REPORT

from: Permanent Representatives Committee

on: 3 June 1994

to: Internal Market Council

No. prev. doc.: 6856/94 ECO 103
No. Cion prop.: 9400/92 ECO 221

Subject: Amended Council proposal on the protection of individuals with regard to the processing of personal data and on the free movement of such data

I. INTRODUCTION

In preparation for the policy debate by the Internal Market Council of 16 June 1994 on the above proposal, the Permanent Representatives Committee carried out a detailed examination of eight major questions raised by the proposal, with particular reference to a Presidency note (see 6856/94) and a consolidated document indicating the stage reached by the draft Directive (see 6285/1/94 REV 1).

These questions are outlined in Chapter II below together with delegations' positions.
It should, however, be noted that before examining these issues, the Committee also held a general discussion on the approach envisaged, during which certain delegations (IRL/DK and UK in particular) voiced their concern at the sometimes cumbersome bureaucratic nature of certain provisions in the consolidated version of the draft Directive, which they thought would impose considerable costs on undertakings covered by such provisions and substantial charges on the authorities responsible for monitoring compliance.

However, other delegations (B/F/E/L and P in particular) stressed the need for a high level of protection of the rights of the individual and for provision for an adequate degree of harmonization to ensure the proper functioning of the Internal Market and in particular to prevent distortions of competition between undertakings.

II. QUESTIONS SUBMITTED TO THE COUNCIL

A. Scope of the Directive

Three points are still outstanding.

1. Inclusion of manual data in the scope of the Directive

   (see Article 3(1) on page 19 of 6285/1/94 REV 1; Article 35(2), second subparagraph, on page 55)

   The present draft Directive also covers data which are the subject of simple manual processing without any use of computerized methods (manual files).

   However, it does allow Member States (Article 35) to provide for gradual application of Articles 6, 7 and 8 (concerning data quality, grounds for processing data and "sensitive" data) to data already contained in manual files when the Directive enters into force. Compliance with these Articles may be achieved in the course of subsequent operations to process such data on the
understanding that it will have to be fully achieved no later than 8 years after adoption of the Directive (5 years for "sensitive" data).

Three delegations (DK/IRL and UK) were against including manual data in the scope of the Directive as they thought that legislative action was not really necessary for the processing of such data (these were far less widely distributed than computerized data and less subject to misuse) and thought in any case that an extension of protection to manual files would involve very high costs (1); the UK delegation stressed, moreover, that most of its difficulties with the draft Directive related to inclusion of manual data.

These three delegations suggested trying to solve the problem raised by manual files through other less costly means, e.g. by limiting the extension of protection to new files in the future (UK), or by making such inclusion optional (IRL and UK) or by providing for a transitional period of at least 10 years (IRL);

Most of the other delegations and the Commission took the view that manual processing of data involved as many risks to the protection of individuals' privacy as computerized processing; however, they were prepared to keep an open mind when examining the extension of the deadlines laid down in Article 35.

2. Exclusion of certain activities which are outside the sphere of Community law (Article 3(2), first subparagraph, page 19).

The draft Directive excludes activities which do not fall within the scope of Community law, with particular reference to those covered by Titles V and VI of the Treaty on European Union.

(1) It should be noted that the UK has submitted a note on costs (see 7301/94 ECO 128).
The D/DK/F/IRL/NL and UK delegations, however, wanted to supplement this exclusion with a list of activities which should in any case be excluded from the scope of the Directive.

The F delegation therefore proposed the following wording for the first indent of Article 3(2):

"in the course of activities which fall outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public safety, defence, state security and the criminal-law activities of the judicial authorities."

This text was supported by the IRL and UK delegations and generally favoured by the NL delegation; the UK delegation, however, asked for the addition of "a State's monetary interests" and "law enforcement"; the IRL delegation wanted to add data which were already in the public domain.

The Commission could agree to the French text with the exception of the expression "sécurité publique" (public safety), which it thought too broad and which might cover activities already falling under Community law.

3. Exclusion of the audiovisual field from the scope of the Directive

This request was made by the F delegation.

B. Arrangements applicable to sensitive data

(see Article 8, pages 24 to 26)

In the case of "sensitive" data (essentially data concerning racial origin, political, religious or philosophical beliefs and the health or sex life of people), the draft
provides for a prohibition in principle together with a list of a limited number of exceptions.

There are still reservations on the scope of the prohibition and on certain exceptions to the prohibition.

1. Scope of the prohibition on processing sensitive data
   (paragraph 1)

   Article 8(1) currently provides for a minimum list of categories of sensitive data to be prohibited, on the understanding that it will be for Member States to regard as sensitive and therefore prohibit other categories of data.

   The B/E/F/I/L and NL delegations were in favour of an exhaustive list of the categories of sensitive data to be prohibited; most of these delegations did, however, accept the current list in the draft Directive provided that it could not be amended unilaterally by Member States.

2. Exceptions to the prohibition
   (paragraphs 2 to 5)

   The DK and IRL delegations maintained general scrutiny reservations on these exceptions.

   Furthermore, the present text prompted the following positions:

   (i) subparagraph 2(a): the B delegation thought that the present wording was excessively broad; the DK/IRL and UK delegations for their part entered reservations on providing for the express consent of the data subject.

   (ii) subparagraph 2(aa): the F delegation wanted this to read as follows:
"Processing is necessary for the purposes of fulfilling the labour law obligations of the controller insofar as it is authorized by legislation providing for adequate guarantees."

The B and I delegations immediately stated that they were favourably inclined towards that suggestion.

(iii) subparagraph 2(c): the B delegation's suggestion that "manifestly public" be replaced by "made public by the data subject" was accepted by the F/L and I delegations and favourably received by the NL delegation.

(iv) paragraph 3

The present text gives Member States the option of providing for additional derogations to the prohibition for reasons of major public interest. This idea of major public interest is, moreover, made clear in recital 17a, which gives several examples and refers inter alia to scientific and statistical research.

However, the B and E delegations, supported by UK, could not settle for scientific research and statistics being covered only by this paragraph, and wanted a separate Article for those fields. (E made particular reference to the need for legal certainty in those two areas).

C. Arrangements applicable to the press (Article 9, page 27)

The present text calls upon delegations to introduce derogation measures in order to reconcile freedom of expression with the right to protection of privacy. Such measures extend to artistic or literary creation.

However this text elicited two sets of reservations:

1. The D/E/F/GR/I and P delegations, and to some extent the L delegation, entered reservations on extending these derogation arrangements to artistic or literary creation (E), however, suggested making it clear that databases could not be regarded as artistic creation).
2. The B/F/L/I/P delegations and the Commission did not want it to be possible to derogate from the powers of national supervisory authorities provided for in Chapter VI of the Directive.

This Chapter confers on supervisory authorities sufficiently important powers of intervention to enable them to find out, among other things, the sources of confidential information in the possession of journalists. Consequently, although these authorities are bound by professional secrecy, derogations to these provisions were envisaged in order to safeguard the confidentiality of information sources used by the press.

D. Right to information of the data subject

(Articles 11 and 12, pages 28 and 29)

The draft Directive provides that, when data are collected, communicated to a third party or recorded, the data subjects must be informed by the controller.

Such information must contain certain elements which are listed in Articles 11 and 12 (in particular the identity of the controller and the purpose and recipients of the processing).

- four delegations (DK/IRL/NL and UK), which wondered whether these provisions were necessary, thought that in any case they should be worded to allow for greater flexibility regarding the person providing this information and the time when it had to be provided;

- with particular reference to the list of minimum details to be supplied (subparagraphs (a), (b), (c) and (d) of Article 11), the D delegation suggested that the items of information under (c) and (d) be provided only at the request of the data subject; the B/E/L and P delegations for their part requested that the list
be supplemented by the existence of right of access to data and of the right to correct them (Ε suggested stipulating that the latter information be provided only at the data subject's request).

E. Notification of processing operations to national supervisory authorities

(Articles 18, 19 and 21, pages 37 to 40)

To enable national supervisory authorities to carry out the controls which are their responsibility, the Directive provides that they shall be notified of processing before it occurs.

Differences remain between delegations on the following three points:

1. The scope of the obligation to notify

(Article 18(2))

The current text adopts the principle of general notification of processing operations together with exemptions (or simplifications) to be applied by Member States to processing operations which are not likely to undermine the rights of individuals.

Five delegations (D/DK/IRL/NL and UK) thought, however, that the present text gave too much scope to the obligation to notify and would prefer a positive list of processing operations to be notified, which would be determined by the Member States themselves. (*)

The other delegations supported the suggested approach, subject in the case of the Ε delegation to the planned exemptions being left to the discretion of Member States, and in the case of the Ε delegation to a clearer statement that in

(*) Note: D submitted detailed amendments to Article 18, which are annexed to 7191/94 EXT 1.
no circumstances could the processing of sensitive data be the subject of an exemption.

2. **Information to be notified** (Article 19(1) and (2))

Under the present text, such information is to be specified by Member States. However, there is provision for a minimum list of information which it is compulsory to notify.

As regards this list, the D/IRL/NL and UK delegations felt that the list was too long (UK suggested restricting it to the information referred to in subparagraphs (a) and (d) and D suggested deleting subparagraphs (e) and (f); NL, which also wanted subparagraph (f) deleted, had doubts as to whether subparagraph (c) should be retained).

The L delegation, on the other hand, wanted to add to the list of information the right of the data subject to access the data and have them corrected.

It should also be noted that B wanted to strengthen Article 19(2), which concerns the notification of changes to such information.

3. **Prior examination by national authorities**
   (Article 19(3))

The present text allows the supervisory authority, where risks are posed to the rights and freedoms of individuals, particularly when processing relates to sensitive data, to decide to examine notified processing operations prior to the commencement of processing. (Such an examination must take place within a period set by Member States, but not to exceed 2 months).

Five delegations (D/DK/E/IRL and UK) were against a prior examination;

The other delegations raised no objections to the present text, although the
F delegation wanted it to be specified that such prior examination must in every case be carried out for processing operations concerning sensitive data.

F. **Arrangements applicable to the transfer of personal data to third countries**

(Association 26 and 27, pages 42 to 45)

Under the present text of the Directive, personal data may be transferred from one Member State to a third country only if the third country in question ensures an adequate level of protection, with a limited number of exceptions indicated (Article 27).

The adequacy of the level of protection ensured by a third country is assessed by the Member State concerned (Article 26 provides a number of indications on this point) subject to a committee procedure (procedure IIIa) to ensure a common Community approach towards third countries.

Four delegations (D/DK/IRL and UK) were unable to support this approach which they thought was too unwieldy.

Moreover, the I delegation wanted the words "adequate level of protection" in these Articles to be replaced by "equivalent level of protection". The F delegation repeated that it would prefer a IIIb committee procedure (see delegations' positions on the committee procedures set out in Chapter H below).

G. **Independence of national supervisory authorities**

(Article 30(1), second subparagraph, page 48)

The Commission, supported by most delegations, proposed conferring organic independence on the national supervisory authorities, which would be guaranteed in formal rules. The D delegation was unable to accept this solution, pointing to problems of a constitutional nature.
In order to assist this delegation, the consolidated text provides only for the functional independence of national supervisory authorities.

Since this solution drew objections from a number of delegations (in particular F/I and P), the Presidency requested the D delegation to reconsider its position, if necessary in consultation with the Commission.

H. Committee procedure (Article 34, pages 53 and 54)

The Commission proposal provides for an advisory committee.

The B/GR/I and P delegations were in favour of a IIIa type regulatory committee; the NL delegation could also accept such a Committee if the Commission's implementing powers were spelt out.

The other delegations said that they would prefer a IIIb type regulatory committee.

It should also be noted that opinions continued to differ on the extent of the implementing powers to be conferred on the Commission (Article 33).

The Presidency, with the Commission's agreement, proposed limiting such powers to the technical procedures necessary to apply Articles 2, 4, 6 to 21, thus excluding certain sensitive provisions such as Articles 1 and 3 and Chapter 3.