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Yves POULLET

The European Directive relating to the protection of physical persons with regard to the processing of personal data and its free circulation - a state of relative harmony.

1. The European Union's objective is, specifically, the creation of a market without internal frontiers, assuring the free circulation of goods, people, services and capital, to which the free circulation of data would appear to be an indispensable precondition. Such a free circulation demands that the fundamental rights of the persons concerned be assured in a uniform, or at least equivalent, manner in all the member states.

The European Directive's aim is to introduce the conditions required for such equivalence, assuming that this is undertaken, according to the declarations of the preambles in a manner guaranteeing a high degree of protection.

It is on the basis of these preliminaries that the first part of preamble 9 states: "due to the alignment of the equivalent protection of national legislations, the member States may no longer obstruct the free movement of personal data for reasons relating to the guarantee of personal liberties, particularly that of privacy".

May we therefore conclude that the equivalence thus decreed leads to the abolition of any disparity between national regulations. The degree of precision contained in the directive may lead one to assume this. The follow-up to preamble 9 markedly attenuates that which otherwise might have constituted the logical consequence of its premise as, without transition, it confirms: "the member States dispose of a margin of manoeuvrability which, in the context of putting the directive into practise, could be made use of by their economic and social partners. This would enable them to precisely adjust the general conditions for data processing permission contained in their national legislations and by so doing strengthen its current protective provisions. Disparities might therefore appear in the carrying out of the directive, assuming these are within this margin and in conformity with community law."

2. Our intention here is to briefly highlight the importance of this "margin of manoeuvrability" enjoyed by the member States. The subject will be arranged as follows:

- firstly, we must identify those provisions of the directive which bear indirect witness to the existence of such a margin;

- secondly, our intention will be to define the exact object upon which this margin of manoeuvrability may be brought to bear, whether such an object be implicit or explicit.

I. Recognizing the margin of manoeuvrability

3. Two provisions relative to cross border transmissions suggest the implicit recognition of a possible regulatory disparity. With regard to transmissions between member States, article 4 a) imposes upon those responsible for branches of companies or institutions established in several member States to "take all necessary measures to ensure the respect by each of those offices for any requirements of national law". Such a measure dispenses with the notion that conformity with the national legislation of one member State is sufficient to enable one to set up activities anywhere in the community. This clearly recognizes the possibility of disparity in the requirements of the various member States.

4. Article 25, which bears on transmissions to third party states, submits the examination of their legitimacy by the relevant national authority to two complementary conditions: the "respect for national provisions taken in response to the other provisions of the directive", and the "level of adequate protection". A large margin of manoeuvrability is thereby accorded to the member States, who are called upon to undertake a preliminary examination of the exchange, subject to a subsequent right of intervention by the Commission. This preliminary examination is not only concerned with the transmission's conformity to the provisions of the directive, but also, and in a separate sense, with its accordance to national legislation. This once more confirms the rights of States to demand a degree of security superior to the requirements of the directive.

5. Added to these two provisions is the preamble n 10: "For this reason, the alignment of legislations should not lead to a weakening of the protection they ensure, but rather should have as its aim the guaranteeing of a higher level of protection throughout the Community". Such a provision clearly indicates a desire, not for uniformity, but simply for alignment and harmony between the different legal codes. Quite particularly clear is that a member State's application of the directive may not be used as a pretext to lower the level of protection hitherto afforded by legislation currently in force there.

II. The areas covered by this margin of manouverability

A. Explicit provisions

6. Some are explicitly confirmed by the text of the directive; others are implicit. Without any pretence to being comprehensive, let us turn to the text's explicit provisions:

- firstly, with regard to sensitive data, article 8.2 authorizes each State to limit the range of consent of the person concerned in all or certain processes bearing on such data; article 8.2 b) leaves up to national legislation the task of defining which processing of sensitive data is justified in respect of innate rights and obligations, legislation on the right to work and the adequacy of the guarantees surrounding such processing; article 8.4 allows the state to legitimate sensitive data processing, for reasons bearing on public interest beyond the case foreseen by the rest of the article; and finally, article 8.7 leaves up to member States the matter of regulating the issue of identification numbers, either of national or general application;

- article 9 leaves the issue of press regulation up to the member States;

- article 11, covering the obligation to inform persons concerned of data collected on them, contains an important alternative as to the moment of that information and the possibility of significant procedural waivers, of which the States may or may not take advantage;

- article 13 allows each State to limit in an original way certain rights foreseen by the directive if such a limitation is deemed necessary in order to safeguard important public interests, the protection of the person concerned or the rights and liberties of another. Liberal interpretation by a State of the prerogatives thus conferred could lead to significant disparities between the levels of protection offered by different nations;

- the right of opposition delineated by article 14 may be limited by national law and article 15 similarly authorizes national legislations to legitimize individual decisions founded solely on automatic processing;

- in the field of administrative obligation to notify the controlling or preliminary authority, articles 18, 19, 20 and 21 leave numerous areas of latitude up to the individual member States, which may lead to profound legislative differences which in turn may affect the choice of country a company makes for its data-processing.

- article 24 leaves the task of defining the degree to which the directive is applied, and in particular the sanctions levied on any violations of those measures taken to enforce the current directive.

B. Beyond the explicit: the implicit margins of manouverability

7. Preamble n 9 mentioned above, is amplified by preamble n 22: "member States clarify, either within their legislation or at the time of carrying out the measures taken to apply the current directive, the general conditions under which data processing is permitted; in particular, article 5, in liason with articles 7 and 8, enables member States to envisage particular conditions for data processing in specific sectors, independant of general legislation".

It may be seen that the member States of the European Union enjoy a certain freedom of interpretation with regard to the essential principles of the directive. In some countries consent, in particular, may be considered a sufficient ground to legitimize processing, in others not; the necessity of performing a task in the public interest (article 7 e) may either be subject to the particular intervention of the controlling authority, or demand a legal rationale, according to the constitutional principles of certain countries.

Beyond the diverse possible interpretations of articles 5 to 9 other provisions may also lead to widely divergent applications of the directive. Definitions of article 2 offer several examples: thus the distiction between "file" and "dossier", so essential for establishing the directive's field of application, may be the object of a multiplicity of viewpoints; the notion of "third party" is a similar point.

Finally, the interpretation value given to data-protection legislation in each judicial system will not be altered by the directive. For example, the superiority attributed by the Swedish supreme court to access legislation covering public data protection law documents contrasts with the choices taken by other national constitutions.

Conclusion: Beyond "accepted" diversity

If the directive's authors seem to have been conscious of the significant margin of manouverability granted to member States despite the alignment of legislation established by the directive, they have simultaneously put into place the instruments required for a necessary but progressive convergence. Our conclusion summarizes these instruments:

- in that which concerns cross-border transmissions towards third party countries, national policy finds its limits in the obligation to inform the Commission of both authorisations and refusals, which in turn enables the Commission, with the aid

of the Committee of Member States Representatives to verify the level of protection guaranteed by the third party country;

- the verification of "divergences susceptible of compromising the equivalence of protection levels" is the object of a rejoinder by the "Group for the protection of persons", composed of representatives of the controlling authorities. This group may also offer consensus interpretations of the directive's text;

- following this we note the powerful mechanism of convergence represented by the drawing-up of Community codes of conduct which are free from examination by national data protection authorities;

- finally, the prohibition for reasons relating to protection of classified data, or interdiction of the transmission of such data within the European Union, as affirmed by article 1 paragraph 2, represents a strong incentive for countries not to introduce national protection that is notably stronger and whose effectiveness could then be easily nullified by transmission within the European Union.

Therefore, though we speak of the relative freedom of the member States, that freedom seems to be, if not controlled, then certainly under surveillance.

Art. 7 of the Treaty of the European Union, 07.02.1992, J.O., 1992, 29.07.1992, C. 231.

This is, so it is said, in conformance with the European Treaty on legislative conformity.

Provision n 11 considers that the directive "amplifies" the principles of the Convention, from the 28.01.1981, of the Council of Europe.

Certainly it is recognized that, although the agent responsible for processing data, without himself being established on the territory of another member State, nonetheless carries out his activities there (e.g. via internet distribution, telematic collect etc.), only the law of the state in which he is actually physically operating can be applied, regardless of the laws pertaining in those lands in which he is collecting or to which he transmits nominative information.

We ask ourselves whether the competent authority here is that of government or the national controlling authority.

On the other hand, we may imagine a state having a very liberal policy as regards the acceptance of cross-border transmission and that companies whose data export activities have been blocked by one state might organize their data transit via that other more liberal state.

This said, determining if there has been a diminution in the level of protection is an awkward task. The reduction of an element of protection such as the obligation to make a declaration to the Commission, may be compensated by an addition to guarantees of another order required by the directive, such as more complete information on the person concerned.

Preamble n 8 in fine: "and that this may have an effect on data circulation both within a member State and within the Community".

The range of this provision should be noted, everyone knows the importance of identification numbers in the circulation of data.

Article 13 lists: state security, defense, public safety, research and pursuit of penal infractions and deontological lapses, economic or financial interests, missions of control, inspection or regulation.

Such as in the case of genetic data relevant to the health of a third party.

Preamble n 23 grants member States the right to edict or maintain sectorial laws parallel or in place of general legislation.

Thus the control by the CNIL (France) on the creation of public sector data banks can be maintained, and such distinctions as operate in Germany, Denmark, Austria and other countries between the principles binding on private data banks and those of the public sector are safeguarded.

Does the format necessary to the existence of a file extend only to a minimal degree of structure, such as alphabetical classification, or does it demand the facility of access to precise informational content?

Thus companies involved in several different data activities, such as insurance companies or banks, must appoint someone responsible for data processing in each different type of activity and maintain communication between them.

This is doubtless how we should understand the last preamble (n 72): "considering that the current directive enables the taking into account of the principle of right of access to public administrative documents in any application of the regulations it puts into place."

This is the committee envisaged under article 31. It should be noted that this body may only express a majority opinion. It is the Commission which passes the measures.