OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)

on: 2 and 3 May 1991

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

1. The Working Party on Economic Questions (Data Protection) held its fourth meeting on 2 and 3 May 1991. The meeting was devoted to the discussion of

- the Proposal for a Council Decision in the field of information security,

- Chapter IV of the Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data.

The results of the Working Party's deliberations on these points are set out below.
I. Proposal for a Council Decision in the field of Information Security

A. General reactions

2. Having heard the representative of the Commission explain the reasons for and the contents of the proposed Council Decision, note was taken of the generally favourable attitude of delegations to the Commission proposal, a number of delegations stressing the importance of the subject dealt with by the Decision and the urgency of dealing with it.

B. Structure of the Decision

3. The discussions of the Working Party on Articles 1-6 of the proposed Council Decision to a large extent concentrated on a possible restructuring of the proposed Decision. The point of departure for this restructuring being the role to be played by the Senior Officials Group on Information Security (SOGIS) set out in Article 6 of the proposed Council Decision. The wish was expressed that the role of SOGIS not be limited solely to the area of the action plan proposed in the Council Decision but be extended to other programmes (EC or non EC programmes) related to information security.

4. In conclusion of the discussion, the Chairman of the Working Party proposed the following structure for the Council Decision:

Article 1 Constitution of SOGIS with an indication of its functions as regards

- the action plan of the present Decision [comitology type III]
- other programmes [comitology type I].

[The UK delegation undertook to prepare a new text of Article 1 taking into account the need to cover the different roles of SOGIS in respect of different programmes.]
C. Title and Articles of the Decision

5. Discussing in more detail the different articles of the proposed Decision the Working Party took note:

ad Title

- of doubts expressed by the German delegation as to whether the title was adequate bearing in mind that the purpose of the Decision related not so much to the security of information but rather to the security of the technical means of storing, processing or transmission or information. In this context a proposal was made to use in the title the words "Security of information systems".

ad Article 1

- a proposal by the representative of the Commission to speak of an initial period of 24 months thus indicating that work might need to be continued after the 24 month period set out in Article 1.

ad Article 2

- a proposal to indicate in Article 2 that the Annex to the Decision only had an indicative nature.
ad Article 3

- a proposal to replace the words "the action plan" with the words "the work under the Decision".

- that the words "in close association with the Member States" might be considered superfluous in the light of the comitology role proposed for SOGIS (see points 3 and 4 above).

ad Article 4

- a request to align Article 4 on the formulation used in the TEDIS programme (Trade Electronic Data Interchange System).

- a request by the French delegation to specify in the text of the Decision itself the amount attributed to the action.

ad Article 5

- a proposal made by the representative of the Commission in order to meet the fears expressed by certain delegations that Article 5 as presently worded could lead to a period when nothing would be done to give to SOGIS the task of expressing itself as to the need to continue work on the action plan.

D. Annex

6. Discussing the Annex and concentrating on the "Issues and Objectives", the Working Party noted:

General

- an explanation by the representative of the Commission that no priority in time was given to the different action plans and that consequently the different action plans in principle could be engaged in parallel.
ad Action line I

- a proposal by the Belgian delegation to reword the contents of the brackets in the 3rd line which in the Belgian delegation's view were incorrect.

ad Action line II

- a proposal by the UK delegation to reword the title for Action line II as follows: "Identification of user requirements for security in information systems";

- a remark by the Belgian delegation to associate also providers of services with the action line;

- that the wording "commercial confidentiality", in the French delegation's view, was too narrow and that a more general reference as for example "protection of the economic sector" would be preferable.

ad Action line III

- a proposal by the UK delegation to reword the title as follows: "Interim solutions for certain priority needs of users";

- a remark by the Belgian delegation also to take into account standardization in Action line III.

ad Action line IV

- a preference by the UK delegation for the title used for Action line IV in the Annex to that used in Article 2,

- a wish also to make a reference to the international dimension;
- to include a reference to mutual recognition of tests.

**ad Action line VI**

- a proposal by the UK delegation to draft the title as follows: "Provision of Information Security Services";

- a proposal by the German delegation to redraft point 38 in a less definitive and more open-ended manner taking inspiration from the drafting of point 39.

8. At the end of the discussion of the proposed Council Decision delegations were requested to submit in writing any proposal for redrafting of the Annex to the Secretariat before 24 May 1991.

**II. Proposal for a Council Directive on the approximation of certain laws, regulations and administrative provisions of the Member States on the protection of individuals in relation to the processing of personal data**

**Legal basis**

9. In the presence of a representative of the Legal Service of the Council and the Commission, delegations who at earlier meetings of the Working Party had raised points concerning the legal basis of the general Directive were invited by the Chairman of the Working Party to reiterate their observations.

10. Responding to this invitation, the Belgian delegation recalled that it had requested the Legal Service of the Council for a written opinion taking into account that one could question the legal basis if not of the whole Directive then at least of most of the Chapters of the Directive. The objective of the Directive was to ensure the free flow of data and
order to obtain this aim the proposal, on the one hand, aimed at harmonizing the principles of the protection of privacy and, on the other hand, engaged the Member States to restrict the prohibition of the free movement of data for reasons related to the protection of privacy. The Directive finally set out the conditions for the flow of data to non EC Member States. As the purpose of the Directive was already subject to a Convention concluded within the framework of the Council of Europe and the protection of privacy was enshrined in Article 8 of the Human Rights Convention, the Belgian delegation felt that one could put into question the competence of the EC to legislate in this matter which seemed to belong to the area of individual, fundamental rights. In this context the Belgian delegation specifically referred to Chapters II to V of the proposed Directive.

11. The Netherlands delegation queried whether Article 100 A provided a sufficient legal basis for a proposal which aimed not simply at ensuring the free movement of goods, persons and services but rather to protect fundamental rights. In this context the Netherlands delegation also recalled that Article 100 A provided for certain exceptions and queried whether these exceptions could give rise to problems in relation to the proposed data protection.

The Netherlands delegation finally referred to the question it had raised at the Working Party's second meeting when discussing Article 3 (see doc. 5705/91, page 8, point 19).

12. The Irish and UK delegations associated themselves with the remarks made by the Belgian and Netherlands delegations. The UK delegation furthermore recalled that it might be useful to get advice as to the possibility of including in a Directive rules such as those contained particularly in Article 4, but also in Article 24 containing elements of extraterritoriality.
13. Referring to Article 2(9) of the proposed Directive, the Irish delegation explained that the concepts of public law were unknown in common law countries and the Irish delegation wondered whether one would be bound to apply strictly the definition of public sector and private sector proposed by the Directive. Furthermore, in Ireland a distinction was not drawn between the private and public sectors as regards the obligations and rights contained in data protection legislation. The Irish delegation wondered if there was anything in the Directive which prevented Ireland from applying the principles in a uniform manner across both the public and private sectors.

14. The representative of the Legal Service took note of the comments made by delegations and undertook to prepare a legal opinion for the meeting of the Working Party to be held on 3/4 June 1991.

Chapter IV

Article 12 - Informed consent

General discussions

15. From the deliberations of the Working Party on Article 12, it emerged that a number of delegations wondered if there was a need for having such detailed rules as those contained in Article 12 in the Directive bearing in mind that a directive was binding as to the results to be achieved leaving, however, the choice of form and methods to the national authorities. Article 12, in these delegations' view, seemed to create a uniform law in respect of the requirements that any giving of consent should fulfill in order to be valid. Such uniform law seemed out of place in a directive and these delegations consequently proposed to delete Article 12.
If, however, detailed rules were to be maintained they should, in the UK delegation's view, be structured differently as they did not at present seem to follow a chronological sequence.

Certain other delegations, although agreeing that Article 12 might be drafted in a less detailed manner, felt that there was a need for maintaining a provision which would set out the conditions for any giving of consent to be valid bearing in mind that references in several articles of the Directive were made thereto.

The Netherlands delegation expressed serious doubts as to the need to place such an emphasis as had been done by the Commission's proposal on "informed consent". Although consent might be desirable from a philosophical point of view, one could query whether it would be correct to legislate with an emphasis being put on the consent of a data subject. In the Netherlands delegation's view the emphasis should rather be put on the protection of persons, consent being only one of the elements to be taken into account when judging whether data had been used in an honest way.

The Netherlands delegation consequently proposed to focus on the general material rules and only if departure was made from these rules should consent be necessary. Within the framework of such an approach the conditions for consent to be valid could be strengthened when compared with those proposed by the Commission.

16. Discussing the details of the wording of Article 12 the Working Party noted:
ad Title

- a proposal by the Italian delegation to speak of "the validity of consent" as Article 12 did not cover the question when consent was necessary but set out the conditions for consent to be valid.

ad (a)

- a proposal by the Netherlands delegation that Article 12(a) be redrafted in order to take into account that the information that the data subject should be provided with could differ according to the sort of processing the data was to undergo.

- a proposal by the French delegation to delete the words "where appropriate" in the second indent of (a).

- a need expressed by the Danish delegation to clarify what was meant by the word "use" in the second indent of (a).

- a proposal by the UK delegation to refer to information coming from the data subject itself.

ad (b)

- a proposal by the French delegation to delete the words following the word "express".

- a proposal by the French delegation to introduce between (a) and (b) the condition that the person had legal capacity.

- a proposal by the Irish delegation that the consent be given in writing in order to provide the controller with evidence.

- a proposal by the UK delegation to indicate more precisely what type of potential recipient was covered.
- a query by the UK delegation as to the need that the consent should specify the forms of processing covered by the consent.

ad (c)

- a proposal by the UK delegation to delete (c) which, in this delegation's view, could negate the whole purpose of Article 12.

Article 13

Provision of information at the time of collection

General

17. As had been the case for Article 12 a number of delegations questioned the need for having a provision with the contents of Article 13 as proposed by the Commission, taking into account it only concerned the application of the principle set out in Article 16(a) concerning fairness and lawfulness - concepts which were easy to understand and apply. The inclusion of Article 13 would only lead to an over-regulation of business transactions, would not give the guarantees it sought, and would be unworkable in practice. As it was based on the specific situation where there was a direct contact between the data subject and the data controller, it would be unworkable in any other situation where such a direct contact did not exist.

As an alternative approach to that set out in Article 13, the suggestion was made to concentrate on the minority of data controllers who did not observe the principles of Article 16 rather than to impose a burden on all of them. A data controller could be obliged to forward free of charge to any enquirer a description of the personal data kept by him, the purposes for which the data were kept and the persons or
categories of persons to whom they might be disclosed (see Working Document No 2, point 6 of Working Document II in the Annex).

Specific wording

18. As regards the specific wording of Article 13.1 the French delegation, for whom Article 13 did not give rise to major difficulties, suggested adding the words "by whatever means" after the word "collected" in the second line of Article 13.1.

The Danish delegation, who had not yet taken any definitive stand on Article 13, stated that it had interpreted the words "a right to be informed" as implying a right which should be fulfilled on request. It suggested that this be clarified in the text.

As regards particularly paragraph 2 of Article 13, certain delegations expressed the view that the provision was too narrow and that a better approach would be to use the exceptions provided or in Article 15(1) which would cover the main need of the public authorities.

Article 14

Additional rights of data subjects

Paragraph 1

19. Discussing Article 14 paragraph 1 a number of delegations indicated that the wording of this paragraph was very vague. If it was meant to give a right of veto it would be too far-reaching; if on the other hand it was only a right of opposition if the rules of the Directive had been violated it was superfluous. These delegations consequently proposed the deletion of Article 14 paragraph 1.
The French delegation, not wishing to go as far as wanting the deletion of Article 14 paragraph 1, suggested that an exception might be necessary for the public sector.

**Paragraph 2**

20. Discussing Article 14 paragraph 2 certain misgivings as to the practical applicability of this provision and the negative consequences such a provision could have on the provision of certain services, was expressed by a number of delegations. Taking into account that a similar provision existed in French law the application of which had been delimited by case law, the French delegation undertook to provide the Working Party with a description as to the application of the provision in French law corresponding to Article 14 paragraph 2.

**Paragraph 3**

21. Discussing paragraph 3 of Article 14, note was taken:

- of a proposal by the UK delegation to indicate that the rights referred to in paragraph 3 were to be fulfilled on request;

- a proposal by the Netherlands delegation to apply the principles of transparency and allow the rights indicated in paragraph 3 to everyone and not only the data subject.

**Paragraph 4**

22. Discussing paragraph 4 of Article 14, note was taken

- of a proposal by the UK delegation - as had been done for paragraph 3 - to indicate that the rights provided for in paragraph 4 be accorded on request;
- of a proposal by the Netherlands delegation that not only the data subject should have the right to know whether personal data were stored. If data were stored, the data subject should then have the right to know which data were stored;

- a proposal by the UK delegation to replace the words "doctor" in the second indent of paragraph 4 by the words "health professional".

**Paragraph 5**

23. Discussing paragraph 5 of Article 14, note was taken:

- of a proposal by the Spanish delegation that the right to rectification or erasure not be limited to the case where data had been processed in violation of the provisions of the Directive;

- of a proposal by the Netherlands and Italian delegations to clarify in paragraph 5 that there was a right to change data if they were incomplete;

- of an explanation by the representative of the Commission that "blocking" should be included in order to cover the cases where a certain processing of data had been illicit but where the data should be allowed to be maintained (possibly after having been depersonalized) first of all as proof as to whether the processing was in fact illicit or not and secondly in order to be used for other - non-illicit - purposes. In this context the Netherlands delegation proposed to replace the word "blocking" by "restrictions in use".
24. Discussing paragraph 6, note was taken of:

- a proposal by the Irish delegation to replace the words "market research and advertising purposes" by "marketing";

- a proposal by the UK delegation that instead of obtaining the errasure as proposed by the Commission, the blocking of data should be obtained in order to provide the possibility of, for example, maintaining a file indicating that a person does not wish to be on a mailing list;

- the fact that the Netherlands delegation, although agreeing with the idea underlying Article 14 paragraph 6, felt that this paragraph which, contrary to the other provisions of Article 14 which were rather general, referred to a specific area, could therefore be better placed in Chapter VI of the draft Directive. The provision as drafted at present also seemed too laconic to the Netherlands delegation who suggested that it be redrafted in the light of the existing Council of Europe recommendation.
General

1. As this chapter is concerned with the rights of data subjects, it would seem that it should be confined to article 14, which deals with those rights, and article 15, which deals with exceptions to them. The remaining articles in the chapter - nos. 12 and 13 - are concerned with the application of the principle set out in article 16.1(a) - fair and lawful processing/collection of personal data - and should perhaps be located after that article when the draft directive is being restructured.

2. But the need for including articles 12 and 13 may be questioned. The data protection principle with which these two articles are concerned deals with concepts - fairness and lawfulness - that are easy to understand and apply and its detailed application would seem to be best left to the national data protection authorities, in conjunction with the Working Party on the Protection of Personal Data to be set up under article 27. That applies also to the detailed application of the other principles set out in article 16.1. Indeed, if it is necessary to give a detailed interpretation of one data protection principle in the directive, there could be an equal case for doing the same for some at least of the other principles, e.g. the principle that data shall be adequate, relevant and not excessive in relation to the purposes for which they are stored. But all such detailed provisions as to how the principles are to be applied do not appear to be necessary and seem out of place in a general directive. (It would be useful to provide for the exceptions to the principles e.g. "incompatible" disclosures of information where required to prevent loss of life or serious injury.)
Article 12

3. Apart from what is said above about the need for having an article of this kind in a general directive, the article seems to be unnecessarily elaborate and it could be unduly restrictive in its application. For example, where information for processing is collected directly from the data subject, the data subject would already have been supplied, in accordance with article 13.1, with the particulars referred to in article 12(a) and (b). And it could be impossible for some data controllers, e.g. sellers of mailing lists, to disclose all potential recipients of the data.

4. If the article is to be retained, a flexible provision would seem to be more appropriate, e.g. a provision requiring member states to specify in their law the circumstances in which a consent would be a valid consent for the purposes of the directive.

Article 13

5. This article also seems to be unnecessarily elaborate, particularly in so far as it concerns data supplied by a customer in the ordinary course of a business relationship. In accordance with article 16.1(b) data must be stored for specified, explicit and lawful purposes and used in a way compatible with those purposes. Breaches of this provision are punishable by sanctions. The great majority of firms use the information supplied by their customers strictly for purposes compatible with the business and the customers could have no objection to such use. Indeed most of them would already be aware of the matters mentioned in subparagraphs (a), (d) and (f) of paragraph 1. Subparagraphs (b) and (c) would not apply anyway. As it stands, therefore, paragraph 1 seems to impose in many cases an unnecessary layer of paperwork on the business community.
6. It might be better to concentrate on the small minority of data controllers who do not observe the compatibility principle rather than to impose a burden on all of them. Data controllers could be required to furnish free of charge to any enquirer a description of the personal data kept by them, the purposes for which the data are kept and the persons, or categories of persons, to whom they may be disclosed. This requirement would not impose any significant burden on data controllers as in practice very few data subjects would ask for this information.

7. As regards notifying each data subject, every time he supplies information, that he has rights of access and rectification (subparagraph (e)), the provision of adequate publicity regarding these and other rights seems to be more a function of the national data protection authority.

8. Paragraph 1 of the article refers to the provision of information to individuals from whom personal data are collected whereas the motto on this article in the explanatory memorandum refers to data obtained from the data subject himself. Moreover, it is not clear how the paragraph will apply, say, to information about individuals' creditworthiness collected by a credit reference agency from a sole trader or a company. Is the agency obliged to inform each of the individuals of the matters specified in the paragraph?

9. If it is appropriate to include a provision such as paragraph 2 in a directive which is concerned only with activities coming within the scope of community law, it is suggested that it would be better to allow a derogation "in the interests of protecting State security, public safety, the monetary interests of the State ... etc.", as in article 9.2 of the 1981 Convention, and also in the financial interests of the Communities. The expression "maintenance of public order" in paragraph 2 appears to have a more limited scope than this. Also, paragraph 2 might be expanded to cover, say, the activities of a private detective agency engaged by an employer to detect suspected leakages of confidential business information. Again, this could be achieved by following article 9.2 of the Convention and invoking the need to protect the rights and freedoms of others.
Article 14:

Paragraph 1

10. The explanatory memorandum says, in effect, that under this paragraph a data subject can oppose the processing of data relating to him (only) when it is being unlawfully processed. If this is so, the provision is hardly necessary. If it is retained, it would be desirable to define "legitimate reasons", as the explanatory memorandum is stated not to have any evidential standing.

Paragraph 2

11. The object of this provision seems to be achieved by the requirement in article 16.1(a) that personal data must be processed fairly and lawfully. If the paragraph is to be retained, its full scope and implications would need to be clarified, so as to ensure that it could not, as expressed, be interpreted so as to interfere unduly with legitimate business operations. Does it apply to a report, prepared on a word processor, on the conduct of a member of a data controller's staff? Does it inhibit the elimination of applicants for posts who do not have the requisite qualifications? When the directive is applied by Council resolution to non-community law areas, will this paragraph limit such matters as profiling of suspects in criminal investigations, procedures for determining eligibility for social welfare benefits etc.

12. The fact that this paragraph is confined to automatic processing emphasises that the dangers to the privacy of individuals primarily arise from the computerisation of data and the possibilities of linkage etc. that that provides.

Paragraph 6

13. It is suggested that "marketing" should be substituted for "market research and advertising". "Marketing" includes both these activities as well as direct marketing.
Paragraph 7
14. It would seem desirable to introduce some time limit, say 12 months, on the liability of data controllers to notify third parties of corrections to personal data.

15. The data subject should also have the right to be informed of the third parties who have been so notified.

Article 15:
Paragraph 1
16. As stated in paragraph 12 of Working Document No 1, data kept for the purpose of safeguarding national security are outside the scope of the directive (v. article 3.1) and so the references to it, and also to defence, in this article appear to be inappropriate.

17. In general, it might be preferable to adopt the wording of article 9 of the Convention and provide that exceptions may be allowed where they are provided for by national law and constitute a necessary measure in a democratic society in the interests of protecting a member state's security etc. and of protecting the data subject or the rights and freedoms of others - with a reference also to the financial interests of the European Communities.

18. The following comments are based on the existing wording of the article.

19. The article should apply to all data, not just data kept in the public sector.

20. If article 14.2 is retained in its present form, an exception should be allowed to that provision where the profiling is carried out for the purposes of a criminal investigation or other legitimate activities.

21. The exceptions should include cases where access to data would be likely to prejudice the international relations of a member state or of the Communities, e.g. despatches from ambassadors abroad.
22. In subparagraph (e), "paramount" should perhaps be "substantial", the term used in the explanatory memorandum. If so, the reference to "duly established" would seem to be unnecessary.

23. Presumably paragraph (g) would restrict the right of access in the following cases for reasons relating to the rights and freedoms of others:

(1) where access to the data would prejudice the interests of the data controller in relation to a claim made against him, e.g. an estimate by an insurance company of its liability under a claim;
(2) where access would prejudice prison security or maintenance of order and discipline; and
(3) where a claim of legal professional privilege could be maintained in relation to the data.

24. Back-up data, which of its nature is likely not to be up-to-date or accurate, should also be excepted from the right of access.

Paragraph 2
25. This paragraph should not entitle the supervisory authority to examine data relating to national security. In any case, the subject matter of this paragraph is covered by article 26.2.

Paragraph 3
26. It is suggested that the following be substituted for the words after "statistical": "or research information therefrom but only where the results of the statistical or research work are not made available in a form that identifies any of the data subjects".