OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 19 and 20 June 1991

No. prev. doc.: 7274/91 ECO 92
No. Cion prop.: 8460/90 ECO 158 - COM(90) 314 final SYN 287

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 fifth meeting on 19 and 20 June 1991. The meeting was devoted to:

- the legal basis of the Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data, and

- Articles 14 and 15 of Chapter IV as well as Chapter II and III of the Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data.

A. Legal basis

3. The representative of the Legal Service of the Commission reserved the right to submit additional written observations in light of the written note to be prepared by the Legal Service of the Council.

B. Chapter IV of the proposed Council Directive concerning the protection of individuals in relation to the processing of personal data

Article 14: Additional rights of data subject

4. At the last meeting the Working Party had discussed Article 14 paragraphs 1 to 6. Before taking up the discussion of paragraph 7 of Article 14, the French delegation made a number of comments on the title of Article 14, as well as paragraphs 2 and 5.

Title

5. The French delegation proposed to amend the title of the article to read "Other rights of data subjects". In the French delegation's view, the present title gave the impression that the rights referred to in Article 14 were only secondary rights.

Paragraph 2

6. At the last meeting of the Working Party, the French delegation had been requested to give a description as to the application of the provision in French law corresponding to Article 14 paragraph 2. Responding to this request, the French delegation in particular stressed that the words "administrative, court or private decision" was to be understood as a decision implying an assessment of the conduct of the data subject, the results of which could be used against him and that the automatic processing could only constitute a help for the legal, administrative or private decision.
Paragraph 5

7. In respect of paragraph 5 the French delegation proposed to split this paragraph into two distinct parts which should read as follows:

5. To obtain as the case may be that the information concerning him which is inaccurate, incomplete, equivocal or outdated be rectified, completed, clarified, updated or erased.

5a. To seize the supervisory authority if an illicit or non-conform processing is carried out in respect of these data.

The proposal by the French delegation was supported by a number of delegations, the Italian delegation noting, however, the need to avoid any duplication with Article 16(d).

Paragraph 7

8. Discussing Article 14 paragraph 7 several delegations, although agreeing with the principles contained in this paragraph, felt that it was too rigid and would in a number of cases prove to be impossible to implement in practice. In this context the question was raised as to whether calculations as to the impact of such a provision had been carried out.

In order to make Article 14 paragraph 7 more flexible, suggestions were made either to introduce a "reasonable effort clause" - or to provide that the right of the data subject contained in paragraph 7 only be exercised on request. A further possibility suggested was to set a time-limit (12 months) on the liability of data controllers to notify third parties of any rectification, erasure or blocking.
Paragraph 8

9. Discussing Article 14 paragraph 8 a number of delegations indicated that the exact scope of this paragraph as presently drafted was unclear.

The UK delegation in this context stressed the need for the Member States to be able to decide that in certain cases recourse to the courts should only be possible where the supervisory authorities had intervened. Having noted that certain delegations had hesitations as to drafting paragraph 8 in too specific a manner, as well as the wish that a two-tier system (supervisory authority - court) should not be mandatory in all cases, the Italian delegation suggested just to stipulate in paragraph 8 that the data subject should have appropriate means of protection including judicial remedy if his rights had been infringed.

The Greek delegation suggested that paragraph 8 be enlarged in order to cover also administrative/judicial remedies in the case of excess of power, and also proposed that the words "rights guaranteed in this Article" be replaced by "rights guaranteed by the present Directive".

Article 15: Exceptions to the data subjects' right of access to public sector files

General

10. Discussing Article 15 a number of delegations indicated that it might be preferable, instead of the wording proposed by the Commission, to use that of Article 9 of the Council of Europe Convention which stipulates that exceptions can be allowed where they are provided for by national law and constitute a necessary measure in a democratic society to, for example, protect a Member State's security, monetary interests or to protect the data subject or the rights and freedom of others.
If the approach of the Council of Europe were, however, not to be adopted, further exceptions to those foreseen in Article 15 as presently worded would have to be provided. As examples for such exceptions, back-up, research, statistical and temporary data as well as data relating to carrier and salaries planning and data held by legal professions was mentioned.

Specific wording

11. As regards the specific wording of Article 15 as proposed by the Commission, note was taken of:

(a) Ad Title

- a query by the Irish delegation as to why Article 15 only applied to data kept in the public sector. In this context the Danish delegation indicated that it was inappropriate to legislate by means of titles. As the text of Article 15 was presently worded it was only by reading the title that it became apparent that the provisions of the article only applied to the public sector.

(b) Ad the Introductory part of paragraph 1

- an intervention by the Irish delegation indicating that the introductory part of paragraph 1 as presently worded left a large discretion to Member States and could lead to a large discrepancy between the rules in the different Member States;

- a proposal by the Netherlands delegation to stipulate in the introductory part of paragraph 1 that the right of the data subject could be limited if such a measure was necessary.

- a proposal by the Spanish delegation that the word "statute" in the first line of paragraph 1 be replaced by a reference to "national provisions".
(c) Ad paragraph 1 a + b

- an intervention by the Irish delegation indicating that as data kept for the purpose of safeguarding national security was outside the scope of the directive, a reference to national security as well as to defence was inappropriate.

(d) Ad e

- a proposal by the Greek delegation to add the word "monetary".
- a proposal by the Spanish delegation to add an exception in order specifically to safeguard the interests of the tax departments.
- a request by the French delegation that e (as well as f and g) be formulated more precisely.

(e) Ad f

- a proposal by the UK delegation to replace the word "public authorities" by "organizations" in order to cover also self-regulatory bodies.

(f) Ad g

- a proposal by the UK delegation to refer also to the interests of the data subject itself (example, medical information).

(g) Paragraph 2

Discussing paragraph 2 note was taken of a proposal by the French delegation in order to avoid an indirect access to information via the supervisory authority to include a reference to certain obligations of confidentiality.
For paragraph 2, see also remarks by the Irish delegation in Working Document No 2, point 25.

(h) Paragraph 3

Discussing Article 15 paragraph 3 a proposal was made by the Irish delegation to add a reference also to research information (Working Document No 2, point 26). Note was furthermore taken of a query by the UK delegation as to the justification for limiting the data subjects’ right of access only to the cases where data had been compiled temporarily.

(i) [New paragraph 4]

Taking into account that paragraph 1 of Article 15 as proposed by the Commission only provided that the Member States could limit the rights of the data subject mentioned in points 3 and 4 of Article 14, the Italian delegation proposed the inclusion of a new paragraph 4 which would indicate that the waiver foreseen in paragraph 1 would also apply in cases where a court action was taken to defend the rights established by Article 14.

Chapter II: Lawfulness of processing in the Public Sector
Chapter III: Lawfulness of processing in the Private Sector

General discussion of Chapters II and III

12. Discussing Chapters II and III, the Irish delegation explained that the definition of "public sector" in Article 2(g) included the concept public law which was not found in the Irish legal system in the sense in which it was used in the draft directive. Although the Irish delegation appreciated that in the legal systems of many of the Member States there was a fundamental distinction between public and private law, it felt that Member States with a different legal system should not be compelled to give effect to the data protection principles in a...
particular manner which was alien to their own legal systems and that those Member States be free to implement the principles while respecting the fundamental principles of their own law (see Working Document No 3, points 2-3).

13. The UK delegation advanced that the whole approach chosen by the Commission in Chapters II and III seemed to be based on the assumption that processing of data was not really desirable; it could therefore not pronounce itself in favour of maintaining these Chapters. If they were however to be maintained, the UK delegation asked the Commission if it could indicate what the resources' implications of Chapters II and III would be.

As the Irish delegation, the UK delegation saw difficulties in drawing a distinction between the public and private sectors and expressed a preference for endeavouring to seek common rules for both sectors and, only if necessary, to provide for a specific rule in one or other sector.

14. Also the French, Greek and Belgian delegations expressed doubts as to the appropriateness of having a distinction between the private and public sector. The French delegation preferred to provide a distinction on material criterion based on the nature of the data; the distinction would be expressed by a difference in the role to be given to the supervisory authority which would go from a simple notification of the supervisory authority to an advance authorisation by that authority.

15. The Luxembourg delegation advanced that a better approach would be to leave it to Member States to make a distinction or not and just set out three main principles concerning the final aim, the access to and the control of the data.

16. The Italian delegation, although it did not have any real problem in respect of the text proposed by the Commission, agreed that it might be useful in order to overcome the
problems of certain Member States to leave it to the Member
States to decide if they wanted to make a distinction or not.
The Italian delegation, furthermore proposed that it might help
these delegations if the definition in Article 2 g an h were
made more precise, stressing the interests pursued.

17. The Spanish, Danish, German and Netherlands delegations
indicated that they saw no difficulties in providing a
distinction between the public and private sectors, it being
advanced that different considerations had to be taken into
account for the different sectors. Certain of these delegations
felt, however, that the rules proposed by the Commission were
too detailed.

The Danish delegation in this context stressed the need
for Member States to be able to maintain a system giving public
access to administrative files which were not confidential; it
furthermore proposed that the rules concerning notification be
re-examined closely.

Chapter II: Lawfulness of processing in the Public Sector

Title

18. Discussing the title of Chapter II the UK delegation
suggested that the title be worded as follows: "Lawfulness of
processing for public administrative purposes".

Article 5: Principles

General

19. Discussing Article 5 the Spanish delegation indicated
that Article 5 (as well as Article 6) seemed superfluous and
could be better replaced by a more generally worded article
indicating that the Member States should set up the conditions
under which use of data was legitimate.
As the Spanish delegation, also the Irish delegation, felt that Article 5 was unnecessary, arguing that processing in the public sector, when necessary to perform a public authority’s tasks, was clearly lawful.

In addition to the Spanish and Irish delegations the French and Italian delegations indicated that they had reservations on the whole of Article 5 which contained concepts which were not sufficiently precise and the practical implications of which were uncertain.

Specific wording

Title

20. Discussing the title of Article 5 note was taken of proposals to reword the title so as to refer to "interpretation" or "application of principles".

21. As regards specifically the wording of Article 5a, note was taken of:

- a proposal by the Greek delegation to delete the word "other" in the first line of Article 5(a);

- a proposal by the UK delegation to clarify what would be the situation for private firms processing for public administrative tasks;

- a query by the UK delegation as to who would determine if the creation of a file was necessary for the performance of the tasks and whether such a judgment related to the task itself;

- a proposal by the Irish delegation to start Article 5(a) with the words "the collection and processing of personal data", thus avoiding referring to the outdated wording "creation of a file".
22. Discussing Article 5(b), note was taken of:

Ad Introductory part of Article 5(b)

- a query by the UK delegation for the need of having at all an extra "test" for the processing of data for new purposes.

- a proposal by the German delegation also to refer to the "use" of data.

- an intervention by the Irish delegation explaining that there seemed to be an overlap between paragraph (b) of Article 5 which dealt with "processing" for a purpose other than that for which the data were collected and Article 6 which dealt with the "communication" of data. The Irish delegation recalled that in Article 2(d) "Processing" was defined as covering various operations, including communication;

Ad first indent

- doubts expressed by several delegations as to the feasibility of applying the principle set out in the first indent of Article 5(b). In this context the UK delegation indicated that it had a preference for an opting-out clause giving the data subject a possibility to object if the processing of data were to be carried out for new purposes;

Ad second indent

- a proposal by the UK delegation in the second indent to use the words "permitted by the law of the Member States", thus also covering laws stemming from the time before the implementation of the directive;

- a proposal by the French delegation to speak of the Member State in the second line of the second indent of Article 5 instead of a Member State.
Ad third indent

- a proposal by the UK delegation instead of using the words "legitimate interests of the data subject", to use the words "not harmful to the data subject".

Ad fourth indent

- a proposal by the UK delegation to refer to the prevention of crime or pursuit of justice and to include specifically a reference to the damage to health.

The UK delegation furthermore requested that Article 5(b) cover data processed for statistical and research purposes.

Article 6: Processing in the public sector having as its object the communication of personal data

General

23. As was the case for Article 5, the French and Italian delegations laid down an overall reservation on Article 6. See point 19.

As for the general attitude of the Irish and UK delegations, see Working Documents Nos 3 and 4.

The Luxembourg delegation queried the need for having a separate Article 6 and proposed that the contents of this article be incorporated into Article 5 as communication of personal data was one of the main principles.

Specific wording

24. As regards the specific wording of the title of Article 6 and paragraph 1 of this article, note was taken of:
Ad Title

- a proposal by the Irish delegation to amend the title to read as follows: "Disclosure of personal data in the public sector". The Irish delegation argued that processing did not have as its purpose the communication of data.

Ad Introductory part of paragraph 1

- a proposal by the Italian delegation to delete the words "in their law" in order to enable Member States to give effect to the provisions of the directive by means of lower ranking legislative measures.

A proposal by the UK delegation to replace the words "shall be lawful only if" by the words "shall not be unlawful if" made in order to overcome a problem stemming from principles of common law.

Ad paragraph 1(a)

- a proposal by the Greek delegation to replace the word "necessary" in the first line of 6(1)(a) with the word "authorized" and to delete the word "entity" in the second line of Article 6(1)(a) in order to avoid a more restrictive interpretation than the definition of public sector in Article 2(g);

- a query by the UK delegation as to who would decide whether a communication was "necessary" for the performance of the tasks of the public sector.

Ad paragraph 1(b)

- a query by the UK delegation as to why additional restrictions for access should apply to the private sector;
- a proposal by the UK delegation to replace the notion "legitimite interest" by using either the term "is not harmful to the data subject", or "done for lawful purposes and does not harm the data subject";

- a proposal by the Danish delegation to include in paragraph 1(b) a provision according to which the rules set out in Article 6(1)(b) would not prevent the communication of personal data which were publicly available pursuant to the legislation of the Member States concerning public access to administrative acts.

Paragraph 2

25. Discussing Article 6 paragraph 2, note was taken of an intervention by the representative of the Commission according to which paragraph 2 would not allow any restriction in the free flow of data between the Member States.

Paragraph 3

26. For the Irish delegation Article 6 paragraph 3, which was confusing, bureaucratic and illogical, would give rise to a number of practical difficulties.

It was furthermore not clear to the Irish delegation why paragraph 3 only referred to 1(b) and not also 1(a) of Article 6. The Irish delegation also pointed to the difference between the procedure foreseen in paragraph 3 and that foreseen in Article 9 paragraph 1, which spoke of informing the data subject at the time of first communication. Finally, it seemed strange to the Irish delegation that the right of being informed of the communication - if it were to be considered as an important one - could be replaced by prior authorisation by the supervisory authority.
For the **UK delegation**, paragraph 3 as presently formulated, would lay a great burden on the holder of data files and this delegation queried what the cost implication would be in respect of the implementation of a provision as that proposed in paragraph 3. The UK delegation preferred that the provision be made facultative and that a certain number of exceptions be provided for taking into account that there could be cases where it would be inappropriate to inform the data subject that a disclosure of data concerning him had taken place.

The **French delegation** could accept the principles set out in paragraph 3 but indicated that it had difficulties concerning the distinction the Commission had made in respect of private and public sectors.

The **Danish delegation** stated that it had not taken any final position in respect of paragraph 3. For this paragraph to be acceptable to the Danish it should however exclude the duty of informing the data subject when the communication concerned non confidential data; the prior authorisation by the supervisory authority should furthermore in the Danish delegation's view be a general authorisation.

The **Italian delegation** proposed to delete in paragraph 3 the word "in their law" in the first line of paragraph 3 (see also point 24 above).

The **Luxembourg delegation** suggested adopting an approach where the strictness of the rules to be applied would depend on the nature of the public function i.e. whether the data subject had had a choice of, for example, being in the telephone directory, or such a choice had not existed.
Article 7: Obligation to notify the supervisory authority

27. Discussing Article 7, the Irish delegation indicated that a rule as that provided for in Article 7 would be too bureaucratic and that the tendency in second generation data protection law was to move away from universal registration. Referring to the discussion of the Working Party on Article 12 and 13, the Irish delegation furthermore recalled that it had proposed that the requirements of transparency might be adequately met so far as data subjects are concerned by requiring all data controllers to supply on request to any individual a document indicating whether personal data was kept, and if so to provide the sort of information which would be available in a register kept by the supervisory authority. If all the necessary information was made available by the data controllers free of charge the Irish delegation questioned the need for imposing a notification system on the Member States as proposed by the Commission.

The views expressed by the Irish delegation were shared by the UK delegation.

28. The German delegation suggested as a possibility that it be left to the Member States to decide either to introduce a notification system or a duty to inform the data subject in the manner proposed by the Irish delegation. It would in any event in the area of a registration system be necessary to draw a distinction between automatic files and manual files.

29. A number of delegations felt that there seemed to be a discrepancy between Article 7(1) which referred to the "creation of a public sector file the personal data in which might be communicated" and Article 14(3) which gave the data subject the right to know of the existence of a file. Note was furthermore taken of a suggestion by the French delegation that the last sentence of paragraph 1 of Article 7 expressing the fundamental point that the register be freely available for
consultation, be set out either in a separate paragraph of
Article 7 or moved to Chapter IV concerning the "Rights of data
subjects".

Referring to paragraph 2 of Article 7, the French
delegation also suggested that the information to be notified
to the supervisory authority include the length of time during
which the data would be kept.

Chapter III: Lawfulness of processing in the Private Sector

Title of Chapter III

30. The UK delegation proposed to redraft the title of
Chapter III as follows: "Lawfulness of processing for
commercial or industrial purposes".

Article 8: Principles

General

31. Discussing Article 8 a number of delegations reiterated
several of the comments they had made when discussing Article
5.

Specific wording

Title

32. The Irish delegation proposed to draft the title of
Article 8 as follows: "Application of principles".

Introductory part of paragraph 1

33. Discussing the introductory part of Article 8 paragraph 1
the UK delegation noted that the approach of positive consent
taken by paragraph 1 gave rise to a number of problems, first
of all because consent on a practical level was not always
possible to achieve and secondly because it put a great burden on the individual who risked being flooded with mail requesting his consent. Instead of the positive consent approach proposed by the Commission the UK delegation preferred an opting-out clause giving the data subject the right to object. A provision of this kind should furthermore be set out at the end of the paragraph. (See point 37 below.)

The UK delegation proposed the following text for the introductory part of Article 8:

"Member States may allow recording and any other processing of data provided the purposes are specified, the processing is in accordance with the provision of this Directive and it is not unlawful in any other respect."

Also the Belgian delegation had hesitation in respect of an approach which emphasized the consent of the data subject, arguing that the data subject was not always in a position to refuse to give his consent. The Belgian delegation proposed that the requirement of consent be limited to well-defined cases.

The French delegation did not agree with the approach taken by the UK and Belgian delegations and on the contrary suggested to stress more than what was presently the case, the principle of the consent of data subjects.

Paragraph 1(a)

34. Discussing Article 8 paragraph 1(a), the Spanish delegation proposed to delete the reference to "quasi-contractual relationship of trust".

As an alternative the UK delegation proposed the following text for paragraph 1(a):
"it is for a purpose of which the data subject can reasonably be expected to be aware",

or alternatively,

"it is inherent in the nature of the dealings between the controller of the data and the data subject".

Paragraph (b)

35. Discussing paragraph 1(b) note was taken of

- a waiting reservation by the French delegation;

- a proposal by the UK delegation to delete the words after "public"; this delegation did not see any reason to limit the provision to data, the processing of which was intended solely for correspondence purposes;

- a proposal by the Greek delegation to delete this paragraph as being superfluous.

Paragraph (c)

36. Discussing Article 8 paragraph 1(c), a number of delegations raised the question who would decide whether an interest was legitimate or not indicating that this concept could give rise to problems of interpretation.

The UK delegation proposed the following text for paragraph (c):

"the recording or processing is necessary for the data user's declared purposes and is not harmful to the data subject".
Note was furthermore taken of a proposal by the German delegation not only to refer to the interests of the data subject but to include also the interests of third parties.

New (d), (e) et (f)

37. To replace the "consent provision" in the introductory part of Article 8(1) the UK delegation proposed a new (d) which would read as follows:

(d) or the data subject has had the opportunity to object to processing or disclosure for new purposes and has not done so.

The UK delegation also proposed a new (e) and (f) to read as follows:

(e) or the disclosure is to a public body for its purposes.

(f) the processing takes place under a legal duty.

Ad paragraph 2

38. Discussing paragraph 2 the Greek delegation proposed to amend the words to read, "The Member States may specify ....".

A number of delegations furthermore queried the appropriateness of using the term public policy, and in this connection the UK delegation proposed to reword Article 8 paragraph 2 as follows:

"Member States may provide that no communication shall be incompatible with the declared purposes of the file or contrary to law."

Finally note was taken of a query by the French delegation as to whether paragraph 2 would not be better placed in Chapter VII.
Ad paragraph 3

39. The UK delegation proposed to reword paragraph 3 as follows:

"Without prejudice to paragraphs 1 or 2, Member States may specify the conditions under which processing or communication is lawful."

Article 9: Obligation to inform the data subject

40. Article 9 as proposed by the Commission gave rise to serious problems for a number of delegations who argued that it was over-bureaucratic and would lead to large compliance cost which in the end would be passed on to the consumer. It was also indicated that there was an overlap between Article 9 and Articles 12 and 13 as according to the latter articles the data subject would already have been informed about the purpose of the file, etc.

The UK delegation proposed that if an information system should exist, the duty to inform the data subject should only exist if the data subject was not aware or could not reasonably be expected to be aware of the existence of the file.

41. Discussing particularly the requirement that the information of the data subject should take place at the time of first communication, set out in paragraph 1 of Article 9, a number of delegations queried the appropriateness of this choice; the question was furthermore asked whether the data subject should be informed when new data was added to the file. The German delegation who was in favour of the information system provided for in Article 9, proposed that the information be given to the data subject at the time when data concerning him was included in the file, and in this context the representative of the Commission suggested to include the words "at the latest" before the words "at the time of first communication".
42. Discussing particularly paragraph 2 of Article 9, and under the assumption that Article 9 paragraph 1 was retained, the UK delegation proposed that further exceptions than those foreseen in the text proposed by the Commission be added—(for example the exceptions under Article 15—all Article 8 circumstances as well as back-up data, historical and research data).

43. Discussing paragraph 3 of Article 9 the French delegation, although agreeing with the principle set out in this paragraph felt that the right of the data subject to object should not be an absolute right but a right exercised under certain conditions.

44. In response to a query made by several delegations as to whether Article 9 paragraph 3 had an independent content when compared with Article 14 paragraph 1, the representative of the Commission explained that Article 9 paragraph 3 went further than Article 14 paragraph 1 clarifying that the controller of the file was obliged to cease the processing if the data subject objected to communication.

**Article 10: Special exceptions to the obligation to inform the data subject**

45. Discussing Article 10, a number of delegations indicated that this article seemed to be a recognition by the Commission that the provision provided for in Article 9 was over ambitious and would not be workable in practice. The wording of Article 10 was, in this delegation's view, furthermore too vague giving a large margin of discretion to Member States leading to different interpretations and this especially as regards the concept of "disproportionate effort" and "overriding legitimate interests".

A number of delegations felt that a better approach would be to leave it to Member States in their legislation to set out the exceptions to the obligation to inform the data subject.
Article 11: Obligation to notify the supervisory authority

46. Discussing Article 11, delegations reiterated the remarks they had made when discussing Article 7 of the Draft Directive.

If Article 11 were to be maintained, the UK delegation proposed to include a number of exceptions concerning particularly personnel, payroll, subscription, and back-up data.

The UK delegation furthermore proposed that Article 11(3) and Article 7(3) be brought in line with each other.