OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 22 April 1991

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


1. Introductory remarks

2. Having taken note of the introductory remarks by the representative of the Commission explaining the reasons for and the contents of the proposed Directive, the Chairman of the Working Party recalled that for the purpose of a useful discussion it should be borne in mind that whereas directives were binding as to the results to be achieved in each Member State, the choice of form and methods were left to the national authorities. He consequently proposed as a first stage to discuss the question of substance in order to reach agreement on the aims and results of the Directive and then, at a second stage, examine the different articles in order to come to an
agreement on the form and wording of the Directive. The Chairman furthermore proposed to structure the Directive in the way set out in the Annex to the present document.

II. General reactions from delegations to the proposed Directive

3. The United Kingdom delegation, although understanding the reasons and the logic for the Commission to table the proposed Directive, felt that the Directive as presently worded went into far too much detail and might prove to be unworkable. Furthermore, the Directive did not, in the UK delegation's view, strike the right balance between the needs of the telecommunications organisations and the privacy rights of individuals. Referring specifically to Articles 4, 5, 9 and 10, the UK delegation indicated that the purposes referred to in these articles were too restrictive and suggested that they be made simpler and more permissive. Also Articles 12 and 13 seemed too complicated and needed to be stripped down to essentials. As far as Article 11 was concerned this Article was unacceptable to the UK delegation.

For the UK delegation the proposed Directive also gave rise to two problems of a more structural nature – one concerning the way in which it was linked with the General Directive and the second concerning the fact that the proposed Directive seemed to place the responsibility of how the obligations of the Directive were to be met on the telecommunications organisations and not on the Member States.

The UK delegation finally suggested a general debate on whether the proposed Directive should focus narrowly on telecommunications organisations.

4. The Belgian delegation indicated that it was still examining the proposed Directive in order to fix its position. It wondered, however, if it was not premature to examine the "Telecommunication networks Directive" as the discussion of the General Directive was still at a very preliminary stage. In
this context the Belgian delegation furthermore recalled that it had asked for a legal opinion as to the legal basis of the General Directive and indicated that it also had certain misgivings as to the legal basis for the proposed telecommunications networks Directive under discussion.

5. The Netherlands delegation, although acknowledging the importance of harmonizing rules to ensure the protection of privacy in the Community and ensure an open market for services, wondered if the proposed instrument would accomplish these aims. Taking into account that the main Directive was not yet approved and that the telecommunications networks Directive at present with its very detailed and inflexible rules risked being overtaken by the technological evolution, the Netherlands delegation suggested that a better approach would be that of "self regulation" within specific areas setting certain basic principles and leaving a certain degree of responsibility to the specific area chosen.

Referring specifically to the text of the Directive, the Netherlands delegation drew attention to the problems that the interaction between the main directive and the telecommunications Directive could give rise to and the problems arising from the different wording used in the two Directives.

The Netherlands delegation furthermore stressed

- the need to deal with data protection in a wider context and not just link it to the area of telecommunications organisation;

- the cost element of covering also services based on analogue networks;

- the need to decide whether legal and natural persons should be subject to the same rules of protection.
The Netherlands delegation finally queried whether the EC had powers in the area of ensuring the protection of privacy.

6. The **French delegation** welcomed the proposal by the Commission which met not only a real need to harmonize rules within the EC but also the ever increasing feeling among consumers for the need to obtain protection of personal data and privacy in light of technical evolution. The French delegation in this context stressed the importance of also including the protection of privacy within the scope of the Directive. For the French delegation the proposed Directive was however not coherent and should, in the French delegation’s view, not only cover public telecommunications services but should be enlarged to apply to all suppliers of services. Acknowledging that a certain amount of detail was necessary the French delegation felt however that the Directive went beyond “the essential requirements” by imposing too many restrictions with a consequential cost increase.

7. The **Irish delegation** indicated as a preliminary view that the principles set out in the proposed Directive were laudable but that the provisions as presently formulated would give rise not only to a number of commercial but also technical and financial problems.

8. The **Italian delegation** indicated that it had not yet a final view on the proposed Directive but agreed with the view expressed that the scope of the Directive should not be limited to the public sector but extended to include all providers of services. The Italian delegation stressed the need in the Directive to make a clearer distinction between the rules on the use of data and the rules concerning the contents and drew attention to the important question of the costs related to the implementation of the Directive in respect of services based on analogue networks. Bearing in mind that a very low percentage of the Italian network at present was digital, the Italian delegation also raised the question of the time given to Member States to comply with the Directive.
9. The Danish delegation thanked the Commission for the initiative it had taken indicating that it shared the views of the Commission on the need for Community rules in the area proposed by the Commission. Although the main objective of the Directive could be supported, the Directive did however contain a number of requirements which would be difficult to fulfill and highly costly to implement. The Directive should in the Danish delegation's view attempt to strive to combine considerations related to the protection of privacy with considerations related to what was technically and administratively feasible. More specifically the Danish delegation indicated that it seemed inappropriate to put the responsibility on the telecommunications organisations for matters which were not of their concern. The Danish delegation finally indicated that it did not find the "committee arrangement" foreseen in the proposed Directive as adequate.

10. The Greek delegation welcomed the proposal by the Commission but indicated that it was not yet in a position to take any final stand on it as the examination of it had not yet been completed.

11. The German delegation also welcomed the initiative taken by the Commission which, in the German delegation's view, went in the right direction. It would however be necessary, when examining the different provisions, to see if the right balance had been struck between the interests of the consumers and those of the operators. The German delegation also agreed with the view expressed by a number of delegations that the scope of the proposed Directive should not be limited to the public sector but be extended to all providers of services.

12. The Spanish delegation indicated that it agreed with the Commission on the urgency of arriving at a result within the area covered by the Directive but regretted that studies on the implementation at national/international level in the area covered by the proposed Directive were not available. In the absence of such studies and taking into account the link to the
General Directive, the Spanish delegation suggested that the best means of making headway in discussions would be for the Working Party to concentrate on the technical aspects of the Directive and especially Chapters III and IV (in the structure proposed by the Chairman set out in the Annex).

III. Discussion of Chapters I and III

Chapter I

13. Title

Referring to the title of the Directive as proposed by the Commission, the French and Spanish delegations indicated that the title might lead to confusion as it referred to public digital telecommunications networks whereas Article 2 stipulated that the provisions of the Directive would also apply to services based on analogue networks. The French delegation consequently proposed to use a more general term referring just to "telecommunications services".

Article 1: Object of the Directive

14. Discussing Article 1 the Working Party noted

- a suggestion by the Spanish delegation to use in paragraph 1, as had been done in paragraph 2, the term "protection of personal data and privacy";

- agreement to reflect on the possibility of replacing in certain linguistic versions the words "equal level of protection" by the words "equivalent level of protection" as used in the French text;

- a proposal by the UK delegation to clarify that the main objective of the Directive was that of free movement of telecommunications equipment and services between Member States;
- that the Irish delegation on the other hand suggested replacing the words "provide for the free movement" by "contribute to the free movement" as the main purpose of the Directive, in this delegation’s view, was not that of providing for the free movement but that of protecting privacy;

- that a number of delegations felt that the inclusion of the reference to protection of privacy was necessary in order to cover, for example, malicious calls and call forwarding;

- a proposal by the Danish delegation to qualify the scope of the Directive more precisely already in Article 1.

**Articles 2 and 3**

**Article 2 paragraph 1**

15. Referring specifically to the opening sentence of Article 2 paragraph 1 ("Without prejudice to the general provisions of Council Directive") the UK delegation stressed the need, once discussions had come closer to the final stages, to review the Directive on telecommunications networks in order to ensure that there were no contradictions with the main Directive.

16. In connection with the discussion of paragraph 1, certain delegations also indicated that the scope of the Directive, by referring to the provision of public telecommunications services in digital telecommunications networks, was too restrictive.

**Article 2 paragraph 2**

17. Discussing Article 2 paragraph 2 and referring specifically to the inclusion of services based on analogue networks, a number of delegations reiterated their concern, as expressed in their general comments, with the financial
implications of such an inclusion. It was in this context proposed, when examining the different provisions of the Directive, to see if and how these provisions could also be applied to analogue networks.

18. The Spanish delegation furthermore suggested rewording paragraph 2 of Article 2, which gave the impression that once a Member State had implemented the Integrated Services Digital Network there would no longer be problems related to analogue networks, whereas the fact was that analogue networks would still remain for a number of years even after a State had begun the introduction of ISDN.

19. Discussing Article 2 a number of delegations also reiterated their view as expressed in their general comments of not limiting the scope of the Directive to public telecommunications services. Reference was in this context also made to the definition in Article 3(2) which in certain delegations' views should also include private bodies who did not provide telecommunications services on the basis of an exclusive right. In this connection a request was made for aligning Article 3(2) and (4).

As a consequence of the remarks made related to the too narrow scope of application proposed by the Commission, the French delegation proposed to provide in Article 2 for a larger scope and then in the different provisions of the proposed Directive to examine their applicability to telecommunications organisations and other providers of services who did not possess any exclusive rights. In this context the Luxembourg delegation proposed that Article 2 be reworded by referring only to users of networks and providers of services.

20. Responding to the remarks made relating to Article 2, the representative of the Commission indicated that the Commission had chosen a pragmatic and flexible approach concentrating the scope of this Directive on the main problems i.e. those related to the telecommunications networks. As to the request that the
scope be extended so as to cover not only public telecommunications services, the representative of the Commission explained that the Commission had not based its proposal on a distinction between public or private sectors but rather on a distinction as to whether the services were based on the grant of an exclusive right or not. For any possible extension to other operators than those foreseen in the present draft, the procedures foreseen in Article 20 of the draft would come into play.

21. As to the problems related to cost aspects of the implementation of the Directive in relation to services based on analogue networks, the representative of the Commission acknowledged the existence of these problems and did not exclude the possibility of providing for either derogations or transitional periods.

Article 3

22. As regards specifically Article 3, the Italian delegation proposed to introduce a definition of "privacy".

The Chairman of the Working Party, in order to overcome the problem of whether the Directive covered natural as well as legal persons, proposed to speak of "subscriber".

Chapter III

Article 12

23. From the discussion of Article 12 it emerged that for a number of delegations this provision gave rise not only to questions concerning the legal/philosophical approaches underlying this provision and in particular the over-emphasis of the protection of the caller - but also raised problems as to its practical implications and the cost involved thereby. It was in this context advanced that Article 12 was an excellent illustration of the need which had been expressed when
discussing the scope of the Directive to examine case by case to which extent the different provisions of the Directive should apply, for example, whether analogue networks should be included or not.

24. Discussing Article 12 the question of the link between this provision and type requirements was also raised.

25. Responding to the comments made by delegations, the representative of the Commission explained that it had sought to protect equally the caller and the called. It was because of this need to strike the right balance that a number of situations and hypotheses had to be covered and it was consequently not possible to simplify the provision as had been suggested.

26. As to the relation to type requirements, the representative of the Commission explained that a distinction would have to be made between subparagraphs 1 and 2 of paragraph 2 in Article 12. Whereas one could envisage that the terminal equipment should be able to fulfil certain conditions established by the Directive, one could envisage that other requirements (second subparagraph) be fulfilled by the networks in order not to oblige subscribers to buy expensive equipment.

27. As to the general costs aspect of the implementation of the rules foreseen in Article 12, the representative of the Commission reiterated that it could be examined whether transitional periods for implementation would be necessary.

**Article 13**

28. From the discussion of Article 13 on which a number of delegations reserved their position and on which only preliminary views were expressed, it emerged that certain delegations felt that as the provision was related to penal law which fell within the competence of Member States, a clear reference to national legislation would be necessary.
Redrafting would also be necessary to avoid the impression which the present wording gave that the obligations provided for were to be carried out by the telecommunications organisations and were not subject to a request by a public authority.

29. Reacting specifically to a question by the Irish delegation as to the use of the words "for a limited period of time" in Article 13 paragraph 1 first sentence, the representative of the Commission explained that they were not to be interpreted as meaning a short period but implied that the subscriber was contacted periodically in order to establish if there was still a reason for overriding the elimination of the calling line identification.

30. Discussing Article 13 paragraph 2 the UK delegation proposed to include also persons who were subject to bomb or terrorist threats under the permanent override function. In relation to the discussion of Article 13 paragraph 2 the question of the practical possibilities of implementing paragraph 2(b) was also raised.

31. Responding to the reactions by delegations the representative of the Commission indicated that as far as the link with national penal law was concerned, the intention of the provision was that it should be for the national courts or authorities, by applying national rules, to decide whether measures such as those foreseen in Article 13 were to be taken. He furthermore suggested redrafting Article 13 by indicating that the States should take all necessary measures to ensure that telecommunications organisations were able to comply with the requirement of Article 13.

Article 14

32. Discussing Article 14 a number of delegations wondered if the rules provided for in this Article could be considered as an essential requirement and whether it was at all necessary
that a rule on forwarding of calls as proposed and which in any event would create difficulties as to its implementation be included in the Directive.

33. Referring specifically to a criticism made in relation to Article 14 paragraph 2 that the procedure foreseen could constitute an encouragement to burglary, the representative of the Commission stated that the Commission attached great importance to this provision which was necessary to maintain a symmetry on the protection of the caller and the called.

Article 15

34. As regards Article 15 certain delegations, as had been done when discussing Article 14, queried the need for such a provision which did not seem possible to implement. These delegations requested the suppression of this provision.
Chapter I

General provisions

Article 1 Object of the Directive
Article 2 Scope
Article 3 Definitions

Chapter II

Lawfulness of processing in the telecommunication sector

Article 4 Principles
Article 5 Aims
Article 6 Right of access
Article 7 Confidentiality
Article 8 Security
Article 9 Billing
Article 10 Traffic data
Article 11 (to be integrated into Article 9)

Chapter III

Technical provisions to ensure the protection of privacy of the users

Article 12 Right of identification of the calling and called subscriber
Article 13 Derogations to the right of identification of the calling and called subscriber
Article 14 Obligations to inform when calls are forwarded
Article 15 Obligations to inform when third parties have access

Chapter IV

Telecommunication services

Article 16 Teleshopping
Article 17 Canvassing
Article 19 Other services
Article 20 Other service providers

+ The UK delegation proposed a sub-division of Articles 4, 5, 9 and 10.
Chapter V

Provisions concerning the implementing of the Directive

Article 18 Technical features and standards
Article 21 Administrative and technical modalities

Chapter VI

Working Party on Protection and Advisory Committee

Article 22 Working Party on Protection
Article 23 Advisory Committee

Chapter VII

Final Provisions

Article 24 Bringing into force of the Directive
Article 25 Addressees of the Directive