EU COUNCIL OF MINISTERS WORKING GROUP KEEPS MANUAL DATA IN DIRECTIVE

Structured manual data will remain within the scope of the European draft directive, despite opposition from the UK, Denmark and Ireland. This is the most important decision to be taken by the end of 1993 in the second reading of the draft directive by the Council of Ministers Working Group.

The change of name from the European Community (EC) to the European Union (EU) in November has no foreseeable practical consequences for the draft directive. The Maastricht Treaty's principle of subsidiarity gives Member States some flexibility in the way that the draft directive will be enforced.

By the end of 1993, following the six Council of Ministers Working Group meetings under the Belgian Presidency in July to December 1993, the second reading had reached Art. 8, on sensitive data, but had left out Art. 4 on the application of national laws.

The Greek Presidency has given the subject equally high priority by scheduling the same number of meetings in the January to June 1994 period. The earliest that the second reading is expected to be completed is by the end of 1994 under the German Presidency.

A personal assessment of progress in the Council of Ministers Working Party

Unlike the European Parliament, the Council of Ministers' Working Group discussions are held in private and so it is difficult for non-members to understand their nature and their slow progress.

After ending the Presidency of the Council of Ministers Working Group in June 1993, Denmark's President, Mrs Lotte Jorgensen, Head of Division of Denmark's Data Protection Agency, gave her view of the influences on the Council of Ministers Working Group and her personal assessment of both consensus and non-consensus issues.

She first explained developments since publication of the revised draft directive (PL&B December 1992 pp. 2-12) and the reasons for apparently slow progress.

Progress in negotiations under Denmark's Presidency

Before Denmark took over from them, the UK Presidency did not have an easy start. In September 1992, the Commission presented the revised draft but at this stage it had not been translated into the various official languages. That was why the first reading of the revised draft could not start until October 1992. Nevertheless, in the last months of 1992, the UK managed in four meetings to get through Article 1-15; that is a large part of Chapter 2 in the revised draft.

The Danish Presidency continued from January 1993 the first reading of the revised draft, i.e. starting from Art. 16 on automated individual decisions.

It has been the Danish Government's intention that the Danish Presidency should be used for achieving results for the EC by trying to obtain an agreement among the Member States. Although Denmark would have to accept results not fully in agreement with what is desirable from a Danish point of view, it is fully in accordance with the Danish tradition of compromise. This means that we try to reach an understanding - and a result acceptable to all parties. This also means that everybody must concede a little and this might be more difficult for powerful states than for less powerful ones.

The content of this revised draft touches the very core of administration in every Member State as well as all their traditions, and for these complex reasons, we must accept that the drafting process takes a lot of time. I was very pleased that the first reading was finished during the time of Denmark's Presidency.

Factors influencing the Working Group

1. Lobbying

The first reading has taken some time, but the reasons for this should be apparent. Many companies, especially from the private sector,

have lobbied so that their interests can influence the draft, and have delivered their criticisms of the first and amended proposal to the Presidency, the Commission and also to the European Parliament.

2. European Parliament amendments

Something else which has influenced the revised draft and the time it has taken to get to its present stage is the fact that the European Parliament has contributed greatly to the Commission's amendments in the revised draft.

3. Difficulty of reaching consensus

I am very fascinated by the range of different opinions, spanning from such expressions as: "Throw this proposal into the wastepaper basket!" to wishing for further tightening of the rules to ensure stronger data protection. This last point of view has (among others) been put forward recently by the EC Data Commissioners. Each Member State is constantly being bombarded with enquiries and is naturally taking care to obtain as many national opinions as possible. For obvious reasons the governments in each country are understandably interested in maintaining peace and quiet on the back benches. Consequently, it is not so easy to reach a consensus.

In short, one ought to be aware that many different national and international opinions will influence achieving a reasonable result which balances these considerations: a free internal market and free movement of data versus protecting the integrity of the individual.

No wonder that it is a difficult task. The deeper one becomes acquainted with the proposal's text, the more one realizes the need for reconsideration. Furthermore, we are working with 9 different languages, which does not make things easier. Even on a national level, regular legislative work takes much time.

I have no possibility of giving a precise statement as to whether there is a general agreement or not in the Working Group. The creation of a so-called "common position" to be presented to the Council of Ministers is the purpose of the second reading.

The Working Group is obliged to respect the confidential nature of the entire drafting process. We have not yet reached concrete decisions and furthermore, when the directive is approved, it will be in the form of a more general regulation and much of the detail will be left to the Members States to decide.

Main consensus issues

However, I can allow myself to point out certain main tendencies. I must stress here that I am not speaking as the Danish President of the Working Group - that task has come to an end - but I am solely presenting my personal opinion. A lot of things may happen during the second and last reading. Also the final position of each Member State will be a consequence of how these negotiations develop.

1. Need for a directive

I would be very surprised if no directive at all resulted from all the great efforts being made. After all, we are talking about the free movement of data as a competitive factor.

The reason for my assumption is that no Member State has been strongly opposed to the idea of adopting a directive, which enables the free movement of data between Member States. Furthermore, we have the support from the European Parliament. You also have to note the development of the basis of legislation each Member State. Since 1990 Portugal, Spain and Belgium have adopted new legislation, while Italy is trying to pass a Bill in parliament.

2. Need for revised structure of directive

I would like to stress the fact that the Commission has been right in making essential changes to the structure of the revised draft. I would only want to state here that we have had very few substantial discussions as to the sequence of the specific articles. That has indeed been a great advantage to the work being done in the Working Group.

3. Need for equal rules for public and private sectors

One of the most important amendments connected with the structure is that the Commission has laid down rules which in principle apply equally to the private and the public sectors. At the same time, it will be possible for Member States to be able to

determine more precisely the way in which the common rules are applied to different sectors. I believe that this is a good idea.

As far as I can see, there is growing tendency to erase the traditional differences between private and public sector activities. Everywhere you meet national political requests or decisions to privatize or to nationalize. By laying down common rules for data protection, you may leave it to each Member State to apply the exception clauses necessary to ensure the exercise of the public sector's powers. By doing so you avoid - on an EC level - the exceedingly difficult discussions on delimitation.

I have to add that there have been no objections to this substantial amendment within the EC Working Group.

4. Making the broadened concept of "processing" the basis for the directive

In the amended proposal, the notion of "processing of personal data" is applied as the basic concept on which the entire regulation is built. An extension of this notion has been made by including collection and use of personal data. This is an amendment also in relation to the Council of Europe Data Protection Convention number 108. In this respect, the Commission has been receptive to the European Parliament's amendment - and probably rightfully so. The development of technology supports the abolition of the well known concept of a register.

I am inclined to believe that this wide notion of data processing should be adopted as the directive's basic concept. But a very detailed definition would still require a thorough consequential examination of other articles where some of the "processing" steps, such as collection of data, are being separately covered.

5. Exemptions for press and other media

It is now compulsory for Member States to lay down rules specially related to the press and audio-visual media, including journalists' activities.

The idea is that Member States are left free to grant specific exemptions from the provisions laid down in the Directive to ensure a balance between the right of expression and the right of privacy. So far there has not been any essential objection to this principle. Time will show what will be the result of this effort to achieve a balance in each Member State.

Seen in the light of a current debate in Denmark, I can already predict that this balancing is among the most difficult problems in the domain with which we are dealing.

Main non-consensus issues

It is self-evident that Member States will not have reservations about the fundamental rules in the Council of Europe Convention 108, such as the right of access for the data subject and requirements as to lawful processing etc.

On the other hand, there are a number of data subjects' rights which the Commission is proposing to strengthen. This will result in more intensive negotiations at a later stage.

I would like to point out some important subject areas, which are new compared to the text of the Council of Europe Convention - and, at the same time, main questions to which there are, in principle, differences of opinion.

1. Manual data

Should manual data be covered by the Directive - even if manual data is processed on the basis of a register? The main reason for including manual data is the Commission's concern about the loophole, by which business enterprises and public authorities could establish a manual register of non-automatic processing operations instead of basing it on automatic processing. Some Member States are in favour of manual data being included; others do not agree.

Personally, I am of the opinion that the Commission perhaps is being unduly anxious. The advantage of the efficiency of automatic processing - especially considering the technical possibility of scanning of letters - is so evident that - in my opinion - nobody will establish a manual file just to avoid the rules in the Directive. There is, of course, still a problem as to existing files, but this could be simplified by implementing a provision making it possible

to include such manual files provided they contain sensitive data or present a specific risk (to the data subject).

2. The notification system

According to the amended proposal, Member States are required to provide a general obligation to notify the supervisory authority - and prior to carrying out automatic processing (Articles 18 and 19). This is necessary, partly to give the supervisory authority the possibility of properly carrying out its control function, and partly to ensure transparency for the citizens in general.

At the same time Member States are free to grant exemptions from the obligation to notify. The Commission has declared that at least 80% of all automatic processing is expected to be qualified for simplification or exemption according to the notification system. But as it is left to Member States to determine the extent of exemption measures, one may expect large differences between Member States.

There is no equivalent notification system to the above mentioned in the Council of Europe Convention - and this gives some Member States grounds to oppose the implementation of a notification system altogether. It has been stated that it should be left to Member States to decide what measures to take in order to provide the necessary control. Other Member States are very concerned that a general obligation to notify would present a risk of overwhelming bureaucracy, even though a great deal of automatic processing will qualify for exemptions. Furthermore, there are discussions as to whether the content of the notification should be as detailed as that proposed - but also in certain other aspects there are differences of opinion.

In brief, whether the notification system will be implemented or not, regardless of its content, remains an open question.

3. The powers of the supervisory authorities

This is a most essential and crucial problem which is closely connected with the legal traditions of each country and is consequently very difficult to handle. To some Member States it is, therefore, natural to ask whether the proposal for this particular item is too detailed. Another Member State has immediate problems as to what powers to assign to the supervisory authority, given the constitution of that country.

This question also causes substantially divergent views among the various countries. In my opinion it is crucial that you provide the supervisory authorities with sufficient and effective powers to secure that EC rules, once adopted by the Member States, will be respected at all levels. The success of harmonisation will only be seen in a long term perspective.

Timetable

The first reading was completed in June 1993 under Denmark's Presidency. During the UK's and Denmark's Presidencies we thoroughly discussed many questions related to each article in the Revised Draft.

The timetable depends on the willingness of each Member State to contribute towards solving the problem raised by the lack of common rules in the EC within the field of data protection in order to facilitate the free movement of data within Member States.

In order to achieve a good result, it is necessary to remember to do two things at the same time. The first is to avoid implementing too many bureaucratic rules. The second is simultaneously, at a high level, to ensure the protection of data subjects' privacy.

I will quote Piet Hein (the Danish author) whose advice is worth remembering for those seeking viable solutions to these and other important European Union issues:

"The noble art of losing face may one day save the human race and turn into eternal merit, what weaker minds would call disgrace."

This is an edited version of the presentation given at the Privacy Laws & Business 6th Annual Conference at St. Catherine's College, Oxford in June 1993 by Mrs. Lotte Nylokke Jorgensen, President of the Council of Ministers Working Group, January to June 1993, and Head of Division, Data Protection Agency, Denmark.