

First evaluation of the relevance of Recommendation No. R (87) 15 regulating the use of personal data in the police sector (1994)

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AD HOC TERMS OF REFERENCE

- 1. Name of the Committee:** PROJECT GROUP ON DATA PROTECTION (CJ-PD)
- 2. Source of terms of reference:** Decision No. CM/547/180193 of the Committee of Ministers
- 3. Completion date:** December 1994
- 4. Terms of reference:**

To evaluate the relevance of Recommendation No. R (87) 15 regulating the use of personal data in the police sector and, in particular the need to revise the text, namely its scope and principle 5.4 (international communication), bearing in mind the principles set out in Assembly Recommendation 1181 (1992).

5. Other Committee to be informed of terms of reference:

Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data (T-PD)

THE CJ-PD'S CONCLUSIONS

6. The Project Group reached the conclusion that Recommendation No. R (87) 15 gives adequate protection for personal data used for police purposes and that, at this stage, there is no need to revise it, or parts of it.
7. The Project Group felt that Article 5.4 of Recommendation No. R (87) 15, especially when read together with paragraphs 56-80 of the Explanatory Memorandum, appears flexible enough to meet the present and foreseeable requirements of international agreements on the exchange of data for police purposes.

8. In view of:

- i) the gradual and on-going increase of member States' ratification of Convention 108;
- ii) the on-going, gradual and occasionally uneven adoption by member States of the principles set out in Recommendation No. R (87) 15;
- iii) the reference to Recommendation No. R (87) 15 in international agreements such as the Schengen Agreement;
- iv) the implementation of new systems for the sharing of personal data used for police purposes, such as EUROPOL;
- v) the rapid development of new technologies;
- vi) the concerns expressed by both the Parliamentary Assembly and the Committee of Ministers;

the Project Group proposes that the relevance of Recommendation No. R (87) 15 should become the subject of periodic review on a regular rather than an ad hoc basis. For this purpose it is further proposed that the next review be carried out and reported on by December 1998 and thereafter on a four-yearly basis.

REPORT

i) INTRODUCTION

9. On 17 September 1987 the Committee of Ministers adopted Recommendation No. R (87) 15 regulating the use of personal data in the police sector (Appendix B to the present report).

10. In its Recommendation 1181 (1992) on police co-operation and protection of personal data in the police sector (Appendix C to the present report), the Parliamentary Assembly recommended that the Committee of Ministers, among other things, draw up a convention enshrining the principles laid down in Recommendation No. R (87) 15.

11. During its 478th meeting (June 1992), the Committee of Ministers adopted Decision No. CM 537/220692 entrusting the Project Group with the drawing up of an opinion on the Assembly's Recommendation 1181.

12. During its 24th meeting (22-25 September 1992), the Project Group drew up the Opinion which appears in Appendix D to the present report.

13. At the same time the Committee of Ministers also requested the opinion of the Consultative Committee of Convention 108. The text of the Consultative Committee's opinion appears in Appendix E to the present report.

14. In the light of these Opinions, the Committee of Ministers, at its 486th meeting of the Ministers' Deputies (January 1993), adopted Decision No. CM/547/180193, entrusting the Project Group with the ad hoc terms of reference which appear above.

ii. SUMMARY OF THE WORK DONE

15. At its 25th meeting (11-14 May 1993) the Project Group took note of the ad hoc terms of reference with which the Committee of Ministers had entrusted the CJ-PD.

16. In a first exchange of views several experts drew attention to the danger that a general revision of Recommendation No. R (87) 15 might lead to some of its principles being weakened. They argued that rather than a systematic revision of the various provisions, new technologies used by the police (eg. satellite surveillance) should be examined and, if appropriate, additional principles be defined. Other experts referred to the growing number of structures for the exchange of police information, such as Interpol, Europol, the Channel Tunnel agreements and customs agreements.

17. Experts undertook to present in writing before 1 September 1993 a short report on the implementation, in their country, of Recommendation No. R (87) 15 and on the main problems met in the implementation, as well as, if appropriate, suggestions for revision of the provisions in particular those on the scope and on international communication.

18. Reports were received from the experts of the following countries:

Austria
Belgium
Bulgaria
Denmark
Finland
Germany
Greece
Hungary
Italy
Luxembourg
Norway
Portugal
Spain
Sweden
Switzerland
United Kingdom

19. During its 26th meeting (19-22 October 1993), the Project Group accepted the offer made by the expert from Malta, Mr J. CANNATACI, to draw up a report synthesising the experts' written observations and any other information available, in particular with regard to implementation of the Recommendation, its scope and questions in connection with international communication.

20. The report, presented by the rapporteur on 10 March 1994, appears in Appendix F to the present report.

21. During its 5th meeting (22-25 March 1994), the Bureau of the Project Group amended the report of the Rapporteur's conclusions slightly and decided to submit them to the Project Group for approval.

22. At its 27th meeting (21-24 June 1994), the Project Group considered and approved the present Final Activity Report.

APPENDIX A



RECOMMENDATION 1181 (1992)¹ on police co-operation and protection of personal data in the police sector

1. As a result of the Schengen Agreement, the European states co-operating in that agreement will proceed with the exchange of automatically processed personal data in the police sector. It is most likely that such an exchange will cover the whole of the European Community after the disappearance of frontier controls at its internal borders.
2. Nowadays there is already an intensive exchange of data in the police sector among Council of Europe member states on a bilateral or multilateral basis and through Interpol.
3. It is of vital importance for an efficient combat against international crime that it is fought at national and at European level.
4. An efficient fight against crime implies an exchange of data in the police sector.
5. In this respect it is useful to recall the Assembly's Recommendation 1044 (1986) on international crime and its plea for a European information and intelligence centre (Europol), and Recommendation No. R (87) 15 of the Committee of Ministers to member states of the Council of Europe regulating the use of personal data in the police sector.
6. It is necessary, however, that there be adequate protection of personal data in the police sector and one may note with satisfaction that the Council of Europe concluded, in 1981, a Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. However, in order to be fully effective, it is not sufficient that this convention has, to date, only been ratified by eleven member states.
7. The Assembly therefore recommends that the Committee of Ministers :
 - i. draw up a convention enshrining the principles laid down in its Recommendation No. R (87) 15 ;
 - ii. promote the application of these principles in the exchange of data in the police sector between member states and between member states and third countries via Interpol. In this respect the implementation of the following principles is of the utmost importance :

¹ Text adopted by the Standing Committee, acting on behalf of the Assembly, on 11 March 1992. See Doc. 6557, report of the Committee on Legal Affairs and Human Rights, Rapporteur : Mr Stoffelen.

- a.* data should be accurate, relevant, not exceed the purpose for which they are stored and, where necessary, kept up to date ;
 - b.* they should be screened before they are stored ;
 - c.* an individual should have the right to know whether personal data concerning him are kept ;
 - d.* he should have an appropriate right of access to such data ;
 - e.* he should have the right to challenge such data and, if necessary, have them rectified or erased ;
 - f.* individuals who are denied access to files relating to them should have a right to appeal to an independent authority which has full access to all relevant files and which can and should weigh the conflicting interests involved ;
 - g.* there should be an independent authority outside the police sector responsible for ensuring respect of the principles laid down in such a convention ;
- iii. appeal to member states to ensure that data in the police sector may only be exchanged with other member states and with Interpol on the lines provided for in the proposed draft convention.

APPENDIX B

Opinion formulated by the Project Group on Data Protection

i. to draw up a convention enshrining the principles laid down in its Recommendation No R (87) 15

1. The Project Group on Data Protection shares the concern of the Parliamentary Assembly that with a view to the increasing exchange of personal data in the police sector, to combat international crime, an adequate protection of these data is necessary. This is the more important, now that a growing number of agreements between European States call for international co-operation not only between national police forces but also between other national authorities in the fields of border control, asylum and refugees, in the absence so far, at least outside the European Community, of uniform guarantees for the protection of personal data, which these police forces and other authorities may be required to exchange in the framework of their co-operation.

2. The Project Group has carefully examined the legal and practical consequences of the implementation of the Assembly's recommendation under sub-paragraph 7 i. to draw up a convention enshrining the principles laid down in Recommendation No R (87) 15.

3. In respect of sub-paragraph 7 i., the Project Group has identified three options:

(a) to draw up a new convention

The Project Group recalls the essential role of Convention 108, as the main legal instrument for the implementation of one of the elements of the right on privacy laid down in Article 8 of the Human Rights Convention, and as the cornerstone of the protection of personal data at international level.

The Project Group is of the opinion that, apart from the time needed for the elaboration and ratification of a new convention, ratification of Convention 108 as the basis of data protection in general would seem to be a prior condition for the ratification of any further Council of Europe convention in the field of data protection.

(b) to amend Convention 108

Article 19 (c) of the Convention entrusts the Consultative Committee with the formulation of an opinion on any proposal for amendment.

However, the Project Group wishes to draw the attention to the general nature of Convention 108, which has been designed to ensure respect of a number of basic principles in all sectors where personal data are collected and automatically processed.

(c) to conclude an Additional Protocol to Convention 108

Again, the Project Group refers to the opinion to be given on this option by the Consultative Committee. However, the Project Group accepts that the definition, by means of an Additional Protocol to Convention 108, of basic rules for the protection of personal data in the exchange of information between national authorities would be useful for all States which have not yet adequate legislation on such exchange.

4. In the light of the observations under paragraph 3 above, the Project Group has defined a fourth option, consisting of establishing on short term such basic rules by means of a Recommendation of the Committee of Ministers. In this respect, it recalls that although not mandatory, these legal instruments are less rigid in nature, take generally less time to draw up, and are easier to adapt to changing circumstances.

5. The Project Group recalls the important role which Recommendation No R (87) 15 has played and still plays in the protection of personal data in the police sector. Reference to Recommendation No R (87) 15 is made in, among other texts, the Schengen Agreement and the provisions on the creation of EUROPOL, the European Information System and the Customs Information System.

6. The Project Group agrees that at this stage, rather than to elaborate a new convention, Recommendation No R (87) 15 should be examined carefully, and an assessment made of the need to revise, in particular, the scope of the Recommendation and principle 5.4 (international communication) with a view to ensuring an adequate protection of those personal data kept by police forces and other national authorities in the fields of border control and customer services, asylum and refugees and which are the subject of transborder data flows, or which are registered in supranational data banks.

In the long term, the elaboration of a conventional text could be considered.

ii. to promote the application of the principles in Recommendation No R (87) 15

7. Most experts in the Project Group fully endorse the recommendation that the application of these principles be promoted. In this light, the Group suggests that the possibility be examined to assess, on a regular basis, implementation of these principles.

iii. appeal to member States to ensure that data in the police sector may only be exchanged with other member States and with Interpol on the lines provided for in the proposed draft convention

8. The Project Group refers to its opinion expressed in paragraph 6 above.

APPENDIX C

Opinion formulated by the Consultative Committee

1. The Consultative Committee has examined Recommendation 1181 of the Parliamentary Assembly, bearing in mind also the conclusions reached by the Project Group on Data Protection in respect of the same Recommendation.
2. The Consultative Committee endorses the conclusions of the Assembly's Rapporteur, that in the fight against international crime co-operation between police forces is increasing, resulting in steadily growing transborder flows of data, including personal data. Under Article 12 of Convention 108 these transborder data flows require respect of regulations providing equivalent protection of personal data.
3. In this respect the Consultative Committee underlines that Article 12 applies to any transborder data flow, in the private sector as well as in the public sector, and not only to the transfer of personal data from one national police force to the other, but between all public authorities.
4. The Consultative Committee recalls that Convention 108 and in particular its Article 12 have been designed to apply to the protection of personal data wherever such data are being collected and processed. The strategy which hitherto has been followed by the Council of Europe in the field of data protection implies that Convention 108 lays down the general principles and that these principles are subsequently elaborated for each of the different sectors by means of recommendations of the Committee of Ministers.
5. Whilst it is true that in the police sector a number of international agreements - both bilateral and multilateral - are being concluded, which may have consequences for the protection of personal data which by virtue of these agreements may be subjected to transborder communication, the Consultative Committee agrees that at this stage, this transborder communication does not require the immediate elaboration of a new international compulsory instrument, mainly for the following reasons:
 - a. in general, these international agreements take account of data protection requirements, and in most cases refer to the relevant Council of Europe texts;
 - b. the elaboration of a new legal instrument can be efficiently undertaken, only when sufficient experience is available on the implementation of the international co-operation agreements;
 - c. Convention 108 - which will remain the basic instrument in the area of data protection - is still being ratified by a number of member States.
6. The Consultative Committee shares therefore the opinion of the Project Group that at this stage Recommendation N° R (87) 15 regulating the use of personal data in the police sector should be examined carefully. An assessment should be made of the need to revise, in particular, the scope

of the Recommendation and principle 5.4 (international communication) with a view to ensuring an adequate protection of those personal data kept by police forces and other national authorities in the fields of border control, customs services, asylum and refugees and which are the subject of transborder data flows, or which are registered in supranational data banks.

7. Under its responsibility for facilitating or improving the application of Convention 108, the Consultative Committee will monitor protection of personal data in the implementation of the various international agreements on co-operation between police forces or other national authorities. It will also consider the results of the assessment of Recommendation N° R (87) 15, if the Committee of Ministers were to follow the opinion of the Project Group.

8. When sufficient information is available on the practical implementation of the international co-operation agreements, and in the light of the results of the assessment, if any, of Recommendation N° R (87) 15, the Consultative Committee will consider whether Convention 108 and in particular its Article 12 still provide sufficient guarantees for the protection of personal data subjected to transborder data flows. If the Committee would not be satisfied, it might envisage the possibility of elaborating additional rules to improve this protection.

9. The Consultative Committee confirms, however, that whatever the results of such considerations, Convention 108 should not be amended; if additional rules were to be established, they could be the subject of an Additional Protocol to the Convention.

Such Additional Protocol would enable those Parties to Convention 108, who would wish to do so, to complement the existing provisions on transborder data flows, without changing their basic undertakings under Convention 108. Nor would the Protocol prevent other States from becoming a Party to Convention 108 only.

APPENDIX D

Report by Mr J. CANNATACI, expert from Malta

1. This Report is NOT a synopsis of the national reports submitted but IS a summary of the qualitative analysis performed on all the national reports in question. As such, the qualitative analysis set out to answer the following questions:

- i. Response Overview: which are those articles of Recommendation R (87) 15, including those not specifically indicated in the terms of reference by the Committee of Ministers, which member States felt may benefit from revision and/or clarification?
- ii. Classification of Response: if one were to apply a simple classification to the response from member States, which responses indicated clarification (C) as opposed to radical review (R), strengthening of the provisions (S) or weakening of the provisions (W)?
- iii. Critical Level of Response: is the level of revisionary response received sufficiently different from that existing in 1987 (ie. at the time of the finalisation of R (87) 15) and is it sufficiently high to warrant revision of the Recommendation, given all the diversion of resources that such a revision would entail?
- iv. Specific relevance of Art. 5.4: Is Article 5, read together with the Explanatory Memorandum, adequate in achieving the balance between sufficient protection of the individual on the one hand and extensive exchange of data between police forces on the other hand?

2. The results of the answers to the questions outlined in 1.i and 1.ii above may be surveyed in the chart illustrated in Fig. 1 below. At a glance, readers may understand that the majority of the member States did not suggest either radical review (R) or Weakening of the provisions (W), most responses were aimed rather at further clarification (C) and occasionally strengthening (S). This reinforces the impression gained from listening to the national experts during plenary sessions that Recommendation R (87) 15 continues to provide a sound basis for data protection in the police sector. Moreover, a closer investigation of the requests for clarification would indicate that the current text of R (87) 15 is sufficiently elastic to permit the various interpretations that some member States may wish to see specifically mentioned in the text or, more often, in the Explanatory Memorandum. Very often these requests are made "for the avoidance of doubt" rather than the "absolute certainty that the Recommendation stipulates a prohibition or mandates a requirement." The very fact that the current text is supple enough to meet the various needs of different member States would militate more in favour of maintenance of the current text rather than the re-opening of the Pandora's box that re-formulation of the text may bring about.²

3. The analysis illustrated in Fig. 1 clearly shows that the bulk of the suggestions for revision of R (87) 15 come from only two member States: Germany and the United Kingdom. This is a very important consideration in a determination of the Critical Level of Response mentioned in 1.iii

2. Those experts who, like the Rapporteur, formed part of the Project Group in 1986-87, will recall the very strenuous negotiations required to arrive at a consensus basis for the current text. Such memories do not favour re-opening discussions on the text except for very serious reasons.

above. This would suggest that very little has changed since 1987; both Germany and the United Kingdom remain, together with Ireland, (Switzerland has since re-considered its position) the member States who entered Reservations to Art. 2 of R (87) 15 when the Recommendation was adopted in 1987. The reservations entered by Germany and the United Kingdom in 1987 are maintained in 1993 with some further additions: the bulk of the United Kingdom's remarks are aimed at further clarification while those of Germany contain the largest number of proposed revisions which would effectively weaken the Recommendation. This consideration compares with the sentiments expressed by the majority of the other respondents: ie that R (87) 15 does not pose any serious problems or that "Several experts concur that the provisions of the Recommendation constitute an inalterable necessary minimum" (CJ-PD (93) 48). This view is typically expressed in the strongest terms by the Swiss Federal Data Protection Officer who "takes the view that these Regulations should not be weakened under any circumstances and that the principles set out in Recommendation R (87) 15 should be regarded as established".

In this respect therefore, and given "the lifting of Switzerland's reservations regarding Recommendation N° R (87) 15" the position in 1993-94 would appear to have moved closer towards an even greater consensus on the text of R (87) 15 than that which existed in 1987, with the German and U.K. positions on this subject becoming increasingly more lonely.

4. As indicated in Fig. 1, the number of requests for serious revision of the text, whether to strengthen or to weaken the provisions, is too small to merit a re-opening of the discussion on R (87) 15 as a priority matter for the Project Group on Data Protection.

5. The considerations outlined in paras. 2, 3 and 4 above would suggest that the arguments to retain the status quo over the text of R (87) 15 would appear to be stronger than those which favour re-opening of detailed discussion of the text and its explanatory memorandum.

6. The attention of the Rapporteur was drawn directly to Article 5.4 by the Terms of Reference. The concern expressed with respect to this principle is typified by the comments of the United Kingdom expert: "The United Kingdom believes that paragraph 5.4 needs to be reviewed in detail in the light of continuing work on the development of international agreements about the exchange of data for police purposes." A similar observation is to be found in the Swiss response: "The application of the Recommendation to customs authorities who have access to police data systems should be examined. Principles should also be formulated on exchange of data between different police systems". Like the United Kingdom comments, the Swiss do not elaborate as to why the current formulation of 5.4 may be problematic, so in search of a further understanding of a difficulty one turns to the other two member States who made specific reference to 5.4 in their responses: Belgium and Germany. Both of these countries had no really serious difficulties with 5.4. Belgium sets the tone: "The provisions contained in the current text of the Recommendation should be regarded as laying down the minimum level of data protection which cannot be called into question. Consequently these provisions can only be made more explicit or practical rules added where this proves necessary. Accordingly, new details could be added to Principles 5.4 (international communication)..." It is important to make the distinction between those changes which are strictly necessary and those which are merely desirable. Belgium clearly makes this distinction, calling for changes "where this proves necessary", but indicates only the possible

addition of "details". Likewise, the German remark is not radical but simply one of clarification: "In view of the fact that the Interpol statutes as the basis for co-operation within the framework of Interpol do not have the force of a law, N° 5.4 lit. a. should be worded as follows so as to avert potential misunderstandings on account of the existing wording: "if there exists a legal provision to this effect under national law or international agreements".

Given the scarcity of detail in the comments reproduced above, it is difficult to understand why the texts of 5.4, when read together with the remainder of Principle 5 and the accompanying Explanatory Memorandum, are not enough to satisfy the countries concerned. It is felt that the following excerpts from R (87) 15 require no further explanation:

5.1 Communication within the police sector

The communication of data between police bodies to be used for police purposes should only be permissible if there exists a legitimate interest for such communication within the framework of the legal powers of these bodies.

5.2.i Communication to other public bodies

Communication to other public bodies should only be permissible if, in a particular case

a. there exists a clear legal obligation or authorisation, or with the authorisation of the supervisory authority, or if

b. these data are indispensable to the recipient to enable him to fulfil his own lawful task and provided that the aim of the collection or processing to be carried out by the recipient is not incompatible with the original processing, and the legal obligations of the communicating body are not contrary to this.

5.4 International Communication

Communication of data to foreign authorities should be restricted to police bodies. It should also be permissible:

a. if there exists a clear legal provision under national or international law;

b. *in the absence of such a provision, if the communication is necessary for the provision of a serious and imminent danger or is necessary for the suppression of a serious criminal offence under ordinary law;*

and provided that domestic regulations for the protection of the person are not prejudiced.

The problems expressed by member States over "international co-operation" and "Interpol" would appear to be resolved by the following explanations given within the Explanatory Memorandum:

"59. The public bodies referred to in Principle 5.2 could, for example, be social security authorities or inland revenue authorities investigating fraud, or immigration control, customs authorities and so on.

65. Principle 5.4 relates to the international transfer of police data in the strict sense between police bodies. The reference to international law refers not only to international agreements concerning mutual assistance in criminal matters but also to co-operation within the framework to Interpol. In addition, this principle also takes account of the existence or conclusions of agreements between neighbouring states which are designed to improve transfrontier data communication between police bodies.

66. As regards the term, "police bodies", it is recognised that in certain member States certain type of police work may be carried out by authorities which are not strictu sensu "police bodies". Alternatively, it may be the case that certain functions which are thought to be within the competence of the police in certain member States may actually be discharged by non-police agencies in other member States.

67. For the purposes of Principle 5.4 therefore, the term "police bodies" should be understood in a broad sense. The question to be asked is whether the body is performing a function related to the prevention or suppression of criminal offences or to the maintenance of public order. Finally, Principle 5.4 should not be interpreted as excluding the possibility that data may be transferred to foreign judicial authorities where such authorities exercise functions concerning the prevention and suppression of criminal offences."

Thus, whether "police bodies" or "public bodies", none of the data exchange needs mentioned by various member States would appear to be beyond the scope of Article 5 of R (87) 15. Nor would the wording of the current provisions appear to be so lax as to arouse undue concern at the opposite end of the data protection scale. As explained in paragraph 56 of the Explanatory Memorandum, "Principle 5 is structured in such a way as to regulate separately the various forms of data transfer that can legitimately take place while at the same time providing general principles applicable to all the transfers envisaged". It is submitted that no overwhelming arguments have been advanced to date as to why current formulation of Principle 5 and its accompanying Explanatory Memorandum fail in providing the most balanced formula capable of providing equitable provision for current requirements.

In the light of the foregoing, it is difficult to find convincing arguments which highlight why it is really necessary (rather than being possibly - and arguably - desirable) to amend Recommendation R (87) 15. Before such convincing arguments are advanced, it is difficult to abandon the principle of "Leave well alone".

Figure 1

Comparative Analysis: National Responses to Recommendation R (87) 15 – POLICE

R (87) 15 Art. No.	United Kingdom	Germany	Finland	Belgium	Austria	Hungary	Norway	Switzer- land
Scope Definition	C			C	C	C		
1.1		C						C
1.2	C							
1.3								
1.4		R/W	C					
2.1	R/W	R						
2.2	R	R						C
2.3								
2.4	R						C	C
3.1								
3.2	C	C					C	C
3.3								
4.	C							
5.1		C		C				
5.2i								
5.2ii		R/W						
5.3i								
5.3ii		R/W						
5.4	R	C		C				
5.5		R/W		C				
5.6	C	C		C				
6.1								
6.2								
6.3								
6.4								
6.5								
6.6		C						
7.1			S					
7.2								
8	C							

C=Clarify; S=Strengthen; W=Weaken; R=Radical Review/Reservation

(The following states responded but did not recommend amendments to specific sections:
Luxembourg, Sweden, Italy, Spain, Denmark, Greece, Bulgaria)

Law & Information Technology Research Unit – University of Malta - 1994