OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 27 and 28 March 1991

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Subject: Protection of individuals in relation to the processing of personal data


Introductory remarks by the Chairman

2. Before commencing the examination of Chapters I and V of the proposed Council Directive, the Chairman recalled that the EC had mainly three legal instruments in its possession in order to legislate, i.e. regulations, directives and decisions.

For the purpose of the discussion it would be useful to bear in mind that whereas directives were binding, as to the results to be achieved, upon each Member State, the choice of form and methods was left to the national authorities. As far as decisions were concerned they were binding in their entirety upon those to whom they were addressed. As the discussions of
the Working Party were mainly concerned with directives, the Chairman proposed as a first stage to discuss the question of substance in order to reach agreement on the aims and results that the directive should attain and at a second stage to examine the different articles in order to arrive at an agreement as to the form and wording of the directive.

Legal Basis

3. Before entering into a discussion of the draft directive the Belgian delegation informed the Working Party that the Belgian government had decided to request the legal service to give a written opinion on the legal basis of the proposed directive.

Chapter I - General provisions

Article 2 - Definitions

4. Discussing Article 2(a), the more general question of whether the scope of the directive should embrace also data concerning legal persons and persons who had deceased was raised.

As to the inclusion of data concerning legal persons, it emerged from the discussion of the Working Party that a majority of delegations were in favour of limiting the scope of the directive to natural persons. In favour of so doing it was argued that the legal philosophy underlying the directive was one of human rights and the protection of individual freedom whereas the philosophy regarding legal persons was more concerned with questions relating to business law, professional secrets, etc.

Although agreeing that the scope of the directive be limited to natural persons the Netherlands delegation mentioned, however, that a number of borderline cases could arise. The Netherlands delegation, in particular, drew the
attention of the Working Party to the case of one-person companies and the case of associations of a limited number of doctors or lawyers. In this connection the Netherlands delegation also indicated that the wording "information relating to" could give rise to problems.

As to the question of whether the scope of the directive should also cover data on deceased persons, it emerged from the discussion that opinions were divided within the Working Party and it was agreed to return to this matter at a latter stage. Note was, however, taken of a suggestion by the United Kingdom delegation to leave it to the discretion of the Member States when implementing the directive whether legislation should cover only data on living persons or not. The same discretion could, in the United Kingdom delegation's view, also be left to the Member States in respect of the question of whether national legislation should cover only natural or also include legal persons.

5. As regards the more detailed discussion of the wording proposed for Article 2 it was noted:

ad (a) personal data

- that the Greek delegation, supported by several delegations, proposed adding the words "directly or indirectly" before the word "identified" in the third line of Article 2(a);

- that several delegations felt that the word "similar" in the fourth line was inadequate as it could be misleading. As alternatives to the wording proposed by the Commission it was suggested to speak of "any specific information" or "any other information";

- that the Netherlands delegation questioned the practical application of a definition using the notion "identifiable individual". As a large amount of data today was identifiable it would, in the Netherlands delegation's view, be useful to
introduce a criterion of "reasonableness". In this connection the Italian delegation referred to the Council of Europe's recommendation explaining the word "identifiable";

- a query by the United Kingdom delegation as to whether the wording "any information" also included photographic information. In the United Kingdom delegation's view such information should not be covered as it could give rise to a number of practical difficulties. To avoid any misunderstanding the UK delegation proposed using the term "textual or numerical information". In relation to the intervention by the UK delegation, the Luxembourg delegation also mentioned the problems which could arise in respect of, for example fingerprints and video surveillance.

ad 2(b) depersonalize

6. As regards the more detailed discussion of the wording of Article 2(b) the Working Party took note of a suggestion by the French and Greek delegations to delete the words "except at the price of an excessive effort in terms of staff, expenditure and time". It was argued that data protection subordinated to the number of staff or expenditure could introduce a discrimination based on the means available.

Note was furthermore taken of a query by the Netherlands delegation as to the need for having any definition of "depersonalize".

ad 2(c) personal data file

7. Discussing Article 2(c) the Netherlands delegation raised the question whether the use of the word "file" was still adequate in light of the technical evolution which had taken place. The UK delegation agreed that the term "personal data file" was too narrow as data could be dispersed between different collections but nevertheless accessed by one single user. The UK delegation therefore suggested that the directive
focus on two concepts - first of all on the user of personal data and secondly on the concept set out in Article 2(a) concerning the definition of which personal data were covered. Such an approach could in the UK delegation's view avoid some of the difficulties arising in respect of determining the precise physical form in which data was held.

8. Discussing Article 2(c) a number of delegations furthermore reiterated their opposition to the inclusion of manual files within the scope of the directive. In this connection the Danish delegation indicated that if in the last resort manual files were to be included these should be limited to files containing sensitive information such as that mentioned in Article 17.

The German delegation stressed the need of not only including manual files in the way proposed by the Commission but also documents as for example acts of legal value.

ad 2(d) processing

9. Discussing Article 2(d) it was noted that a number of delegations felt that the inclusion of recording, dissemination and retrieval of data in the definition of processing was superfluous.

10. Note was furthermore taken of a proposal by the Greek delegation, supported by several other delegations, to include under the definition of processing the collection of data and their consultation. Responding specifically to the suggestion to include the collection of data in Article 2(d) the representative of the Commission indicated that such an inclusion might lead to undesirable consequences particularly in respect of the obligations foreseen in Article 11. The representative of the Commission suggested as an alternative to extend the scope of Article 1 by using in this article the term "collecting and processing of personal data".
11. The UK delegation proposed stating more precisely that "communication of data" only related to communication outside an organisation and suggested excluding "word processing" specifically from the definition of processing. The UK delegation finally asked the Working Party to reflect on whether "processing" should also cover "storage".

ad 2(e) controller of the file

12. Discussing Article 2(e) the Belgian delegation indicated that in its view the definition of controller of the file as proposed by the Commission and the absence of a definition of the administrator of a file would have as a result that the legislator could be considered the controller of a file. The Belgian delegation therefore wondered if it would not be useful to have also a definition of the administrator of a file.

13. In relation to the discussion of Article 2(e) note was furthermore taken of a query by the Netherlands delegation as to the need for the inclusion of the words "or other body competent under Community law" as well as a request by the German delegation not to speak only of persons or bodies competent under national law - which expression, in the German delegation's view, was too narrow. The German delegation also requested spelling out in detail what was meant by the expression "third parties".

ad 2(f) supervisory authority

14. Responding to a question by the Belgian delegation as to the expression "or other independant body" referred to in the second line of the definition, the representative of the Commission indicated that the wording had been chosen deliberately in order to secure a certain amount of flexibility as to how Member States would organise themselves, maintaining however the requirement that the body be independent.
15. In relation to the discussion of Article 2(g) and (h) the UK delegation reiterated that it had certain doubts as to the need for making a structured distinction between the public and private sectors as had been proposed by the Commission. In the UK delegation's view the two sectors should be treated in the same way and with this as a starting point one could then examine if there was any need for restrictions applicable only to one of the sectors. The Irish delegation in this context recalled that it had certain difficulties with the concepts of private and public sectors and shared the view expressed by the UK delegation that the private and public sectors be treated structurally in the same way.

16. Concerning particularly Article 2(g) the Danish delegation stated that it had problems with understanding the distinction between public and private sectors as proposed by the Commission which, in the Danish delegation's view, needed clarification. Contrary to what was the case in Denmark where the distinction was based on whether the authorities or organisations were established by law and financed by the State, the distinction proposed by the Commission was based on the function of the authority or organisation. This could in the Danish delegation's view give rise to questions of interpretation as to whether, for example, a television company or a railway company would fall within the private or public sector. The Danish delegation also raised the question whether Parliaments and courts should be covered by the directive or whether an exception should not be made as had been done in the directive concerning information on the environmental sector.

17. The French delegation indicated that it was not convinced of the need for making a distinction between the public and private sectors. Should, however, a distinction be made it would, in the French delegation's view, be necessary to review the contents of the definition proposed by the Commission which were too restrictive. In the French delegation's view the...
definition of public sector should also include establishments of an industrial and commercial character and even private law organisations with public power prerogatives.

In this connection it was mentioned that what should determine whether an authority or organisation belonged to the public or private sector could be determined on the basis of what the principal purpose of the authority or organisation was. If it were merely an administrative purpose it would fall within the public sector, whereas if the functions were mainly commercial it would fall within the private sector.

18. In response to a question raised by the Belgian delegation as to whether the international public and private law sector fell within the scope of the directive, the representative of the Commission stated that, as this was a question of a more general nature which did not concern only the directive under discussion, he would consult his legal service.

Article 3 - Scope

Paragraph 1

19. Discussing Article 3(1) the Netherlands delegation stated that this provision gave rise to a number of serious and fundamental questions, first of all because the expression "with the exception of files in the public sector where the activities of that sector do not fall within the scope of Community law" was very dynamic and left a great deal of uncertainty as to what actually fell within the scope of the directive.

Although it could of course be advanced that those files which did not fall within the scope of Community law would be covered by the proposed draft resolution of the Representatives of the Governments meeting within the Council, there would
always be a difference in the sense that in relation to the area covered by the directive the European Court of Justice would be competent.

The Netherlands delegation furthermore indicated that it did not find grounds to make exceptions only for files in the public sector as a number of activities in the private sector also could fall outside the scope of Community law.

A number of delegations shared the views expressed by the Netherlands delegation.

The French delegation, referring especially to the fact that the exception in Article 3(1) only concerned the public sector, proposed to amend this paragraph to read as follows:

"The Member States shall apply this Directive to files in the public and private sectors with the exception of files created within the framework of activities which do not fall within the field of application of the Treaty."

Paragraph 2

ad 2(a)

20. Discussing paragraph 2(a) the Working Party noted that the Netherlands delegation felt that using the words "private" and "personal" was a duplication.

ad 2(b)

21. The French, German and Netherlands delegations raised several doubts as to the appropriateness of including an exception for non-profit making bodies such as that proposed by the Commission in Article 3 paragraph 2(b), especially as data collected by such bodies could relate to very sensitive areas. In this connection attention was drawn to the example of
hospitals run for the public good. If the Commission proposal was followed such data established by such bodies would fall outside the scope of the directive.

Assuming that non-profit making bodies mentioned in 2(b) should not be exempted from the specific guarantees given in respect of sensitive information such as that mentioned in Article 17, the Luxembourg delegation suggested that paragraph 2(b) be better integrated in the formerly mentioned article setting out the limits of access and use of files of non-profit making bodies.

22. Discussing paragraph 2(b) the Irish delegation raised the points set out in Working Document No 1 (see points 9-12 of the Working Document given in the Annex). As regards specifically the proposal by the Irish delegation to exclude from the scope of the directive personal data required by national law to be made available by the data controller to the public, it was supported by a number of delegations.

23. In addition to the exception proposed by the Irish delegation, the UK delegation also suggested that inclusion of the following exceptions be considered:

1) data held for historical, research or archive purposes - if only used for these purposes;

2) mailing lists (excluding direct mail organisations);

3) administrative payrolls, pensions, accounts by private or public sector organisations in the case where the data was not disclosed outside unless the data subject agreed or disclosure took place for legal or court requirements.

The UK delegation furthermore proposed to use the term "not for profit bodies" instead of "non-profit making bodies" as a body might end up making a profit.
The UK delegation finally proposed to ensure that charities were included amongst the bodies of a political, philosophical, religious etc. nature and suggested that if trade unions were to be mentioned in Article 3 para. 2(b), so should trade associations.

**Article 4 - Law applicable**

**Title**

24. The French delegation proposed to amend the title to read "Territorial application".

**Paragraph 1**

25. Discussing paragraph 1 of Article 4 a number of delegations indicated that this provision gave rise to serious problems especially as paragraph 1(b) seemed to imply that the rules of the directive would apply to files situated outside the Community. It seemed difficult to comprehend how it would be possible for Member States to enforce the rules of the directive in respect of files situated outside the territory of the EC.

Reference in this context was also made to the difficulties which might arise in the application of the applicable law rules even between the Member States of the EC as the directive was intended to be a minimum directive.

26. The French delegation proposed rewording Article 4 paragraph 1 as follows:

"1. Each Member State shall apply this Directive

(a) to the controller of a file resident in its territory, or
27. Note was finally taken of a suggestion by the Greek delegation to avoid reference to the words "unless such use is only sporadic".

Paragraph 2

28. Paragraph 2 also gave rise to problems for several delegations relating not only to its practical application but also to problems of a legal nature as it contained elements of extraterritoriality. Consequently, the French delegation proposed the deletion of this paragraph (see also in this context its proposal for rewording paragraph 1).

29. The Greek delegation suggested, as it had done for paragraph 1, avoiding the reference to the wording "unless such use is only sporadic".

Paragraph 3

30. The Greek delegation proposed replacing the word "temporarily" with the words "for a short period".

31. Reacting to the interventions made by delegations in respect of Article 4, the Representative of the Commission indicated that one of the main aims of Article 4 was to avoid any overlapping of applicable laws. For this purpose the Commission had chosen the connecting factors set out in the different paragraphs of Article 4 which sought to solve the problems related to the specific cases which could be envisaged. If there was agreement on the objective of avoiding overlapping of applicable laws other connecting factors than those chosen by the Commission could, however, be discussed.
Chapter V - Data Quality

Article 16 - Principles

32. As a general comment concerning the way in which the draft directive was structured a number of delegations proposed that Article 16 be brought forward in the directive and be linked with Article 4 of the draft directive.

33. As regards more specifically the discussion of the wording of Article 16, the Working Party noted:

I. ad paragraph 1(a)

- that the Irish delegation proposed to substitute "obtained" for "collected". (See Working Document 1 in the Annex, point 14);

- that the Netherlands delegation felt that the wording "fairly and lawfully" seemed to give a very large scope for different interpretations. Certain guidelines should consequently be given in order to ensure that they were not interpreted too differently in the Member States.

II. ad paragraph 1(b)

- that the German delegation felt that it was necessary to define the purposes to be covered by Article 16 paragraph 1(b) more stringently;

- that the Irish delegation proposed to amend paragraph 1(b) to read:

"stored for specified and legitimate purposes and not used in a way incompatible with those purposes". (See point 15 of Working Document given in the Annex);
that the Greek delegation proposed to substitute "in conformity" for the words "in a way compatible".

III. ad paragraph 1(e)

- that this paragraph, as proposed by the Commission, by indicating that the data could be kept in a form which permits identification of the data subjects for no longer than is necessary for the purposes for which the data are stored, could create difficulties in respect of data sent to archives and used for historical, statistical or scientific purposes.

Paragraph 2

IV. Discussing Article 16(2) a number of delegations expressed the feeling that a provision concerning the obligations of the controller could be better placed in Article 21 of the draft directive concerning the question of liability.

Without prejudice to the final place of Article 16 paragraph 2 and taking into account that there were a number of elements which were beyond the powers of control of the controller, as for example a change of address, the UK delegation proposed to reword the proposed paragraph 2 in the following manner:

"It shall be for the controller to do everything he can to ensure that paragraph 1 is complied with."

Article 17 - Special categories of data

34. Discussing Article 17 several delegations indicated that the proposal by the Commission, by going further than the text of the Council of Europe Convention, created a number of problems and would be difficult to implement in practice. In this connection mention was made of the rules on equal
opportunity which often required the holding of data on race. Reference was furthermore made to the example of holiday firms who needed to keep files on persons who were disabled or who for religious reasons needed a specific diet. These delegations, therefore, felt that it would be more appropriate to have a text which was closer to the text of the Council of Europe Convention, leaving it to the Member States to set the protection in accordance with the national needs and the specific situations.

In this context the Irish delegation put forward a proposal for new wording of Article 17 (see point 17 of Working Document 1 given in the Annex).

35. As regards the specific wording of paragraph 1, it was furthermore noted:

- that the requirement of express and written consent was impractical; reference was made to the example of a person being brought unconscious to hospital;

- that certain delegations felt that this provision should also include manual data.

36. Discussing paragraph 2 it was noted:

- that this provision seemed too detailed;

- that the word "law" should be replaced by "national provision";

- that derogation should be possible not only on public interest grounds.

37. Discussing paragraph 3 it was noted that certain delegations felt that a need to keep data on criminal convictions could exist not only in relation to public sector files.
Article 18 - Data security

38. Discussing Article 18 the Working Party noted:

- that the Portuguese delegation felt that it was inappropriate to give the tasks mentioned in Article 18 to the controller and that a provision similar to that of the Council of Europe Convention would be better;

- that the UK delegation proposed replacing the words "having regard to the state of the art" in paragraph 1 second sub-paragraph by "having regard to the technical means available";

- that the word "recommendation" should be replaced by a reference to the technical measures provided for in Article 29 of the draft directive;

- that the German delegation expressed the wish that a specific provision be provided for "on-line consultation". In this connection note was furthermore taken of a proposal by the French delegation that Article 2 give a definition of "on-line consultation".

Future work

39. At the Working Party’s next meeting on 2-3 May 1991, discussions will be devoted to:

- the Council decision in the field of information security;

- Chapter IV of the Council Directive concerning the protection of individuals in relation to the processing of personal data.
Origin: Irish Delegation

Subject: Proposed amendments for Chapters I and V of the draft Council Directive concerning the protection of individuals in relation to the processing of personal data

Chapter I

Article 1

1. In paragraph 1, line 2, delete "the privacy of".

Comment
These words appear to be unnecessary. They do not occur in the title of the Directive or of the Council of Europe Convention.

2. In paragraph 1, line 2, insert "automatic" before "processing".

Object
To exclude manual files from the scope of the Directive.

3. In paragraph 1, line 3, delete "contained in data files".

Comment
These words would appear to be unnecessary if, as proposed by this delegation, manual files are excluded from the scope of the Directive.

Article 2

(a) "personal data"

4. In line 2, insert "living" before the first reference to "individual".

Object
To remove doubt.

(b) "depersonalize"

5. This term should be deleted as no explicit reference is made to it in the remainder of the Directive.
6. Delete references to "file" and the words after the first reference to "automatic processing".

Object
To exclude manual files.

7. In line 1, delete "whether or not".

Object
To exclude manual files.

8. "public sector" (h) "private sector"

These expressions, as defined, create difficulty for a common law state as as Ireland. In Ireland all public authorities and all private individuals (apart from those who keep data for personal, recreational etc. purposes) and firms are subject to the same data protection principles, i.e. those of the Convention. The only distinction is that some data controllers, i.e. all public authorities, as well as individuals and firms keeping certain categories of data, e.g. health data, are obliged to register with an independent Data Protection Commissioner.

Article 3

9. Clarification is desired of the expression "corresponding members" in paragraph 2(b).

10. Should some of the additional rights provided by Article 14, e.g. right of access and right to rectify any inaccurate data, apply to members of these bodies?

11. Include a further category to which the Directive should not apply:

"(c) personal data required by national law to be made available by the data controller to the public".

Comment
Special provision for protecting such data seems unnecessary.

12. Specifically exclude national security data.

Comment
As national security data are outside the scope of Community law, they appear to be excluded by paragraph 1 of this article. However, national security, defence etc. data are referred to in Article 15 as if the Directive does apply to them.

Article 4

13. In paragraph 2, line 3, should "a Member State" read "that Member State".
Chapter V: Data Quality

Article 16

14. In paragraph 1(a), substitute "obtained" for "collected".

15. Amend paragraph 1(b) to read:

"(b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes".

Comment
It seems better to use the wording in Article 5 of the Convention throughout paragraph 1, unless there is a good reason for not doing so.

16. In paragraph 1(d), delete "inaccurate or incomplete data shall be erased or rectified".

Comment
See previous comment. The right of erasure or rectification is already provided for in Article 14.5.

Article 17

17. It is submitted that the provisions of the Article are impracticable in their present form and should be brought more into line with Article 6 of the Convention. The following redraft is suggested:

"Personal data relating to ethnic or racial origins, political opinions, religious or philosophical beliefs or trade union membership, physical or mental health, or sexual life, shall be processed (automatically) only where the national supervisory authority is satisfied that appropriate safeguards for the protection of the privacy of the data subjects concerned are being, and will continue to be, provided by the data controller."