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Belgian Privacy Bill Has Problems and Deficiencies

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Many privacy projects and proposals have been formulated in Belgium since 1971. The Justice Ministers Vanderpoorten, Moureaux and Gol have produced the most developed projects. These three, although appearing similar, have significant differences. Here are some comments about the latest of these, the 'Gol Project', which has two chapters dealing with:

a) control of illicit eavesdropping, recording and filming;
b) protection of privacy in automated processing of personal data.

These two chapters should be considered as two different bills linked only by the key word 'privacy protection'. The first prohibits certain practices already considered as illicit, whereas the second deals with the control of an improper use of informatics. In other words, the Gol bill aims at establishing a *transparency* based on knowledge gained through equipment installed in the private and public sectors and at asserting some r mal rules of conduct in the face of the pervasive informatization of Belgian society. We will focus on the second chapter. There are three points for consideration:

1 Owners of records: Who are they? How can we know them?
2 Recorded persons: Who are they? How can they know their data is being processed?
3 Control and controllers: Which is it? Who exercises the control?

Owners of records

Who are they? Interesting question. The Gol bill gives strong attention to the concept of communication between files or file linkage. The principle is quite simple: as long as the data are utilized for (or, more vaguely, intended to be used for) internal purposes within the owner organization of the file, external control is not needed. *Example:* a commercial agency 'selling' information about a potential customer.

principle of control needs a good preliminary definition of 'contents of files' and 'third parties'. The concept of third party is quite clear in the private sector: it is an individual or legal entity other than the one who carries out the file processing. An example would be a bank which provides personal data to a competitor or insurance-credit company. This concept of a third party could be more complex and full of serious implications: in the case of companies with many subsidiaries where the file-linking could be too liberal. In the public sector references to existing juridical entities are not precise enough since the state, a set of ministerial departments, is one, and only one, juridical entity.

With regard to these difficulties of a third-party definition, the bill is rather fuzzy. Indeed the text says: 'A third party is any individual or legal entity other than the individual or legal entity competent to decide the finality of the automated processing' (Article 14 No 3). Therefore, the bill ties the third party to the party competent to decide the existence and contents of files, the party the 'Moureaux Project' called the master of automated processing (Article 13 of the Moureaux bill). This definition could give rise to a dangerous situation. Indeed most automated processing is decided, in the public sector, by reference to a law. *Example:* Article 18 of the 29 June 1981 law creating a social data bank covering the entire social and assistance security sector in Belgium. Therefore, are the deputies of Parliament 'masters' of adp? On the other hand, is it reasonable to consider all the ministerial departments together as the one and only responsible of the files?

In the private sector there is no definition of 'who decides' the finality of adp-operations in a subsidiary company. It would therefore be dangerous to put all the files operated in many subsidiaries under the responsibility of one, and only one, legal entity, namely the executive board of the parent company. This observation gives rise to a second: the Moureaux bill elaborated not only on the master of adp but also on the executive manager (person) nominated by the master, who is in charge of controlling adp practices in terms of the law. This concept of an executive manager was a kind of insurance for the people recorded. In case of litigation, this manager is automatically called upon. The Gol bill no longer focusses on this concept, nor on who he is or who nominates him.

Not all file owners are subject to the law. The Gol bill gives a list of exceptions and there is some vagueness about the list. Some adp completely escapes the law. *Example:* personal data which are already legally published, either within the frame of regulatory provisions or by the person concerned. In this example, one question might be: Can my address and telephone number be duplicated from the telephone directory and recorded on file for adp without any legal control? Another case, which is an exception: industrial or commercial companies collecting data not intended to be communicated to third parties are not subject to the obligation to inform the 'filed people'. The question here is: What does it mean, exactly, to collect data not intended to be communicated to third parties? The fact that a company collects data about its personnel which normally are not communicated to third parties could be hidden from this personnel.

Most foreign legislation states the establishment of adp systems must not be a secret action. Any adp must be 'declared', and some information must be available to the public; a kind of public identity card for adp. In conformity with these principles, the Gol bill proposes two provisions:

1 Any adp subject to the law must be declared to the Ministry of Justice. The declaration must cover: technical characteristics (choice of processing systems, security systems, methods of processing); functional characteristics (what is the purpose of the processing, duration of data-recording and identification of processing).

2 From this declaration certain details will be open for inspection in a public register. The contents of the public register

are different from those of the declaration. For example, the links between files are not mentioned and categories of people having direct access to the files are not indicated.

It must be noted that the transparency of files intended by the two provisions is assumed only when the adp is created. There is no obligation for a *new* declaration when the adp is modified, *except* if the modifications bring about changes in transborder data flows. Another exception which causes fuzziness: a Royal Decree (after consultation with the commission described in Article 19) could establish a 'simplified declaration' for processing not intended for communications. Transitory provisions state that declaration modalities and forms will be fixed by Royal Decree. Since there is no indicated schedule, enforcement may be delayed indefinitely.

The 'filed people'

This is a question of files concerning individuals. The Gol bill doesn't mix up individuals and moral entities and therefore avoids dealing with a confused notion of 'privacy'. Filed-people protection is envisaged only from the point of view of privacy. It is prohibited *a priori* to record personal data concerning: religion; philosophy; race; criminal record; etc. Such protection could have been enlarged by using concepts other than privacy only. *Example:* the concept of non-discrimination which was included in the Vanderpoorten bill and was taken into consideration by the German and French data protection laws.

The principle of non-discrimination states that the adp masters do not collect, process, disseminate or keep information which is not pertinent to the declared purpose of the adp. *Example:* a company cannot collect data concerning the job of an employee's father. These data are not pertinent to a company's personnel file and therefore the use of such data could result in discrimination. However, data concerning the employee's career at school or university could be considered as pertinent to a company's personnel file. The principle of non-discrimination gives rise to a list of 'forbidden data' which must not be the object of any adp. This is the case with data about: race; religion; political involvements. The list of forbidden data warrants some observations:

1 The slogan 'privacy is in danger' induced the Gol bill to multiply the forbidden data and consequently to multiply the exceptions, the significance of which is rather vague. *Example:* a criminal record could be admitted in adp files for insurance-credit (Article 20 No 3).

2 Some criminal records, like, for instance, bad cheques in the past, should be erased after a certain period, otherwise some people in economic difficulty could be indefinitely estranged from many economic activities.

The efficiency of filed-people protection assumes the *right* of such persons to *information* in a large sense. First, the filed person has the right to know why he is investigated. He has the right to know that he is *filed*. Furthermore, he has the right to know what data concerning himself are processed and to possibly correct those data, and the assurance that these corrections are passed on to others receiving the data.

Concerning the right to information in the Gol bill, there are some cases when this right does not exist. For example, when it is a question of enquiries about penal infractions and prosecution of alleged criminals and their accomplices. This case is understandable as well as that of 'physicians, lawyers, notaries and courts' when ethical principles impose the obligation of confidentiality. Nevertheless, in this last case one would appreciate an explicit statement of these regulations and a justification of them by the professions concerned.

Another case, less understandable, is the exception to the right to information for industrial and commercial companies collecting data not intended to be communicated to third parties. The right to file-access should be expanded not only to the data concerning the filed person and to the identification of the collecting party, but also to the internal users of such data.

As far as the right of data correction is concerned, the Gol bill proposes a precontentious procedure with the executive manager. In cases of failure to resolve disputes, the litigation will be examined by the president of the First-Instance Court which means the action is fast and debates are public. The right of correction can be extended to a 'right to follow up'. The court can assess that correction or suppression of data should be imposed also on third parties.

Controllers and control

Three commissions, discarded for budgetary reasons by the Moureaux bill, are established by the Gol bill. Two are in charge of illicit recording and filming, and control files involved in internal and external security of the state. These commissions are called Privacy Protection Council and Parliamentary Commission for Privacy Protection, respectively. Their mission is clear and limited: to ensure security of state and protection of privacy. The third commission, called Consultative Commission for Privacy Protection, established by Article 36, deserves the following comments:

Its statute and composition are not quite satisfactory. Whereas the two other commissions are controlled by the judicial and legislative power, this one is under the control of government, namely the Minister of Justice. The King decides its composition. The dependence of the commission on the Government does not provide for democratic debate as it would have had the commission been under the control of Parliament. This situation will create difficulty of coordination between the commission and others operating under the authority of Parliament. The Consultative Commission will operate according to executive and judicial authorities, but not legislative. The commission does not report to Parliament, and Parliament cannot directly address the commission.

Competence of the commission in the face of the Government is only advisory, and there is no obligation for the Government to adopt its recommendations or opinions. The advisory function of the Consultative Commission is mandatory for several matters fixed by Royal Decree, as for example:

- declarations of personal adp (Article 8);
- prohibiting adp linkage (Article 20);
- rules concerning some TDF (Article 21).

The Consultative Commission may also give advice upon request by the Minister of Justice, who is the *sole* authority having the power to call upon it. Judicial authorities can request its advice. The commission can refer to the Public Prosecutor for certified offences and cannot be called upon by an individual. This commission cannot be, in any way, an Ombudsman, as are data protection authorities operating under other foreign laws. It has some power of investigation, but only after authorization by the Magistrate.

What does the Gol bill introduce in the field of control? Two types of control: to prevent adp from being established, and regulating operating processes. For both the Gol bill is weak and inadequate. Abroad, declarations to the public register open the way automatically to preventive control. The authority in charge of that control then intervenes to verify the conformity of the adp project with the law. In the Gol bill nothing like that is foreseen. Declarations are never submitted to the commission which, consequently, can neither issue recommendations nor propose models of declaration to the file owners.

Concerning control during the operating process, the *only* provision of the Gol bill concerns: a) the links between files; and b) the TDF problems. On these two points, the prohibited actions will be described by Royal Decree after debate in the Council of Ministers and advice from the Consultative Commission. Otherwise, the commission has no power of control except in the case of certified offences. There is a real likelihood that exemptions will be granted. Furthermore, information to be declared in the case of modification of systems does not allow the authorities to really know about the 'life' of these activities, and leaves the way free to an operating process which is not in conformity with the previous declaration.

Conclusion

The Gol bill is intended to protect privacy but the provisio do not efficiently achieve this objective. Beyond privacy pr tection there are some other stakes attached to the informatiz tion of society. This project might increase the imbalance power between parliament and government. It fails to wide public and democratic debate. The commissions depending o only the Government constitute an instrument of contr which is not really democratic. The project does not impro the *transparency* of informatics in the public sector. The powe of the Minister of Justice is strengthened too much.

The Minister of Public Function, who has until now been i charge of coordinating informatics, will no longer have infor mation from his colleague in Place Poelaert.

As far as the private sector is concerned, the concept of 'ad master' is very ambiguous. Furthermore, the exceptions ar too many, like: files of data already publicized/adp of indus trial and commercial companies not linked to third parties. Ex perience, such as in the State of Hesse, after 10 years show that privacy offences come, for the major part, from file owned by private enterprises. The filed people, namely the workers, do not have any right to information about data an data processing concerning themselves.

Too much freedom for the private sector could cause ineffectiveness of the Gol bill. ■

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