

**Annex A.1.1**

**Survey of The Software Alliance and U.S. Chamber of Commerce Members:  
C-311/18 Data Protection Commissioner v Face book Ireland Limited, Maximillian  
Schrems (“Schrems II”) Referral Questionnaire Responses**

The following table sets out a summary of the responses received from The Software Alliance and U.S. Chamber of Commerce members who completed a Schrems II Referral Questionnaire in September 2018. The questions asked of each member are set out below, along with a summary of their responses. A total of 20 members responded to the questionnaire.

Question	Member Responses
Does your company use the SCCs (either controller-controller or controller-processor) for transfers of personal data outside of the EEA?	100% of responding companies answered “Yes”
Does your company use the SCCs for intra-group transfers?	85% of responding companies answered “Yes”
Does your company use the SCCs to transfer European customer data outside of the EEA?	95% of responding companies answered “Yes”
Are the SCCs your company's principal data transfer mechanism for data transfers from the EEA?	70% of responding companies answered “Yes”
How many contracts with the SCCs does your company have? (If not known, please estimate (e.g., over 1,000).) <ul style="list-style-type: none"> <li>• 1 – 249</li> <li>• 250 – 499</li> <li>• 500 – 749</li> <li>• 750 – 999</li> <li>• 1,000+</li> </ul>	50% of responding companies have more than 1,000 contracts with SCCs. 45% have fewer than 250 contracts with SCCs. 5% have between 250 and 499 contracts with SCCs.
If you responded yes to any of the questions above, what are the main countries of destination of the transfers?	A variety of countries were listed in response to this question, including: the United States; India; Philippines; Australia; Canada; South America; Singapore; and “globally”.

**Annex B.1.1**

7767/91  
RESTREINT

ECO 107

**OUTCOME OF PROCEEDINGS**

---

of : Working Party on Economic Questions (Data Protection)

on : 23 and 24 July 1991

---

No. prev. doc.: 7284/91 ECO 93

No. Cion prop.: 8460/90 ECO 158 - COM(90) 314 final - SYN 287

---

Subject: Protection of individuals in relation to the processing of personal data in the Community and information security

---

1. The Working Party on Economic Questions (Data Protection) held its sixth meeting on 23 and 24 July 1991 during which it completed its first reading of Chapters II, III, VI and IX and had a general discussion on Chapter VIII.
2. Chapter II: Lawfulness of processing in the Public Sector  
Chapter III: Lawfulness of processing in the Private Sector

In order to complete the reading of Chapters II and III which constituted a central part of the directive determining its whole nature, the Chairman of the Working Party invited delegations to examine the following key questions:

- Was it desirable and possible to make a distinction between the private and public sector in a directive to be implemented by 12 different States?
- What should be the emphasis put in the directive on the principles of the Council of Europe Convention and the practical implementation of these principles?

- Were the provisions setting out a notification system justified or could alternatives be envisaged in order to ensure transparency?

3. Reacting to the question concerning the desirability and possibility of making a distinction between the public and private sector, the UK delegation indicated that such a distinction could lead to practical problems and would be difficult to apply in a number of borderline cases. In this context the UK delegation recalled that a certain part of industry in the United Kingdom had moved from the public to the private sector. The UK delegation preferred an approach which would concentrate on the relationship between the data subjects and data users endeavouring to find common principles for the public and private sectors and only if absolutely necessary to provide specific provisions for one or other sector.

In respect of the question concerning the principles of the Council of Europe Convention, the UK delegation felt that more emphasis be put in the directive on these principles rather than on the procedures implementing the principles. The UK delegation recalled that Article 189 of the Rome Treaty stipulated that whereas directives were binding as to the results to be achieved, the choice of form and methods was left to the national authorities.

As regards the question of the notification system provided for, the UK delegation stressed that it was necessary first of all to clarify which issues one wished to solve, and then see how these issues could be solved, at the same time taking into account the resource implications.

4. The Danish delegation recalled that during the last meeting of the Working Party it had pronounced itself for having a distinction between the public and private sectors. It had done so because it felt that such a distinction was necessary if detailed procedural rules were contained in the directive. If the directive was not however to set out such

detailed procedural rules but concentrate on principles such as those set out in Article 16 of the directive, the Danish delegation could envisage changing its position.

5. The Irish delegation reiterated that the system created by the Commission in its proposal was much too bureaucratic. Instead of looking forward and attempting to create a third generation data protection law, it was trying to turn back the clock to the time of the first generation data protection laws and this in spite of the great evolution in computerization which had taken place.

The Irish delegation recalled that it had proposed that instead of a notification system one could require that all data controllers supply on request to any individual a document indicating whether personal data was kept, and if so what they were used for and to whom they were communicated. Bearing in mind that the principles of data protection were well known, the Irish delegation felt that a greater freedom should be left to Member States to ensure that these principles were actually applied. Should difficulties arise these could be dealt with by the Working Party composed of representatives of the Supervisory authorities on the basis of a face-to-face consultation.

6. The French delegation as well as the German delegation expressed doubts as to the usefulness of reopening the discussions on Chapters II and III. These delegations felt there was a need for further reflection following the discussion which had taken place at the Working Party's last meeting.

The French delegation recalled, however, that as it was in favour of having a high level of protection and harmonization it attached great importance not only to the principles of data protection but also to the rules setting out the procedures ensuring that the principles were applied. As a number of other delegations, the French delegation had doubts

as to whether it would be pertinent to make a distinction between the private and public sectors and in this context recalled the idea it had put forward at the Working Party's last meeting to provide a distinction on material criterion based on the nature of the data; the distinction would be expressed by a difference in the role to be given to the supervisory authority which would go from a simple notification of the supervisory authority to an advance authorisation by that authority.

7. The Luxembourg delegation agreed with the German and French delegations that it was premature to reopen discussion on Chapters II and III at a time when the first reading of the directive had not yet been completed. It recalled, however, that at the last meeting of the Working Party it had indicated that the procedures foreseen in the draft directive and on which the distinction between the public and private sectors was based would have to be examined case by case. Whereas certain procedures could be maintained, it was the opinion of the Luxembourg delegation that others would have to be eliminated.

8. The Portuguese delegation, although being in a position to accept a distinction between the private and public sector, stressed the importance of establishing the principles to be applied and not so much the procedures making sure they were applied. Special attention would, however, in the Portuguese delegation's view, have to be given to specific sensitive areas as the insurance sector and the area of private investigations.

9. The Italian delegation stressed the need for identifying a list of principles to be respected, the sort of data which should be controlled and the areas where the control was not necessary; a control system would undoubtedly be needed but the system of notification proposed by the Commission was just one amongst several ways of carrying out the control.

10. The Belgian delegation recalled that it was not in favour of establishing a distinction between the private and public sectors and that it preferred establishing common principles for both sectors. In the Belgian delegation's view the emphasis in the directive should be put on the principles, leaving the procedures to make sure that the principles were abided by to the Member States which thus could take into account their proper traditions and sensitivities.
11. Concluding the discussions of the Working Party on Chapters II and III, the Chairman of the Working Party indicated that it seemed conceivable to distinguish between the aims to be achieved at national level and those to be achieved at Community level. One could, for example, envisage that a distinction between the public or private sector be applied at national level but not at Community level, leaving it to the Member States to decide if a distinction was desirable or not. This was, however, just one possibility amongst others as a final choice would depend on what the directive at the end of the day really aimed at achieving. Harmonization of rules could be achieved in different ways, going from the extreme case of creating totally uniform rules to a less rigid approach. One could thus imagine a directive leaving certain choices to the Member States without this, however, hampering the aim of the directive of ensuring the free movement of data between the Member States. If, on the other hand, a too ambitious approach was taken the risk existed of not achieving reasonable progress within the time available.



Chapter IX: Supervisory authorities and Working Party on the protection of personal data

Article 26

General comments

12. Discussing Article 26 generally, the French delegation proposed a restructuration of this article based on the following three elements:

- the role or remit of the supervisory authority;
- the powers of the supervisory authority;
- the procedural limits to be respected by the supervisory authority.

The proposal by the French delegation would entail that the present Article 26 paragraph 3 be incorporated into paragraph 1 of Article 26 and that a new drafted paragraph 3 set out rules concerning the procedures to be respected.

Note was furthermore taken of a proposal by the Luxembourg delegation to incorporate into Article 26 certain elements contained in the explanatory memorandum to the directive.

Article 26 paragraph 1

13. Responding to a number of questions concerning the implication of the word "independent" in the first line of Article 26 and the question as to whether a Member State could have several independent competent authorities, the representative of the Commission explained that the independence of the competent authority could be measured against elements as to whether it received instructions from other governmental bodies - who had the nominating powers - and

who fixed the budget. As Article 26 paragraph 1 was presently worded it left a large margin to the Member States to ensure that the requirement of independence was respected.

As to the question whether a Member State could have several competent authorities to supervise the protection of personal data, the representative of the Commission explained that this was a question which was left to the Member States which could set up separate authorities for example for the public and private sectors or separate regional authorities.

14. In reaction to the intervention by the representative of the Commission it was noted:

- that the Italian delegation feared that if too large a margin was given to the Member States in interpreting the notion of independence this could lead to too different an application in the different Member States. The Italian delegation furthermore noted that particular problems would arise in respect of assuring a total independence of the supervisory authority in respect of data in the public sector;
- that the UK delegation pronounced itself for maintaining a system giving the Member States a certain amount of appreciation to ensure the independence of the supervisory authority. For the UK delegation independence required that the supervisory authority be independent from those supervised and from a day-to-day political control;
- that the Danish delegation referring to the proposed declaration by the Commission on the application to the institutions of the EC of the principles contained in the Council Directive, raised the question who would supervise the files of the Commission;
- that the French delegation proposed to amend the present paragraph 3 as follows:

"complaints relating to the application of the present directive may be lodged with the authority."

As a consequence of the proposal it had made to restructure Article 26 this text should be incorporated into paragraph 1 of Article 26, see point 12 above.

In the context of the proposal made by the French delegation the UK delegation proposed to refer to complaints in relation to national law implementing the directive.

#### Paragraph 2

15. Referring to the investigative powers of the supervisory authority provided for in paragraph 2, the Italian delegation stressed the need to define where the powers of the supervisory authority stopped and those of the legal authorities started.
16. Referring to the right of access of the supervisory authority to files covered by the directive, the UK delegation agreed that such an access should exist but only under certain conditions as for example a magistrate's warrant; furthermore the right should not always be a right of physical access but rather a right to information.
17. Discussing the question as to whether the supervisory authority could or should have the power to take decisions, the representative of the Commission explained that the Supervisory authority should have powers of intervention against users which did not conform with the directive and should be in a position to stop any infringement. As to how this was done different options were open to the Member States including:
  - a system where the supervisory authority could take a decision which was subject to a judiciary control;
  - a system where the supervisory authority would need the intervention of an other public authority;

- a system with an ombudsman provided that he was given the necessary powers to ensure that the directive was respected.

If, on the contrary, the powers of the supervisory authority were limited to the publication of a report without powers to ensure that the directive was respected, this would not be sufficient.

Having noted the intervention by the representative of the Commission, the Chairman of the Working Party proposed in paragraph 2 to speak of "powers which ensure efficient application of the directive".

### Paragraph 3

18. Discussing Article 26 paragraph 3, note was taken of a suggestion made by the Italian delegation in order to maintain the prerogatives of the legal/judiciary authorities to make a reference in paragraph 3 to the powers of these authorities.
19. Referring to the proposal for restructuring Article 26, the French delegation proposed to draft a new paragraph 3 which would indicate that the authority, when exercising its supervision, would respect the right of defence and basic freedoms and that the decision of the authority should be reasoned and subject to an appeal before a court.

The French delegation furthermore suggested adding a sentence either in paragraph 3 or in a new paragraph 4 indicating that the supervisory authority should be subject to certain rules of confidentiality.

### Article 27: Working Party on the Protection of Personal Data

20. Discussing in particular Article 27 paragraph 1, note was taken of a proposal by the Belgian delegation to reword paragraph 1 as follows:

"1. A Working Party on the Protection of Personal Data is hereby set up. An independent authority with advisory power, this Working Party shall be composed of representatives of the supervisory authorities provided for in Article 26, of each Member State, and a representative of the Commission. The Working Party shall elect a chairman for a term not exceeding five years."

Referring to the element of the proposal of the Belgian delegation which would entail that the representative of the Commission would not obligatorily be the Chairman of the Working Party, a number of delegations indicated that they could fully subscribe to this change made in respect of the proposal by the Commission. Reference was in this context made to the possibility of envisaging that the Chairmanship could be taken in turn by the representatives in the Working Party.

The representative of the Commission indicated that it did not insist on permanently having the Chair of the Working Party and that it could accept to participate on an equal basis with the representatives of the supervisory authorities.

21. The Italian delegation reserved the right to put forward amendments to Article 27. In the Italian delegation's view the composition of the Working Party seemed to be unbalanced as it did not comprise representatives of the Member States themselves.

In this context the UK delegation stressed the need for the Commission also to look at the interests of the data users.

22. Note was finally taken of a query by the Irish delegation who wondered whether the reference made that the Working Party should act independently was adequate in view of the fact that a representative of the Commission took part in the Working Party whose task it was to advise the Commission.

Article 28: Tasks of the Working Party on the Protection of  
Personal Data

Paragraph 1

23. Discussing paragraph 1 and in particular (c) of this paragraph, it was agreed that when the Commission was preparing new proposals or measures to safeguard the protection of privacy it should, as a rule, always consult the Working Party on the Protection of Personal Data. As to the question of whether the Commission should also consult other committees or working parties than the Working Party set up by Article 27, note was taken of certain hesitations expressed by the representative of the Commission who indicated that this might render procedures inefficient. It was agreed however that the text of Article 28 as presently worded did not exclude any consultations of other committees or working parties.

Paragraph 2

24. Discussing the question whether the use of the term "equivalence of protection" in the fourth line of paragraph 2 was appropriate and whether it should not be substituted by a reference to the free flow of data, the representative of the Commission recalled that the purpose of the directive first of all was to ensure an equivalent level of protection in the Member States. The directive set out a number of measures to obtain this aim giving, however, in certain provisions of the directive the Member States a certain sovereignty of setting out for example more detailed rules. Because of flexibility given by the directive, the possibility of different levels of protection in the Member States existed and it was exactly because of this possibility that paragraph 2 of Article 28 had been incorporated into the proposed directive. As regards the question of free flow of data this was already covered by Article 1 of the draft Directive. In this context the

representative of the Commission drew the attention of delegations to the sixth recital of the preamble of the directive.

Paragraph 3

25. Discussing paragraph 3, a large number of delegations supported a proposal by the Irish delegation that recommendations formulated by the Working Party on the Protection of Personal Data should in all cases be transmitted to the Advisory Committee referred to in Article 30 of the draft Directive.

Responding to this proposal the representative of the Commission indicated that he could accept the principle that recommendations of the Working Party be passed on to the Advisory Committee referred to in Article 30. Making such a transmission obligatory might, however, have its drawbacks as the contents of the recommendations would not always be of interest or relevance to the Advisory Committee. In the opinion of the representative of the Commission a more flexible rule would consequently be more efficient.

Paragraph 4

26. Discussing paragraph 4 of Article 28 a number of delegations agreed with a proposal made during the meeting that the annual report to be drawn up by the Working Party be published and submitted to Parliament.

Certain other delegations did however express certain doubts as to the proposal for publishing the report arguing that such a publication might be inappropriate where for example a Member State was accused for not having a sufficient level of protection.

As to the proposal for submitting the report to Parliament, the representative of the Commission suggested that such a submission could be envisaged within the framework of the procedure set out in Article 32 of the draft Directive.

27. Responding to a suggestion made by the UK delegation not to specify too much in detail what the report of the Working Party should contain but leave it to the Working Party to highlight the points it wished, the representative of the Commission agreed to envisage a broader worded draft of paragraph 4 referring to the mandate given to the Working Party in paragraph 1 of Article 28.

28. At the end of the discussion of Articles 27 and 28 the Working Party took note of a proposal for restructuring these articles made by the Portuguese delegation. This proposal will be distributed separately.

#### Chapter VIII: Transfer of Personal data to third countries

29. From the first general discussion of Chapter VIII within the Working Party it emerged that this Chapter which for many delegations constituted a very sensitive part of the directive with great economic implications, raised problems in respect of the principles underlying the approach taken by the Commission in its proposal as well as to the practical implementation of the specific rules.
30. As regards the principle underlying the approach in the Commission proposal, it was advanced that such an approach might be considered inappropriate as it seemed to attempt to put pressure on third states to establish rules in the area of data protection which were considered satisfactory to the Member States of the EC. If this was the underlying philosophy



of Chapter VIII it would only increase the largely expressed opinion in third states that the Member States of the EC were attempting to create a European fortress.

It was also advanced that instead of the approach taken by the Commission according to which transfer to a third country only could take place if the third country ensured an adequate level of protection, one could imagine to alter the philosophy and specify that a transfer to third states was permitted unless the protection in the third state either was not adequate or did not fulfill certain criteria to be established.

31. The rules proposed by the Commission would also, in several delegations' view, not be possible to implement in practice and in this context mention was made of the difficulties which could arise, for example, in the area of bank transfers, air ticket reservations, teleshopping services, as well as the exchange of information between multinational companies and between public authorities (Interpol).

Finally it was advanced that the procedures foreseen in Article 24 would be time consuming and create difficulties for the business world which often needed to have decisions taken quickly.

32. Responding to a number of questions concerning the application of in particular paragraph 1 of Article 27, the representative of the Commission explained that when judging whether a third country had an adequate level of protection one would have to look not only at the general and sectorial laws but also take into account any regulations or codes of conduct effectively applied. In order to have as flexible a system as possible it would also be possible to limit the judgment as to whether an adequate protection existed to certain types of operations. As regards specifically a proposal by the French delegation to substitute the word "adequate" with "equivalent",

the representative of the Commission and a number of delegations felt that such an approach would be going too far and give the impression of a certain imperialistic attitude.

33. Having noted the explanation of the Commission, it was suggested that alongside the approach taken by the Commission in its proposal, alternative solutions should be examined.

One alternative approach put forward was to set out as a criterion for allowing transfer of data the consent of the data subject. If such a consent did not exist one could then turn to the approach used in Article 12 of the Council of Europe Convention as a point of departure.

Reacting to the part of the proposal made to use the consent of the data subject as a criteria, certain delegations indicated that this would not always be practicable as transfer of data was often done massively.

As regards the part of the proposal to use the approach of Article 12 paragraph 3 in the directive if consent did not exist, the representative of the Commission explained that a rule as that set out in Article 12 had been necessary in the Convention because it did not establish an equivalent protection in the Member States, parties to the Convention. By the directive such an equivalent protection would however be created.

Other criteria which could be used by Member States to prohibit a transfer was mentioned as for example:

- that a transfer would evade the purposes of the directive;

- could harm the data subject; or
- concerned sensitive data.

It was also mentioned that the application of the criteria by the Member States subsequently could be discussed within the framework of the Advisory Committee which thus could develop a certain case law in the area of transfer of data to third countries.

34. In conclusion, the Working Party agreed to reflect further on the contents of Chapter VIII and resume discussion of this Chapter at its meeting on 7/8 October. Delegations who had experience in respect of application of rules on transfer of data to other countries were requested to prepare a note on this subject to be submitted to the Council Secretariat at the latest on 19 September.

Chapter VI: Provisions specifically relating to certain sectors

Article 19

35. Discussing Article 19 a large number of delegations expressed the opinion that it should be specified that the derogation provided for in Article 19 only concerned data stored for journalistic purposes and not for example data on staff.

In the Spanish delegation's view Article 19 might be considered superfluous as the rule in Article 20 on codes of conduct could be applicable to the Press Sector.

36. Responding to a proposal by the Danish delegation that derogations other than those foreseen in Article 19 be given also to statistical data, research data and data kept in archives for historical purposes, the representative of the Commission explained that he had difficulties in accepting these derogations as the balance of interests were different than that in the Press sector where there were other remedies to secure the rights of individuals as for example the right of reply.
37. The Irish delegation expressed a preference that Article 19 specified more in detail in which ways Member States should solve the conflicting interest between the right to privacy and the rules governing freedom of information.
38. A proposal to include the Press sector under Article 3(b) and thus exclude it from the scope of the directive was not acceptable to a number of delegations, some of which already had difficulties with the Article 3(b) as presently proposed by the Commission.
39. Finally note was taken of a proposal by the UK delegation in Article 19 only to refer to the right to privacy and rules governing freedom of information in terms of concepts. The UK delegation also proposed not only to speak of "press" but also "audiovisual media" in the last line of Article 19.

#### Article 20

40. In response to a question raised by the UK delegation as to whether the drawing up of codes of conduct would avoid the establishment of sectorial directives, the representative of the Commission referred to the nineteenth recital of the proposed directive according to which the Commission will take into account codes of conduct when it considers the appropriateness of new specific measures in respect of certain sectors.

41. In response to a question as to whether a Member State which allowed codes of conduct to be established under certain conditions could maintain these conditions, the representative of the Commission explained that the directive would not restrict these possibilities but not impose them either.

42. Note was finally taken of a proposal by the Irish delegation that the encouragement of the business circles to draw up codes of conduct be left to the Working Party on personal data and that this mandate be included amongst the tasks of the Working Party in Article 28.

#### Future work

43. It was agreed that the Working Party at its next meeting on 19 and 20 September would discuss:

1. Chapters VII and X of the proposed Council Directive concerning the protection of individuals in relation to the processing of personal data.
2. The proposed Council Decision in the field of information security (doc. 7274/91).

Point 1. would be discussed on 19 September and if necessary also on 20 September, whereas point 2. in any event would only be discussed on 20 September.