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Second Report

drawn up on behalf of the Legal Affairs Committee

on the protection of the rights of the individual in the face of technical developments in data processing

Rapporteur: Mr H. SIEGLERSCHMIDT

At its sitting of 17 April 1980, the European Parliament referred to the Legal Affairs Committee a motion for a resolution (Doc. 1-103/80) tabled by Mrs Roudy and others pursuant to Rule 25 of the Rules of Procedure on the protection of private life.

At its meeting of 29 April 1980 the Legal Affairs Committee appointed Mr Sieglerschmidt rapporteur.

On 17 April 1980 the European Parliament also referred to the Legal Affairs Committee a motion for a resolution (Doc. 1-116/80) tabled by Mr Glinne and others on behalf of the Socialist Group pursuant to Rule 25 of the Rules of Procedure on the protection of individuals against data processing.

At its meeting of 4 June 1980, having regard to the close connection between the two motions for resolutions, the Legal Affairs Committee appointed Mr Sieglerschmidt rapporteur for this motion for a resolution also and instructed him to deal with both motions for resolutions in a second report on the protection of the rights of the individual in the face of technical developments in data processing¹.

The Legal Affairs Committee examined the draft report drawn up by Mr Sieglerschmidt at its meetings of 25 and 26 June 1981 and 22 and 23 September 1981 and adopted the motion for a resolution unanimously at the latter meeting.

Present: Mr Ferri, chairman; Mr Turner and Mr Chambeiron, vice-chairmen; Mr Sieglerschmidt, rapporteur; Mrs Cinciari Rodano, Mr Dalziel, Mr d'Angelosante, Mrs van den Heuvel (deputizing for Mr Blaskovitis), Mr Janssen van Raay, Mr Megahy, Mr Peters (deputizing for Mr Vetter), Sir James Scott-Hopkins (deputizing for Mr Prout), Mr Tyrrell and Mrs Vayssade (deputizing for Mrs Théobald-Paoli).

¹ The first report, by Mr Bayerl (Doc. 100/79), was adopted by the Legal Affairs Committee on 6 April 1979 (resolution of the European Parliament of 8 May 1979, OJ N° C 140, 5.6.1979, p. 34)

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A

The Legal Affairs Committee hereby submits to the European Parliament the following motion for a resolution together with explanatory statement :

MOTION FOR A RESOLUTION

on the protection of the rights of the individual in the face of technical developments in data processing

The European Parliament

- having regard to its debates of 8 July 1974¹ and 21 February 1975²
- having regard to its resolution³ of 8 April 1976 in which it :
instructed its Legal Affairs Committee to report to it on Community activities to be undertaken or continued with a view to safeguarding the rights of the individual in the face of developing technical progress in the field of automatic data processing, and

invited the Commission of the European Communities to take steps to ensure that the collection of data and information intended as a basis for the drafting of Community legislation in this field was brought to a conclusion under its authority,

- having regard to the joint declaration by the European Parliament, the Council and Commission on respect for fundamental rights⁴,
- having regard to its resolution⁵ of 8 May 1979 in which it called upon the Commission to prepare a proposal for a directive on the harmonization of legislation on data protection to provide the citizens of the Community with the maximum protection, and

urged strongly the Commission and the Council when preparing legislation on data protection to take the fullest account of the recommendations appended to that resolution of which they were an integral part,

¹OJ Debates No. 179 page 54 et seq.

²OJ Debates No. 186 page 254

³OJ No. C 100, 3.5.1976, page 27

⁴OJ No. C 103, 27.4.1977, page 1

⁵Doc. 100/79

recommended the Member States to coordinate their efforts in all the international forums where these questions are discussed and once the Council of Europe Convention had been signed to work for the accession to that convention of the greatest possible number of third countries, subject to reciprocity,

- having regard to its debates of 24 September 1979¹
 - whereas according to Article 17 of the International Covenant on civil and political rights (no one shall be subject to arbitrary or unlawful interference with his private life) everyone is entitled to protection under the law against such interference or encroachment,
 - having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms (principle of respect for privacy),
 - having regard to the resolution of the Organization for Economic Cooperation and Development (OECD) of 22 July 1979,
 - having regard to the motion for a resolution tabled by Mrs Roudy and others (Doc. 1-103/80),
 - having regard to the motion for a resolution tabled by Mr Glinne and others on behalf of the Socialist Group (Doc. 1-116/80),
 - having regard to the report of the Legal Affairs Committee (Doc. 100/79),
 - having regard to the second report of the Legal Affairs Committee (Doc. 1-548/81),
1. Welcomes the resolution of the Committee of Ministers of the Council of Europe of 18 September 1980 approving this Convention for the protection of individuals with regard to automatic processing of personal data;
 2. Is however concerned that it is not clear when all the Member States of the Community will finally have signed and ratified this European Convention;
 3. Considers that rules on the protection of personal data are also feasible and necessary for the Community and that the European Convention should be adapted accordingly;

¹ OJ Debates N° 245, page 19 et seq.

4. Takes the view that modern technology may pose serious threats to the rights of the individual and in particular to the right to respect for privacy;
5. Notes that a number of Community countries do not yet have laws protecting the citizen from the misuse of data files and data processing or that such laws where they exist may differ in the level of protection, the procedural principles or the rules they contain;
6. Refers to Article 100 of the EEC Treaty providing for the approximation of such provisions laid down by law, regulation or administrative action in the Member States as directly affect the establishment or functioning of the Common Market;
7. Is of the opinion that the corresponding directive when issued should not only approximate but progress beyond the relevant provisions of the Member States;
8. Considers that the use of data processing and transmission techniques particularly in the light of rapid technological change, demands periodic review at a Community level;
9. Takes the view that the European Community as a Community set up for economic and commercial purposes must have power to eliminate related problems and protect the citizens of Europe by means of general, uniform and effective provisions in the field of data protection;
10. Considers that data transmission in general should be placed on a legal footing and not be determined merely by technical considerations;
11. Considers that thought should be given to investigating the possibility and desirability of expressly incorporating the right to the protection of personal data as a human right or fundamental freedom in the text of the European Convention for the protection of Human Rights and Fundamental Freedoms in the form of a sixth protocol;
12. Calls upon Member States to comply with the Commission Recommendation of 29 July 1981 on the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data, namely to sign it before the end of 1981 and to ratify it before the end of 1982, and further to give legal effect to the provisions thereof;
13. Calls upon the Commission to undertake regular consultation with the Consultative Committee of the said Convention on personal data and to review its work;
14. Believes that the European Community should in due course accede to the abovementioned convention in its own right;

15. Considers nevertheless that there remains an urgent need for a Community directive with special care being taken to ensure that
- the same level of protection from such technologies is afforded in both the private and the public sector and that such protection shall extend to all data of a personal nature irrespective of national borders,
 - the directive shall include an obligation to notify the person concerned who shall be entitled to have access to, and to correct, information concerning him;
 - liability for damage caused shall be introduced,
 - the operation of data banks shall be subject to obligatory notification and approval on a national basis;
16. Considers it essential that a Community body should be set up with the sole task of defining and supervising compliance with conditions for the transmission of data across frontiers;
17. Instructs its President to forward this resolution to the Council, the Commission, the Court of Justice and the governments and parliaments of the Member States, the Assembly and the Committee of Ministers of the Council of Europe, the Council of the Organization for Economic Cooperation and Development and the national bodies responsible for supervising the application of general or specific legal provisions on the protection of freedoms.

Prefatory note

This Second Report on behalf of the Legal Affairs Committee on the protection of the rights of the individual in the face of technical developments in data processing is a sequel to the First Report¹ drawn up by Mr Alfons Bayerl in 1979.

In drawing up this second report the rapporteur's intention is not to present a totally new and different report, but rather to take into account subsequent developments in the data-processing field - whether in the form of international agreements or other provisions or more recent legislation in the Member States or third countries - in other words, to update the Bayerl report.

¹ Doc. 100/79

B
EXPLANATORY STATEMENT

I. Introduction

1. In May 1979 the First Report on the protection of the rights of the individual in the face of technical developments in data processing was presented to the European Parliament by its rapporteur, Mr BAYERL, and the motion for a resolution was adopted unanimously¹.

Important points in the resolution were the request to the Commission to prepare a proposal for a directive on the harmonization of legislation on data protection to provide citizens of the Community with the maximum protection and the recommendation to the Member States to coordinate their efforts in all the international forums where these questions are discussed and to work for the accession to the Council of Europe convention of the greatest possible number of countries.

2. On 24 September 1979 a debate on data protection² was held in the European Parliament on the basis of an oral question by Mr van Aerssen and Mr Alber on behalf of the Group of the European People's Party. In that debate speakers from all the groups voiced their conviction that a Community directive was as necessary as ever. Particular attention was drawn to the need for Community legislation on transborder data flows and to three principles to be observed in the drafting of the directive: it must preserve a balance of information between the Member States, ensure the legality of the processing of data, and be formulated in legally unambiguous terms³. It was also stressed that the directive must provide the highest level of protection⁴.

The Commissioner, Mr Natali, affirmed that the Commission was aware of the importance of this subject, but wanted to wait until the text of the Council of Europe convention was available before submitting proposals for a directive⁵.

¹ Annex I, Doc. 100/79

² OJ Debates No. 245, p.19 et seq.

³ *ibid.* loc. cit.

⁴ *ibid.* p.22

⁵ *ibid.* p.20

3. In response to further written questions in November¹ and December² 1979 and in April³, June⁴ and July⁵ 1980, concerning further Community work in the data-protection field, Members of the Commission referred again to the need to await the outcome of the Council of Europe's work. In the answer to written question to the Council of Ministers July 1980⁶ reference was made to the studies being carried out under the Commission's auspices.

In April 1980 the Socialist Group of the European Parliament tabled a motion for a resolution on 'the protection of individuals against data processing'⁷.

The motion for a resolution by Mrs Roudy and others on 'the protection of private life'⁸ contained similar observations.

On 4 June 1980 the rapporteur of the Legal Affairs Committee, to which these resolutions had been referred, was asked to draw up a report on the subject⁹.

II. Review of the present situation with regard to data-protection legislation and work in progress

(a) Commission of the European Communities

4. At the beginning of 1978 the Commission set up a Group of Experts on Data Processing and the Protection of Privacy, which decided at its constituent meeting to await finalization of the preliminary draft convention of the Council of Europe before deciding what position the Community should adopt¹⁰.

At its subsequent meeting it decided to carry out a substantial long-term research project covering the following points:

- nature and scope of transborder data-flows
- legal structure of data-protection bodies
- the problem of legal and natural persons

¹ OJ No. C 156, 25.6.1980, p.19

² OJ No. C 160, 30.6.1980, pp 11-12

³ OJ Nos. C 178, 16.7.1980, pp 58-59 and C 198 of 4.8.1980, pp 35-36

⁴ OJ No. C 255 of 2.10.1980, p.16

⁵ OJ No. C 245, 22.9.1980, pp 15-16

⁶ OJ No. C 283, 3.11.1980, p.20

⁷ Annex I, Doc. 1-116/80

⁸ Annex II, Doc. 1-103/80

⁹ cf PE 65.865, p.9, (c)

¹⁰ Commission Doc. III/268/78

- costs connected with international rules on personal data
- technical aspects of right of access
- control, scrutiny and the implications for data protection of stricter rules on security.

5. In November 1979 the group of experts discussed the Community's position on the Council of Europe's draft convention which had meanwhile become available. The majority of the participants considered that, in view of the possibility of the Community acceding to the convention, there was no urgent need for a Community directive to be adopted in this field, but they were aware that the Community's accession to the convention would create a number of difficulties¹. It was generally believed, however, that the 'hard core' of the draft convention offered a sound basis for the Community's own work.

6. In May 1980 the research institutes commissioned to carry out the study referred to above presented their report, which ran to several volumes². It was expected that this work would continue for the rest of the current four-year programme.

(b) Council of Europe

6a. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains a provision in general terms guaranteeing everyone the right to respect for his private life. In the light of rapid technical advances being made in the field of data protection it seems worthwhile considering whether Article 8 should not be buttressed by including expressly in the text of the European Convention on Human Rights the right to the protection of personal data as a human right or fundamental freedom. The Council of Europe's efforts to extend the list of fundamental freedoms protected by the European Convention on Human Rights have produced a number of preliminary drafts for a sixth protocol to the Convention. The Parliamentary Assembly of the Council of Europe has, in conformity with the preliminary draft of a sixth protocol to the European Convention on Human Rights drawn up by the International Union of Lawyers, recommended the incorporation into the Convention of, inter alia, a right to the protection of data³.

¹ cf Council of Europe Doc. 4472, p.6

² Final report of the EEC research project 'Data protection and security' prepared by the GMD, IRIA and NCC research institutes for the Commission, St Augustin 1980

³ See Recommendation 890 (1980) of 1.2.1980

7. After preliminary work, begun as far back as 1968, a committee of experts set up by the European Committee on Legal Cooperation (CDCJ) submitted the draft of a 'Convention for the protection of individuals with regard to automatic processing of personal data'¹. This draft was finalized by the CDCJ at its meeting of 27.6.1980 and forwarded to the Committee of Ministers.

8. On 10 February 1980 the Parliamentary Assembly of the Council of Europe, after considering a report drawn up by Mr Holst on data processing and the protection of human rights², also adopted Resolution 721 (1980) on 'Data processing and the rights of the individual'³. In this resolution the European Parliament was urged to keep a close watch on the application of the principles of the future convention and thus assist, within the framework of the Community's activity, in establishing the data protection called for. In addition, the parliaments of those countries in which there were still no data-protection provisions were urged to introduce legislation of their own, taking into account the principles defined by the Council of Europe.

In this connection it should be pointed out that one reason why the finalization of the draft convention was speeded up was to enable the Community to accede to the Convention once the Member States had done so.

There appears to be a good chance of this happening from the broad measure of agreement on the draft convention expressed in the European Committee on Legal Cooperation by the member countries of the Council of Europe, which include all the Member States of the Community. Of the 21 Member countries only Malta voted against the draft; the Federal Republic of Germany abstained because there were some doubts about the compatibility of the draft convention with the data-protection law of one of the 'Länder'. These doubts have since been removed.

9. The draft convention was approved on 18 September 1980 by the Committee of Ministers⁴, which will now fix the date from which the convention will be open for signing by non-member countries as well as by member countries of the Council of Europe.

The Convention was signed on 28 January 1981 by Austria, Denmark, the Federal Republic of Germany, France, Luxembourg, Sweden and Turkey. Subsequently, Norway and the United Kingdom have also signed the Convention.

Contents of the Convention

10. As the title indicates (Convention for the protection of individuals with regard to automatic processing of personal data), the convention is concerned only with personal data in the field of automated data processing.

¹ Council of Europe Doc. CJ-PD(79) - Miset

² Council of Europe Doc. 4472

³ PE 63.693

⁴ Official text of the Convention cf Annex III CDCJ (28), Add.1

Chapter I contains general provisions defining the object, purpose and scope of the convention. The convention covers data banks in the public and private sectors. However, according to Article 3(2c) the signatory states are free to apply it to manual processing. Another way in which the scope of the convention may be optionally extended is for the signatory states to grant data-protection rights to groups of persons, associations, foundations, companies, corporations or any other bodies (Art.3(2b)). In Article 3(2a), on the other hand, it is left to the signatory states, if they wish, to exclude certain categories of data from the scope of the provisions.

Chapter II (Articles 4-11) sets out the basic principles governing data protection, which include the fair and lawful collection of data, the relevance of the data stored and the way they are used to the purpose for which they are intended, restrictions on the storing of particular data, the updating of the data and prohibition on the storing of sensitive data such as political opinions. Furthermore, the data subject has the right to obtain information about the nature of the data concerning him from the agency officially responsible for him and to demand that incorrect data be corrected. Exceptions are allowed only in the interests of public safety, preventing criminal acts, protecting the fiscal interests of the State or protecting the data subject or third persons.

Chapter III (Article 12) refers to transborder data transmission. In Article 12(2) it is emphasized that the signatories to the convention are not entitled to make the transborder transmission of personal data between themselves subject to authorization solely for the purpose of protecting privacy. Article 12(3) allows any signatory to adopt provisions restricting the application of 12(2), in particular in regard to transborder export of data to non-signatory states.

Chapter IV (Articles 13-17) contains provisions relating to mutual assistance by the national data-protection authorities and assistance to persons who are affected by the use of data in a country other than their country of residence and want to take preventive action. The convention also stipulates that the responsible authorities should not use the data made available for purposes of mutual assistance for purposes other than those for which they are intended.

Chapter V (Articles 18-20) provides for the setting up, after the entry into force of the convention, of a Consultative Committee in which all contracting parties will be represented and which should meet at least every two years. This committee would be responsible in particular for on-going advice on the implementation of the convention and for proposing necessary amendments.

The final Chapters, VI and VII, (Articles 21-27) contain provisions for possible amendments to the convention and the customary clauses regarding its entry into force and field of application and reservations, termination and registration. The provision on reservations makes it clear that, apart from the exceptions which the individual states may make pursuant to Articles 3(2a), 9(2 and 3) and 12(3 and 16), no other reservations are possible.

11. In addition to the 'Convention for the protection of individuals with regard to automatic processing of personal data', the Council is expected to devote attention to the need for other provisions in the field of medical data banks, police records and credit records¹.

12. The European convention will no doubt be criticized, especially because, in Article 3(2a), it allows the signatory states to exclude certain categories of data from its scope. At the same time, it constitutes an important step towards the harmonization of data protection in Europe. Its significance is all the greater since more countries belong to the Council of Europe than to the European Community.

On the other hand, it could well be that some states, in particular those without any data-protection legislation at present, will find even this relatively 'wide-meshed' convention insufficiently flexible.

(c) Organization for Economic Cooperation and Development

13. In the summer of 1979, an OECD group of experts presented 'Guidelines on privacy protection and transborder data flows'².

14. The work on the guidelines, which lasted for over two years, ended in their adoption by the OECD Council of Ministers on 23 September 1980³. Upon the adoption of the guidelines, by a large majority of the national representatives (18 out of 24 OECD member countries voted for the guidelines, while six abstained but indicated the possibility of acceding at a later date, namely Australia, Canada, Iceland, Ireland, Turkey and the United Kingdom), it was stressed again⁴ that the purpose was to safeguard the individual's privacy on the one hand, while ensuring the secure and unimpeded transmission of data, on the other, particular reference being made to transborder data-flow needs in such areas as banking, insurance, aircraft reservations and the despatch of confidential data between the parent company and subsidiaries of multinational undertakings. It was also pointed out that in over half the OECD member countries, data-protection legislation either already existed or had been or soon would be introduced.

¹ cf Doc. 100/79, p. 15, containing further references

² OECD Directorate for Science, Technology and Industry, Doc. DSTI "ICCP" 79.40 (DG-14), Paris, 22 June 1979

³ cf Annex IV, PRESS/A (80) 57

⁴ ibid.

Contents of the guidelines

15. The guidelines are divided into five parts.

Part One contains general considerations. The guidelines apply to both automated and manually stored personal data, in both the public and private sectors (paras. 1(b) and 2). A report on problems connected with transborder flows of non-personal data, on which the group of experts started work at the beginning of 1980, has still to appear.

The scope of the guidelines is restricted to personal data which, because of their nature or the manner in which they are processed, pose a threat to privacy and other individual liberties (para. 2). It also stresses that the guidelines must not be interpreted as preventing the application of different national measures e.g. excluding personal data which obviously do not contain any risk to privacy and individual liberties (3(b)) and restricting application of the guidelines to automatic processing only (3(c)). However, exceptions should be as few as possible (4(a)).

The general statements regarding the scope of the guidelines also include the principle that they are to be regarded as setting an absolute minimum standard and that they may therefore be supplemented by the Member countries by additional, more far-reaching provisions for the protection of privacy and individual liberties (6).

Part Two contains basic principles governing implementation of the guidelines through national legislation. These cover limits on the collection of personal data (7), the relevance of the data to the purpose for which they are to be used; the use made of them, and the need to keep them up to date (8), the need for security safeguards (11) and, lastly, the rights of the data subject vis-à-vis the processors (13).

Part Three lays down the basic principles of free flow, on the one hand, and legitimate restrictions for the purpose of protecting privacy and individual liberties, on the other. It stresses the importance of member countries ensuring that transborder flows of data, including transit through a member country, are free, uninterrupted and secure and avoiding laws or administrative provisions which will create obstacles (16,18). Only when another member country does not apply the guidelines reciprocally or its laws do not provide protection for certain categories of personal data may restrictions be imposed (17).

Part Four sets out rules to be observed by the member countries when adopting provisions in implementation of the guidelines (19) and Part Five concerns the need for international cooperation to ensure that the guidelines are interpreted and implemented in a uniform manner (20-22).

16. The OECD guidelines, like the Council of Europe convention, are designed to establish a balance between the protection of the individual's interests, on the one hand, and economic, international interests in regard to free data flow, on the other. It could be said, however, that they make insufficient provision for the protection of the individual.

There is a wide measure of agreement between the guidelines and the convention, but the latter contains far more detailed rules. As against this, however, the OECD guidelines, which are confined to basic principles, allow the relatively large number of member countries - especially those without data-protection laws - more room for manoeuvre as regards incorporation into domestic law and, unlike the legally binding convention, allows them to assist in the harmonization of data-protection law without time-consuming accession and ratification procedures.

(d) Member States of the European Community

A survey of data-protection legislation or work in progress in the Member States of the European Community reveals the following picture:

Belgium

17. Since about 1970 efforts have been made to get a new law introduced to provide fuller protection for individuals, notwithstanding a few provisions already existing in the field of civil and public law.

Of the various proposals put forward by the government and other Members of Parliament the Bill¹ tabled in 1976 by Mr Vanderpoorten, which deals in general with threats to private life from technical progress and in Chapters III and IV with the threat from data banks is of particular importance. This Bill is at present under consideration in the Senate's Legal Affairs Committee.

18. The Bill is concerned with the protection of personal data of natural and legal persons in the widest sense, i.e. it also covers data relating indirectly to individuals. It includes the processing of data in data files, i.e. registers of all kinds compiled for the purpose of processing or by means of computers. This, therefore, also includes manual data processing, if it is related in some way to automated processing. Under the terms of the Bill the processing of sensitive data would be subject to a legal ruling or the explicit consent of the data subject and may be carried out by the authorities only within their terms of reference.

¹ cf 'Banque de données, Entreprises, Vie Privée', conference proceedings, Namur 1979.