REPORT

from : Working Party on Economic Questions (Data Protection)
on :  6 and 7 October 1994
to : Permanent Representatives Committee

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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

A. INTRODUCTION

In accordance with the instructions given by the Council on 16 June 1994, which called upon Coreper to have work on this issue resumed with a view to enabling the Council to adopt a common position at its next meeting, the Working Party on Economic Questions carried out a third reading of the Directive. (1)

The text of the draft Directive as it stands following those proceedings is set out in 9951/94 + COR 1(en), with footnotes containing the reservations maintained on the various Articles.

(1) The SF/N/Ö and S delegations participated in the third reading as observers, and their concerns were taken into account.
The substantive questions are set out below.

B. SUBSTANTIVE QUESTIONS

I. Scope of the Directive

There are three questions here:
– the inclusion of manual data in the scope of the Directive;
– the exclusion of sounds and images;
– the exclusion of certain activities.

1. The inclusion of manual data (Article 2(c) in 9951/94)

The inclusion in the scope of the Directive of data in manual files, which cannot be accessed by computers, was already discussed in detail at the Council meeting on 16 June 1994. During the discussion three delegations (DK/IRL and UK) confirmed their reservations on such inclusion, owing in particular to the significant costs to undertakings, which would in any event be disproportionate to the advantages gained. Eight delegations, however, agreed to the principle of such inclusion, but were prepared, as a compromise, to agree to the progressive application, in stages, of the Directive to manual data.

In its attempts to find a compromise on this issue, the Working Party reached the following solution:

– rigorous definition of manual files as opposed to non-structured files, which would be excluded from the scope of the Directive (see recital 14b and the draft statement for the Council minutes under Article 2(c));
– fixing of a ten-year period from adoption of the Directive during which the rules of the Directive likely to generate costs for undertakings (Articles 6, 7 and 8) would progressively be applied to existing manual files (see the second subparagraph of Article 35(2)).

The IRL and UK delegations confirmed their opposition in principle to the inclusion of manual data in the scope of the Directive. With particular reference to the Working Party's solution, they felt that the definition adopted still raised significant problems of interpretation (they regarded the term "files" as inappropriate) and that the 10-year transition period was in any case insufficient.

The other delegations were prepared to endorse that solution as a compromise, although the DK delegation, supported by S, wanted a total derogation for 10 years without progressive application of the Directive; the B delegation maintained a provisional reservation on the 10-year period and on recital 14.

2. Sounds and images (Article 2(a))

The Directive defines personal data as any information relating to an identified or identifiable natural person.

The F delegation felt that images and sounds as such could not be regarded as personal information which would therefore be subject to the personal data protection system. It therefore called, with the support of
the NL and S delegations, for their exclusion from the scope of the Directive save where their processing was secondary to a personal file.

A number of delegations (DK/GR/IRL and UK) wanted to consider that request; the other delegations and the Commission felt that sounds or images of an individual made that individual identifiable and should therefore be regarded as personal information warranting protection since it was being processed.

The Commission representative pointed out, moreover, that two fields in which the data processing of sounds or images was likely to be carried out would not be covered by the Directive, viz.: that of activities not covered by Community law (e.g. phone-tapping or video-surveillance for the purpose of investigating offences) and the media which, under freedom of expression, benefit from derogations under national legislation as well as under the Directive (Article 9).

3. Exclusion of certain activities from the scope of the Directive (Article 3(2))

Article 3(2) excludes from the Directive processing in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and also contains a list of activities excluded in any case, excepting where they might at a later date come within Community law.

– the F delegation, whose concern was shared by the I/IRL and UK delegations, felt that those exclusions should continue to apply even where the activities in question came within Community law. However,
that delegation stated unofficially that it might possibly be able to agree to a statement in the Council minutes specifying that Article 2 would not prejudge any obligations concerning the fields of State security which the Member States might enter into under Community acts adopted on the basis of Articles 56, 57 and 100a of the Treaty.

The Commission representative pointed out that there were no grounds for excluding from the Directive all processing operations that might concern State security, as those interests were already safeguarded by the exceptions provided for in Article 14 of the draft Directive.

- the DK and UK delegations wanted to add processing operations relating to the smooth economic functioning of the State to the list of exclusions; the IRL delegation also called for the exclusion of public registers.

II. Arrangements applicable to "sensitive" data (Article 8)

The increased protection to be applied to data regarded as sensitive raises two questions: the list of data the processing of which is prohibited on the one hand and the exceptions to that ban on the other hand.

The compromise text prepared by the Working Party contains a comprehensive list of data which absolutely should be regarded as sensitive and the processing of which should therefore be prohibited (see paragraph 1: racial origin, political opinions, religious or philosophical beliefs, trade-union membership, health and sex life), but leaves Member States the right to amplify that list pursuant to Article 5 of the draft Directive (see statement for the Council minutes set out in footnote 4 on page 23). That prohibition in principle is accompanied by a number of specified exceptions (paragraphs 2 to 6).
Agreement was reached on that text by a large majority of delegations, with only the IRL and UK delegations maintaining reservations on the approach adopted.

However, it should be noted, with regard to the list adopted, that the DK delegation, supported by SF/N and S, entered a reservation on the inclusion of trade-union membership, which could not be regarded as sensitive in the Danish context. A number of reservations were also maintained with regard to the wording of the exceptions to the principle of prohibited processing (see footnotes to the Articles).

III. Arrangements applicable to the press (Article 9)

This Article calls upon Member States to provide for derogations to reconcile the right to privacy on the one hand and freedom of expression on the other hand. Those derogations also cover the field of artistic or literary expression.

Four delegations (DK/IRL/NL and UK, supported by S) wanted a specific reference made to the powers of the supervisory authorities (Chapter VI of the draft Directive) amongst the derogation measures to be taken by Member States. They felt that press bodies should not be supervised by those authorities and therefore maintained reservations on this Article.

In addition, the I and E delegations did not want the arrangements to be extended to include artistic or literary creation, fearing that such an extension could give rise to abuse.
IV. The rights of individuals

These are rights of individuals to information, access and the right to object.

1. Information to be given to the data subject (Articles 11 and 12)

The draft Directive stipulates that where data are collected from the subject concerned, recorded or disclosed to a third party, information must be provided by the controller to the persons concerned by such data. That information must contain certain details, which are listed (in particular the identity of the controller, the purposes of processing and the recipients).

A very large majority of delegations could agree to the principle of information for individuals and to most of the details to be given to them (†); two delegations (IRL and UK), however, challenged the validity of the provisions in question, which they regarded as a specific expression of the general principle laid down in Article 6 whereby personal data must be processed fairly. They wanted the controller to be exempt, in any event, from the information requirement where he had reason to believe that the information would be obvious to the person concerned. That wish was endorsed by the DK/SF/N and S delegations.

2. The data subject's right of access to data (Articles 13 and 14)

The draft Directive contains provisions concerning the right of the person concerned to have access to data relating to him and the additional right

(†) On the substance of these details, see points raised by F and I in the footnotes to 9951/94.
to obtain, as appropriate, the rectification, erasure or blocking of those data.

A very large majority of delegations could agree to the approach adopted by the Working Party.

With particular reference to the information that should be given to data subjects under the right of access, eight delegations felt that the person concerned must have the right to be told the identities of all the recipients (or categories of recipients) to whom data were communicated, including recipients from other departments in the same undertaking or even from other establishments in the same group.

Four delegations (DK/D/IRL and UK, supported by N and S) wanted to restrict the information to third parties (or categories of third parties). (3)

3. The data subject's right to object (Article 15)

The draft Directive allows the data subject, on certain grounds relating to his particular situation, to object to a processing operation even though it is in principle lawful.

Nine delegations could agree to the text prepared by the Working Party.

The DK delegation maintained a provisional reservation on it.

(3) It should be borne in mind that the concept of "third party" covers only persons unconnected with the controller.
Two delegations (IRL and UK, whose concern was shared by N and S) maintained substantive objections to the text in spite of the flexibility allowed Member States.

4. Exemptions from the rights of data subjects in respect of data processing for purposes of scientific and statistical research (Article 14)

The draft Directive contains several provisions to ensure a balance between the protection of individuals’ rights and research and statistical needs.

The principle of purpose (basic principle of the Directive, whereby data may be processed only for the purpose for which they were collected) is applied somewhat flexibly here. Processing operations for scientific or statistical and historical purposes are regarded as compatible with the initial purpose (e.g. file of social security benefits recipients) (see recital 15a and footnote 3 to Article 6).

Exemptions from the rights of individuals are envisaged: no information of data subjects if it would involve a disproportionate effort; no right of access to data kept temporarily in personal form for the purpose of creating statistics for scientific purposes (see Articles 12(2), 14(2) and statement for the minutes) and exemption from the prohibition on the processing of sensitive data (see Article 8(3) and recital 17a).

Likewise, it was emphasized that data made anonymous did not come within the scope of the draft Directive (see recital 14a).
A majority of delegations could agree to the approach adopted.

The E delegation stated that it could consider going along with the majority if it were stated in Article 6 (and not only in recital 15a) that statistical or scientific processing operations were compatible with the original objectives.

The DK delegation put forward a proposal to authorize Member States to introduce general derogations from Articles 12, 13 and 21 subject to adequate guarantees. The proposal was supported by UK and IRL (see footnote to Article 14(2)).

5. Automated individual decisions (Article 16)

The draft Directive is directed towards guaranteeing, with a view to equal treatment, the right of every person not to be subject to a decision which produces legal effects concerning him (e.g. refusal of a loan by a bank) and which is based solely on automatic processing of data intended to evaluate certain personal aspects relating to him.

Eight delegations could support the text produced by the Working Party.

Two other delegations (DK and IRL) maintained scrutiny reservations.

One delegation (UK) entered a reservation on the grounds that the provision in question was alien to the purpose of the Directive and would result in costs for certain economic sectors, such as the personal loans sector.
The NL delegation could have agreed to this Article if the phrase "decision which produces legal effects concerning him" had been replaced by "decision significantly affecting him".

V. Notification of the supervisory authorities (Articles 18, 19 and 19a)

The draft Directive lays down the principle of notification of processing operations to the supervisory authorities prior to being carried out, so that those authorities are able to carry out the checks for which they are responsible. However, Member States may, if they so wish, provide for a simplification of the notification or an exemption from the obligation to notify in respect of processing operations which do not jeopardize his privacy.

In addition an obligation is laid down (Article 19a) for Member States to carry out prior checks on processing operations potentially involving specific risks for the privacy of the individual.

Most delegations supported the Working Party text.

Three delegations (DK/IRL and UK, supported by SF/N and S), basing themselves on their present practices, which involved the principle of general notification, stated that they were opposed to the envisaged provisions on the grounds that they were not simple enough and would give rise to needless bureaucracy. They wanted the Directive to leave Member States the possibility of laying down in their national legislation a positive list of processing operations which had to be notified.

The E delegation once more maintained a scrutiny reservation on prior checks on certain processing operations.

Eight delegations urged that the details to be given in the notification (Article 19(1)) target in particular the recipients (or categories of recipients) to whom the data might
be disclosed, whilst four delegations (D/DK/IRL and UK, with the support of N and S) wanted them confined to third parties (or categories of third parties). In addition, the DK and NL delegations remained opposed to notification of a general description of security measures (subparagraph (f)).

VI. Transfer of personal data to third countries (Articles 26 and 27)

The text as it stands obliges Member States to ensure that the transfer of personal data to a third country may not take place if that country does not ensure an adequate level of protection in that field. Specified individual exceptions are, however, permitted.

However, these provisions allow a degree of flexibility to Member States, which are initially responsible for deciding, in accordance with procedures which they have chosen, on the adequacy of the third country's level of protection, taking into account certain criteria laid down in Article 26(2).

In a subsequent phase a Community procedure comes into play in order to ensure a common, well-structured approach in this field (Article 26(4), (4a) and (5)).

Nine delegations could endorse that approach. Two delegations (DK and IRL) maintained scrutiny reservations, while one delegation (UK, supported by S) felt that the provisions envisaged would in practice result in an unmanageable administrative burden.

VIII. National law applicable (Articles 4, 22 and 30)

In practice any one processing operation concerns two or more Member States. It is therefore likely to be subject to the cumulative application of several sets of national laws or, on the contrary, escape the application of any legislation. In the first case the controller is in an unacceptable situation in the context of the internal market, in the second the lack of protection is to be condemned.
The draft Directive is therefore aimed at fixing the criterion for determining which national law is applicable to processing operations.

There are several possible applicability criteria, including the place of establishment of the controller, reflecting the philosophy of the internal market, or the place where the processing operations are carried out.

However, discussion of this problem brought to light differences of opinion on the criteria to be chosen, with one group of delegations (D/DK and P plus SF/N and Ö) in favour of the place of processing for determining territorial competence, whilst other delegations (B/E/F and NL) felt that the applicable law should be defined by reference to the place of establishment of the controller.

In view of the disadvantages of each system, which were recognized by all delegations (on the one hand it would in many instances be impossible to determine the place of processing, which could be spread over a number of Member States, notably in the case of databases and network bases which were constantly expanding within an information society, and on the other hand the criterion of the place of establishment of the controller could give rise to distortions between operators from different countries carrying out processing on the same national territory, given the fact in particular that the Directive does not initially allow for total harmonization), the Working Party endeavoured to reach an essentially pragmatic compromise solution covering Articles 4, 22 and 30 and recitals 12a and 12b.

The solution, which was reached in the last stage of the Working Party's proceedings, was immediately welcomed by the B/E/F/L/NL and P delegations, with the SF and S delegations also amenable to it.
The D and DK delegations, supported by N and Ö, remained in favour of the criterion of territoriality, whilst the I delegation felt that the compromise text was less satisfactory than a solution based on the criterion of territoriality or on that of the seat of the controller. The GR/IRL and UK delegations reserved their positions on the matter. (*)

VIII. Committee procedure (Articles 33 and 34)

The Working Party's text uses the solution of a regulatory type IIIb committee, which was wanted by all delegations except for B and GR (type IIIa committee).

The Commission, for its part, stood by its original proposal of an advisory committee.

(*) UK suggested unofficially, during the meeting, that the following be added to the compromise text: 
"3. Member States shall also provide that data controllers established within their territory, or otherwise subject to their law in accordance with paragraph 1(a) above, shall not collect data relating to data subjects resident in another Member State, other than in accordance with the laws of that Member State."

That delegation took the view that, for the circumstances envisaged in paragraph 3, the supervisory authority and/or the courts of the Member States would simply need to consider (a) whether data had been collected relevant to persons living in another Member State, and (b) whether that collection was in accordance with the laws of that Member State.