OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 25 February 1991

N° prop. Cion: 8460/90 ECO 158 - COM(90) 314 final - SYN 287-288

Subject: Protection of individuals in relation to the processing of personal data in the Community and information security


I. Introductory remarks by the Chairman

2. The Chairman of the Working Party congratulated the Commission for its initiative and its courage to have submitted in Septembre 1990 the file on personal data protection. This file, which had been elaborated with great professional conscientiousness, constituted, in the Chairman’s view, an excellent basis for the Working Party’s discussion.
Although appreciating the initiative by the Commission, the Chairman did however regret that this initiative had only been taken at the end of 1990. He recalled that already in 1976 the European Parliament had adopted resolutions on the subject and that already in 1981 the Commission in a recommendation had stressed the fundamental right character of personal data protection.

Taking into account that the internal market should be operational by 1 January 1993 and taking into consideration also that the absence of a Community protection system would constitute an obstacle to the creation of an internal market, the Working Party found itself under serious time pressure. Only with the active collaboration of all delegations would it be possible for the Working Party to complete its work in time for Council adoption before the end of 1992.

II. Introductory remarks by the Representative of the Commission

3. Having thanked the Presidency for according a high priority to the Commission’s proposal concerning the protection of personal data, the Representative of the Commission stressed the great importance of the issue for Community citizens, administrations, research bodies and industry. From discussions with representatives from all possible interests, including national supervisory authorities, academic institutions, professional associations and a large number of industries, a clear consensus that Community action in this field was necessary had emerged.

4. Outlining the developments and motives which led the Commission to take the initiative, the Representative of the Commission recalled that already in the 1970s, when the
First data protection laws appeared in Europe and the European Parliament issued its first two resolutions on this matter. It had become quite clear that this was not exclusively a human rights issue but an issue which also had important economic and strategic dimensions. This had been stressed in both international initiatives that appeared at the time, i.e. the Council of Europe Convention n° 108 and the OECD Privacy Guidelines. It had furthermore been stressed by the Commission when in July 1981 it issued a recommendation urging Member States to ratify Convention 108 at the same time stating that if all the Member States did not within a reasonable time sign and ratify the Convention the Commission reserved the right to propose that the Council adopt an instrument on the basis of the EEC Treaty.

If in 1981 economic side-effects from lack of harmonization had been feared, mostly in the field of computer and data processing services, today, ten years later, insufficient harmonization of Member States legislation directly affected the whole process leading to the single market and a citizens’ Europe. Free exchange of information was necessary between companies in the context of commercial and industrial activities, between research institutions, but also between administrations, including customs, police and social security authorities. At the same time information and data were becoming increasingly easy to manipulate. This fact plus the growing flow of information throughout the Community made the question of adequate protection of personal data a very pressing one.

Free exchange of information, and in particular personal information, would be very difficult without an adequate level of personal data protection throughout the Community. This had already been witnessed in the context of the Schengen agreement and in the context of bilateral
cases including cases between Community Member States and between countries parties to the Council of Europe Convention. Moreover, strong divergences among national laws carried the risk of creating market distortions in favour of the countries with the most lenient or least effective laws.

The main objectives of the Commission's proposal were therefore:

- to establish an adequate level of protection throughout the Community;

- to prevent barriers to information flows within the Community on data protection grounds;

- to establish certain specific procedures aiming at approximating to some extent national laws;

- to ensure that Community citizens' data were not abused outside the Community and Community data protection law was not circumvented through operations in third countries; and

- to establish mechanisms and procedures for additional initiatives including sectoral codes of practice and Community instruments, further national law approximation steps and if necessary amendments to the directive itself.

As regards the reactions received including a very large number of detailed written comments from industry associations and data protection authorities, the Representative of the Commission indicated that there had not been a single case of objections to the principles of data protection and the need for Community action. Starting
from this consensus, comments had gone in the direction of both more and less strict provisions. In some cases they showed a simple misunderstanding of the Commission's text or intentions, while in some other cases they went further and questioned basic issues including the scope, the definitions, the respective treatment of the public and the private sectors, the question of transborder data flows, etc.

The Representative of the Commission went on to stress that the Commission had taken into account the fact that relevant laws exist already in 7 Member States. It had tried to take up those national law elements that it considered most appropriate. It had however had to introduce certain novelties, notably those concerning export of data to third countries, applicable law in transborder flow cases and mechanisms for further Community cooperation and action.

III. General reactions from delegations to the proposal by the Commission

5. The Italian delegation congratulated the Commission for the work it had done which in its view constituted an excellent starting point for the discussions of the Working Party. The Italian delegation did not however wish to give a detailed reaction to the Commission's proposal, as the proposal was still under examination by the Italian authorities and this especially in respect of the ramifications with regard to the Council of Europe Convention and the Schengen agreement. The examination being carried out by the Italian authorities also included the question of the legal basis of the proposal.
6. The Irish delegation informed the Working Party that Ireland, two years ago, had enacted legislation to give effect to the Council of Europe Convention on data protection. In doing so Ireland had wished to strike a balance between the rights of individuals and the concern of not overburdening industry and the public sector. The legislation, which could be described as a second generation data protection law, had proved to be effective and only a few complaints to the supervisory authorities had been made.

7. As regards specifically the proposal by the Commission, the Irish delegation indicated that very strong opposition had been voiced by public departments in Ireland and this mainly for the following reasons:

- the main justification for the proposed Directive was that ratification by all the Member States of the European Communities of the Council of Europe Convention would not provide an adequate solution as a fair level of appreciation was left to the States parties to the Convention with the result that the level of protection would vary between the Member States and thus prevent the free flow of data between Member States of the EC. Although the Directive tried to avoid this by giving extremely detailed rules, it did however also leave a certain amount of discretion to the Member States and this was indeed anticipated in Article 28; there therefore seemed to be a contradiction between the justification for the Directive and its actual contents;

- it had to be recognised that in the different States having legislation in the field of data protection there were different data protection cultures based on the existence of different legal concepts and different social environments and that in spite of this each
system operated satisfactorily. The concepts of the Directive were either unknown in some States or would be understood differently in the different Member States, prejudicing even further the aim of achieving equivalent protection in all Member States;

- the fears expressed in respect of the safeguard of the right of privacy had arisen especially in relation to the evolution in respect of personal data which had undergone automatic processing which permitted the storage of an enormous amount of data - these fears did not exist to the same extent in relation to manual files and the inclusion of such files within the scope of the directive was therefore not necessary and would only create an unnecessary administrative burden in a climate becoming increasingly competitive.

8. Because of the kind of problems raised by the Irish delegation, this delegation felt that it would be difficult to establish Community legislation to be enacted before the end of 1992. On a personal basis the representative of Ireland indicated that he preferred the following two-tier system:

- in an initial period the Member States would apply the basic principles of data protection of the Council of Europe Convention and any problems arising from the fact that protection in Member States was not equivalent would be dealt with by administrative actions such as those foreseen in Articles 27 and 30 in the draft Directive;

- at the end of the initial period and on the basis of the experience gained the Commission would provide a unifying text, possibly even in the form of a Regulation.
9. As regards the legal basis, the Irish delegation queried whether it would not be more appropriate that the basis be Article 235 of the EEC Treaty rather than Article 100 A as the Directive was more related to human rights than the internal market. The Irish proposed that the legal service of the Council be asked to pronounce itself on the legal basis.

10. The French delegation in its preliminary remarks indicated that it welcomed the proposal made by the Commission and that it would participate in the work as constructively as possible. The proposal by the Commission did however give rise to a number of difficulties for the French delegation.

The French delegation had noted not only that the directive allowed Member States which had a higher level of protection than that foreseen by the Directive to maintain such a level of protection, but also that in order to avoid distortion of competition and ensure the free flow of data, it was necessary to have as homogeneous a system as possible. The French delegation agreed with this principle under the condition that the homogeneous approach was made at a high level of protection and took into account national laws which have already been adopted.

As regards the question of transparency, the French delegation indicated that it attached great importance to assuring a certain amount of transparency in the processing and collecting of personal data and felt that the draft Directive did not go far enough in this respect, especially as regards the guarantees afforded to the data subjects in respect of the creation of files and in respect of the information to be given to the supervisory authorities.
The distinction between the private and public sectors which did not exist in the Council of Europe Convention did not appear pertinent to the French delegation. The French delegation wondered why this distinction had been chosen instead of a distinction based for example on the nature of the files.

Referring to the supervisory authorities the French delegation queried by which legal technical means the obligations flowing from the Directive would be rendered binding on the Institutions of the European Community.

11. The Spanish delegation welcomed the draft Directive proposed by the Commission but expressed concern as to the implications of the Directive in specific sectors as for example tax files and police files. In the Spanish delegation's view specific account would have to be taken of these specific sectors in the Directive.

The Spanish delegation also indicated that although certain fundamental principles were common to the public and private sectors, there did however also exist a number of differences. Whereas, in the public sector standards laid down the conditions under which a file could be used, such standards did not exist in the private sector. They would be created independently and in this respect the Directive had concepts which would be difficult to implement.

The Spanish delegation also mentioned that although the proposal by the Commission used the expression equivalent protection it would allow a certain latitude for the Member States. This could, in the Spanish delegation's view, lead to strange effects.
Finally, the Spanish delegation indicated that it had problems relating to the supervisory authorities foreseen as it did not know exactly what would be the powers of these authorities.

12. The Greek delegation informed the Working Party that although attempts had been made to legislate in the field of personal data protection in Greece since 1979, legislation had not been passed. A draft drawn up in 1986 by a special committee had because of ministerial changes and elections not become law. It was however expected that a draft would very soon be submitted again to Parliament.

As a general comment on the draft proposal by the Commission the Greek delegation underlined the difficulties which might arise when a matter was dealt with by different international organisations. International texts established by the different organisations could be in conflict with each other and give rise to questions of interpretation.

Referring specifically to the intervention by the Irish delegation concerning the legal basis, the Greek delegation queried whether the title of the Directive was appropriate and should not rather refer to the free movement of data.

13. The German delegation welcomed the proposal by the Commission which it considered necessary for the creation of an internal market and which should be based on a high standard going beyond that set out in the Council of Europe Convention. The German delegation particularly welcomed the inclusion of manual data in the scope of the proposed Directive and stressed the need to ensure that it would be possible to maintain specific systems of protection for specific sectors going beyond the
protection foreseen in the Directive. As regards the
transfer of personal data to third countries, the German
delegation indicated that the provisions proposed by the
Commission seemed impractical and that it would make
certain alternative proposals in this respect.

14. The Danish delegation thanked the Commission for the
initiative it had taken and shared the views of the
Commission that it was necessary to create data protection
at a high level in order to ensure the flow of data
between Member States. The Danish delegation stressed
however that it had particular problems with the Directive
and that it could not support it as it was presently
formulated.

The Danish delegation drew attention to the following
points in particular:

- the question whether manual data generally should be
covered by the scope of the Directive. Should the
Directive include manual data, this would create
difficulties in respect of the Danish legislation in the
field of data protection;

- the Directive was too bureaucratic by giving detailed
procedural rules instead of creating general substantive
rules;

- the Directive was unclear in respect of the passing on
of information from public sectors to the private sector
and within the public sector and in this connection the
Danish delegation had noted that the directive did not
give specific exceptions for information to be passed on
for statistical or scientific purposes. Such exceptions
would, according to experience in the Danish
dlegation's view, be necessary.
The Danish delegation was satisfied that the Directive to a wide extent was based on the principles of the Council of Europe Convention. One could perhaps consider drafting the Directive by referring to the principles of the Convention, following which it would only be necessary to provide supplementary rules concerning the exchange of information between the Member States of the EC and between these States and third countries.

15. The Belgian delegation informed the Working Party that although Belgium had not yet ratified the Council of Europe Convention, Belgium had the intention of ratifying the Convention and a draft law which would transpose into national law the principles of the Convention would be submitted to Parliament shortly. As the other Member States which had not yet ratified the Convention also intended to do so, one could ask if the Directive which in any event could only be a minimal directive, was necessary. As interventions made in the Working Party already showed that whereas some delegations, for example were in favour of including manual files, other delegations had expressed opposition to such an inclusion, one could query whether it would be possible to go further than what had already been provided for in the Council of Europe Convention. The Belgian delegation, furthermore, indicated that as certain exceptions in relation to the rules of data protection already existed in the Member States in order to take into account specific problems in those countries, it could be expected that Member States with such exceptions would wish to maintain them.

As it seemed doubtful to the Belgian delegation whether it would be possible to go further than the Convention this delegation wondered if, instead of taking systematically the principles of the Convention and attempting to better them by going further as had been
proposed by the Commission, it would not be more appropriate to take a more pragmatic approach. In this context and referring specifically to Articles 3(2)(a) and 12 of the Council of Europe Convention which allow Member States to make exceptions to the principles of the Convention, the Belgian delegation proposed to examine these exceptions more closely and to see how problems arising from the use of such exceptions could be solved.

As regards the accession of the Communities to the Council of Europe Convention the Belgian delegation expressed the wish to obtain further information as to the contents of any protocol and the legal consequences of any accession by the Communities to the Convention. In this context the Belgian delegation referred to the problems which could arise from the fact that the same subject matter would be dealt with by two different jurisdictions and the fact that the text proposed by the Commission was not compatible with the Convention.

16. As the protection of data was considered as a human rights issue, the Belgian delegation supported the request by the Irish delegation to ask the Legal Service to give an opinion as to the legal basis proposed by the Commission.

17. The United Kingdom delegation stated that it was not yet in a position to express a final view on the Commission's proposal as consultations of the interested circles were still under way in the United Kingdom.

As a preliminary general remark the UK delegation indicated that when considering the question of data protection it had to be borne in mind that a modern society was built on information and the circulation of information. Taking this as a starting point, information
should be free and it was consequently necessary to strike a balance between the need to protect privacy and to ensure the free circulation of information.

The question of general restrictions on the free flow of information had only become acute with the introduction of computers and this had to be borne in mind when looking at the future scope of legislation in the field of data protection. As data protection laws in any form impose burdens both on government administration and on commerce, one should strive for sensible measured objectives, for solutions proportionate to the scale of problems caused, and for procedures which were simple for the users of data and data subjects.

The United Kingdom marked a preference that the directive should address the problems posed by particularly computerized data rather than the whole field of privacy.

18. Whereas certain proposals made by the Commission seemed sensible to the UK delegation, others worried the UK delegation. The worrying issues in particular concerned:

- the concepts of the Directive which were very general and which would have to be qualified by very general exceptions would be difficult to translate into practice;

- the notification system for some data;

- the concept of self-determination;

- the restrictions on disclosure to third parties which were likely to be burdensome and which might prove to be counter-productive in the case of some industries;
- the extension to manual data which seemed unjustified;

- the codes of conduct which could become too inflexible;

- the exceptions - should the holding of data for domestic purposes, payrolls, accounts, be subject to the rules of the Directive?

The UK delegation finally indicated that it was still examining the question of the legal basis of the proposed Directive.

19. The Netherlands delegation stated that the document submitted by the Commission was an extremely important one. It would however have wished that the proposal had been discussed in other fora before being submitted to Council. In general terms the Netherlands delegation was in favour of the proposal by the Commission. The Netherlands delegation:

- felt, however, that certain provisions were too cumbersome and left open the question of how much discretion was left for Member States;

- felt that the proposals raised the question of what equivalent protection in the context of a Directive really meant;

- felt that the Directive raised the question of the appropriateness of establishing rules concerning the approval of the person concerned before information was used;

- asked what was meant by providing that the Directive would apply to the public sector with the exception of files in the public sector where activities of this
sector did not fall within the scope of Community law and this especially when seen in relation to the Schengen Agreement.

The Netherlands delegation expressed the wish that the draft Directive be examined article by article and principle by principle scrutinising what the problems involved really amounted to in practical terms.

20. The Luxembourg delegation informed the Working Party that Luxembourg, since 1979, had a law on personal data protection. Luxembourg was however reflecting on the possibility of readjusting its legislation because of the progress made in the field of automatic data processing. This adjustment would however await the progress made in the Working Party. The Luxembourg delegation went on to explain that the Luxembourg law at present did not include manual files but questioned whether it would not be more appropriate to include such files. Whereas the Luxembourg law made a distinction between the public and private sectors proposed by the Commission in its draft directive, this distinction did not apply to the protection itself but to the protection procedures.

In the Luxembourg delegation's view protection of personal data should be considered as a whole and this in respect of - the time of protection which should start already from the collection of data - the nature of data, i.e. manual or automatic files - data in the private and public sectors. If there was equivalent protection in all Member States this equivalence should be attached to the main principles of data protection concerning:
- the end results sought by the processing of data;

- the transparency of this processing;

- and an independent control.

Although it could be said that all these principles for the protection of data were already contained in the Council of Europe Convention, it could equally be argued that the Convention only established a philosophical framework and that within the European Communities such a framework would not suffice and more specific and more precise rules would be necessary.

IV. Reactions of the Representative of the Commission to the general remarks by delegations

21. Reacting to the general remarks made by delegations, the Representative of the Commission noted with satisfaction that there was general support for the fact that the Commission had made a proposal for data protection and that a large number of elements of the Commission's proposal had been supported. Responding specifically to certain questions and doubts which had been expressed the Representative of the Commission explained:

- that as regards the inclusion of manual files it had been advanced that the question of data protection had only become acute with computerization. Although this might be true it did not however mean that problems did not exist also in the area of manual files and this especially in respect of the access and transmission of data. When the Commission used the term manual files it meant files which had characteristics coming very close to automatic files;
that the Directive aimed at obtaining equivalent protection. Such an equivalent protection was necessary in order to permit the free flow of data between Member States. It would however be possible for Member States to provide a higher level of protection than that foreseen in the Directive. A protection going too far could however entail competitive disadvantages for those States going beyond the level foreseen in the Directive. The possibility of providing a higher level of protection could however not impede the guarantees of free flow of data between the Member States;

- that the distinction between the public and private sector was based not so much on a distinction between sectors but more on a distinction between public functions and private functions. The basis for public functions were to a great extent different from those of private functions;

- as to the Directive being too bureaucratic, this to a large extent depended on how it was implemented in practice;

- that the accession of the Communities to the Council of Europe Convention required Community legislation to be established ensuring protection at the same level or beyond that required by the Convention. As the Convention at present only made accession by States possible a protocol would have to be negotiated allowing the accession of the European Communities;

- as to the incompatibility between the Directive and the Convention there was none;
- that as far as the legal basis was concerned, Article 100 A of the EEC Treaty provided the appropriate basis in as much as a high level of equivalent protection was essential to the creation of the internal market. Consequently recourse to Article 235 of the EEC Treaty would not be possible as this was a subsidiary provision used only when no legal basis had been foreseen in the Treaty. As to the possibility of requesting the legal services of the Council or the Commission to give an opinion on the legal basis it would be premature as the final contents of the Directive were not yet known.

V. Discussion of Article 1

a. Structure

22. Discussing the structure of Article 1, the Working Party took note of a suggestion by the French delegation to invert the order of paragraphs 1 and 2. In the French delegation's view it would be more logical to start with the real general principle of the Directive to ensure the free flow of personal data between the Member States and then to speak in paragraph 2 of the protection of privacy of individuals which could constitute an obstacle to the free flow of data.

Responding to the suggestion made by the French delegation the Representative of the Commission explained that the principle of the Directive was that only once an equivalent protection of personal data in the Member States had been achieved could one require the free flow of such data between the Member States. As equivalent data protection formed a condition for free flow it was consequently logical that the principle of free flow be given after the principle of equivalent data protection as suggested by the Commission.
For the Greek delegation the philosophy of the Commission could be clarified by adding in paragraph 2 the words, "given that Member States have established data protection".

The Chairman of the Working Party suggested inserting in paragraph 1 the words "equivalent protection" thus setting the principle that with equivalent protection in all Member States the necessary guarantees existed for not preventing the free flow of personal data.

b. Wording of Article 1, paragraph 1

23. As regards specifically the discussion of paragraph 1 of Article 1, the Working Party noted:

(a) that a number of delegations felt that the notion "privacy of individuals" proposed by the Commission was too restrictive. It was suggested either to use the term "interests of individuals" or "individual rights";

(b) that certain delegations felt that the word "processing" was too narrow as also the collection of data ought to be covered;

(c) that the Belgian delegation proposed, at least in the French text, to speak of "personnes physiques" instead of just "personnes";

(d) that in the Luxembourg delegation's view the term "data files" seemed outdated.

As regards the use of the words "privacy of individuals", the Representative of the Commission indicated that these words corresponded to the wording of Article 8 of the Human Rights Convention. If this wording was not
completely satisfactory the Representative of the Commission would be prepared to accept the wording "in particular the privacy of individuals". As regards the remarks set out under (b), (c) and (d), the Commission suggested that these points be better discussed when dealing with Article 2 of the draft Directive.

c. Scope of paragraph 2

24. Discussing Article 1, paragraph 2 and especially the scope of this provision, the Representative of the Commission reiterated that the proposal of the Commission followed the principles laid down by the Court of Justice in the "Cassis de Dijon" ruling. The Directive would set out an adequate level of protection without however preventing Member States from going even further. This would avoid harmonizing all aspects in all details. Such an approach did not however allow obstacles to be made to the free flow of data from or to a State which had opted for a higher level of protection than that required by the Directive.

Whereas certain delegations indicated that they could accept the principle outlined by the Representative of the Commission, a number of other delegations felt that such an approach would render the national laws of the Member States which had introduced a higher level of protection than that required by the Directive a dead letter. Reference was in this context also made to the fact that the Council of Europe Convention in its Article 12 allowed exceptions to the general principle of free flow of data information.
VI. Future work

25. At the next meeting of the Working Party discussions will be devoted to Chapters I and V of the Commission's proposal for the protection of individuals in relation to the processing of personal data.

Scheduled meetings of the Working Party (Economic Questions) protection of personal data

Meetings scheduled for the discussion of the Directive on the protection of individuals in relation to processing of personal data:

27 and 28 (morning only) March 1991
2 and 3 May 1991
19 and 20 June 1991.

Meetings scheduled for the discussion of the proposed Directive concerning the protection of personal data in the context of public digital telecommunications interests, in particular the integrated services digital network (SDN):

22 April 1991
3 and 4 June 1991.