OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data protection)
on: 21 and 22 April 1994

No. prev. doc.: 6316/94 ECO 77
No. Cion prop.: 9400/94 ECO 221

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

At its meeting on 21 and 22 April 1994, the Working Party examined, in the following order, Articles 8, 3, 4, 17, 17a, 33 and 34, on the basis of compromise texts drawn up by the Presidency.

The outcome of these proceedings is summarized below.
1. **Article 8: Processing of special categories of data**

The Working Party discussed this Article in detail on the basis of the text proposed by the Presidency in 6316/94. In the light of those discussions, the Presidency drew up a revised text, which is given in the Annex.

The main reservations or comments on 6316/94 are given below, for the record:

(i) **General reservations by IRL and UK**, which would prefer this Article to be replaced by Article 6 of Convention 108 (**DK and L** were open-minded about this idea) *(1)*

(ii) **Paragraph 1 (list of sensitive data)**

- 5 delegations (**B/E/F/I and L**) regretted the insertion of the word "notamment" (data shall be deemed to include ...) at the beginning of the second sentence, restating their preference for an exhaustive list; **D** stated its preference for the text in 9345/93;
- **DK/IRL and UK** wanted the expression "sensitive data" to be used (9345/93);
- **DK** entered a reservation on the reference to trade-union membership;
- **I**, supported by **E**, proposed replacing "philosophical beliefs" by "or other beliefs"; **I** also wanted a reference to criminal convictions;
- **IRL** also drew attention to a linguistic problem in the English version (sexual life).

(iii) **Paragraph 2 (exemption from the ban)**

- (a): reservations by **DK/IRL and UK** on the word "explicit";
- (aa): reservations by **B/F/I and P**, which felt the scope of the provisions was too

*(1)* Written proposals for the text of Article 8 have been submitted by **L and UK**; these proposals have not been discussed, but will be circulated shortly in the form of an addendum to this note.
broad and could be a source of abuse (I suggested adopting the wording in 5575/94, adding the words "provided that the laws of the Member States do not prohibit such processing"); NL announced that it could accept deletion of this subparagraph; however, IRL and UK thought the subparagraph too restrictive (IRL suggested adopting the text proposed by UNICE);

- (ab): objections by B/F and P to the reference to "or of another person";
- (b): DK and I wanted this provision made optional;
- (c): reservation by IRL; F, supported by B and L, proposed amending the subparagraph as follows "... to data which the person has himself made public"; DK preferred the text proposed by the Commission.

(iv) Paragraph 2b (Data on health)

- objection by P to the reference to "the provision of care";
- I wanted this confined to data on health and sex life;
- the following three amendments were proposed: "preventive medicine" (UK); "payment for medical services" (NL); "laid down ..." (IRL);
- D pointed out linguistic problems in the German version.

(v) Paragraph 3 (reasons of important public interest)

- DK/D/IRL/UK stood by their text (9345/93);
- E wanted the supervisory authority referred to in the 2nd subparagraph replaced by the Member State.

(vi) Paragraph 4 (criminal convictions)

- IRL and NL wanted to refer to "national record" (UK) wanted "record" in the English version replaced by "register";
- objection by NL to the reference to "security measures";
- I proposed clarifying the expression "under the supervision" by stating that only the public authorities could process such data;
– objections to the 2nd subparagraph by E and UK. (E’s concerns related to lawyers and insurers); NL asked for clarification of what was meant by "administrative decisions".

(vii) **Paragraph 5** (identification number)

DK/D/IRL and UK wanted this provisions to be made optional.

(viii) **Recital 17a**

Reservations by B/DK/E/IRL/NL and UK, while I wanted the text of this recital included in paragraph 3; E/IRL/I and NL were in favour of including Article 9a as proposed by the Belgian Presidency (7695/93 ADD 3).

2. **Article 3**

The new Presidency text given on p. 2 of 6032/94 elicited a number of reservations and observations, which are summarized below:

(i) **Paragraph 1**

DK/IRL and UK remained opposed to the inclusion of manual data, with UK wanting to know what was meant by a manual file (the other delegations confirmed that they were in favour of including them, and D and NL emphasized that this was a necessary pre-condition for their agreement to the Directive). (*)

(*) In reply to a question from I, the Commission representative explained that the scope was not determined solely by the controller's intentions when collecting data, but by objective factors. Furthermore, on the question of whether there should be a specific provision on electronic mail (NL) the Commission representative replied that he did not think it necessary, but that he would be ready to consider any suggestions that might be made.
(ii) **Paragraph 2**

- reservation on the first indent by F, which proposed the following wording:

  "– in the course of an activity which falls outside the scope of Community law, including data covered by Titles V and VI of the Union Treaty and in any event data relating to public safety, defence, State security and criminal proceedings by judicial authorities."

This text was viewed favourably by DK/D/IRL/I and UK (the latter suggested adding "the monetary and budgetary interests of the State"); B/E/GR and L were against the F proposal.

- IRL and UK wanted public registers included.

- NL pointed out a linguistic problem in the Dutch version.

  It was also confirmed that the expression "purely personal or household activity" in the 2nd indent would be spelt out in a statement for the minutes (I request).

3. **Article 4: National law applicable**

   6032/94 pages 2 and 3

Most delegations thought the Presidency text a good working basis for determining the national law applicable, but wished nevertheless to continue considering some of its implications.

In this connection, the Working Party discussed in detail the problem arising where data were collected in one Member State but processed in another, with different national laws; it was understood, however, that the scale of the problem depended on the degree of harmonization secured by the Directive and so could not be fully assessed at this stage.
Some delegations put forward their thoughts on the subject, in particular:

I, which was especially concerned by the link between this Article and Article 8, suggested two possible approaches

– either stating in a recital (no 12, for example) that the provisions of Article 4 could not be used to evade a rule that a Member State had brought in pursuant to Article 8 and that, should such a case arise nevertheless, the supervisory authorities, co-operating between themselves, should take appropriate steps to cope with the situation;

– or including a new paragraph in Article 8, stipulating that where data processing under that Article was being carried out on the territory of several Member States, and specific exemptions were laid down by the legislation of one of those States, the supervisory authorities of the other Member States could, at the request of the authority of the State concerned, require the controller to provide suitable safeguards on his own territory.

NL took the view that in such cases it was the national law of the State in which the data were collected that would apply; DK, which shared this view, suggested revising the definition of the controller.

Before taking any definite decision on this Article, the DK/D/E/F/P and UK delegations wanted to have a written opinion from the Council Legal Service; they wanted it to consider whether the approach provided for in the Article was compatible with Community law, and more specifically to verify whether the arrangements it provided for could apply to criminal sanctions. Furthermore, D wanted the Legal Service to consider whether the wording of the Article was compatible with Article 1 of Convention 108.

In addition B, referring to the expression "for the purposes of transit" in paragraph 1(b),
asked that it be spelt out in a statement for the minutes that the law of the Member State would nevertheless apply to data generated during transit through the territory of that Member State.

4. Article 17: Confidentiality of processing
   6032/94 page 4
   - in response to certain concerns, the Commission representative stated:
   - for I's benefit, that third parties were themselves controllers and thus subject to the requirements of the Directive;
   - for the UK's benefit, that the phrase "unless he is required to do so by law" made the text of Article 17 compatible with the Community Directive on money laundering;
   - IRL asked for "instructions" in the third line to be replaced by "authorization".

5. Article 17a: Security of processing
   6032/94 pages 4 and 5
   (i) Paragraph 1
   - E was concerned by the security of telecommunications networks, and submitted a revised draft of this paragraph which will be circulated shortly in an Addendum to this note;
   - I wanted the word "appropriate" in the second subparagraph to be replaced by "adequate".
   (ii) Paragraph 2
   E, supported by E, wanted to add "and organizational measures" after "technical security measures".
   (iii) Paragraph 3
   - it should be noted that in the French version the expressions "pour compte" in the first line and "agent-traitant" in the first indent should be replaced by "en sous-traitance" and "sous-traitant".
   UK and NL upheld their scrutiny reservations on the term "subcontractor" ["sous-traitant"] (in any event, the terminology in the various languages will need to be checked).
(iv) **Paragraph 4**

Reservations by E/IRL and UK on the requirement for contracts to be in writing (conversely, E/B and COM pressed for this provision to be kept).

6. **Article 33: The Commission's implementing powers**

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A large number of delegations wanted the Commission to state in writing what was meant by "technical measures". B and I also entered reservations about confining the scope of this Article to chapter II only.

The Commission proposed to delete the words "In addition to the measures it is empowered to take under the foregoing provisions of this Directive" from the beginning of the text.

It also emphasized that the Commission's implementing powers could under no circumstances result in amendment of the Directive (Court of Justice jurisprudence); amongst other things, it did not feel that the text was incompatible with Article 5 (query by I).

7. **Article 34: Committee procedures**

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Positions on this question were as follows:

- Commission: Advisory Committee;
- B/GR/I: Type III(a) regulatory committee;
- P: open-minded;
- the other delegations: Type III(b) regulatory committee.

8. **Second subparagraph of Article 35(2): transitional period**

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- UK reservation (linked to the question of manual data);
- NL wanted an exception for historical archives compiled before entry into force of the Directive for purely historical purposes;
IRL wanted the transitional period to cover the whole Directive, particularly Article 13;

I suggested periods of 5 and 3 years instead of 8 and 5.

9. **DK proposals for Articles 12, 13 and 14**

   (i) **Article 12**

   Add the new paragraph 3 given on page 5 of 5244/94.

(ii) **Article 13**

   – paragraph 1: first indent:
     replace "recipients" by "third parties";

   – paragraph 1: third indent:
     replace the current text by the text proposed for paragraph 2 in 9345/93;

(iii) **Article 14**

   – paragraph 1:
     delete "of another person" from (h) and add a new subparagraph (i): "clear ...";

   – paragraph 2:
     delete.

10. **Article 26(4a)**

    UK asked the Legal Service to consider whether the role given the Commission in this Article as regards negotiations with third countries was compatible with Article 113 of the Treaty, as UK felt that these provisions went beyond the confines of common trade policy.