent authorities to comply with the statutory requirement for disposal or destruction.

Accordingly, the Danish Data Protection Authority and the Ministry of the Interior in liaison with the Danish Association of County Councils have laid down that production of plastic health insurance cards for persons covered by the Danish health insurance scheme must take place in Denmark because their production involves the provision of certain CPR data on all persons currently resident in Denmark.

If production were to be undertaken by a supplier outside Denmark, it would mean transferring such data abroad. Reference in this case was made to Article 2 of the Directive on public supply contracts (see point 1 above).

4. Unless the Danish delegation can be given a very clear assurance that notwithstanding the adoption of the data protection Directive with the existing wording of Article 1(2) it will still be possible, on grounds of security such as those mentioned, to refuse to provide personal data to foreign countries, the delegation wants the abovementioned addition made to Article 1(2) of the data protection Directive.