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REPORT OF THE OECD/ICCP WORKING PARTY ON
TRANS BORDER DATA FLOWS
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He said that there was a general desire to see greater openness of the TBDF debate, including in symposia. At the moment there were Secretariat rules inhibiting openness within the OECD. It was up to participants to make their views on this subject known to their Permanent Delegations. There should be a report to the ICCP committee stressing the need for greater openness than had occurred in the London symposium. Delegates should report this debate to their home authorities.

7. IBI meeting and developing countries. Mr Gassmann then reported at length on relevant international conferences including meetings recently concluded in Lisbon (Council of Europe) and Rome (IBI). He said that the Secretary-General of the ITU (Mr Richard Butler) had stressed in Rome that too many issues were being imposed on the concept of TBDF resulting in a lack of precision and consequent discontent. The Chairman said that a large number of international organisations were now jumping on the 'bandwagon' of TBDF. He said that IBI was clearly unsuitable to act as co-ordinator of international efforts. I made the point that IBI had not claimed such a role but simply offered to help facilitate co-operation. The United States representatives commented favourably on the recently concluded IBI Conference in Rome. He said that surprisingly little rhetoric has been presented eg on a World Information Order. He acknowledged the fear about sovereignty. He reported the repeated statements by developing countries concerning the need for open flows. He said that the meeting had been a useful educative event. The representative of France said that the meeting had illustrated the evolution in knowledge about TBDF issues, particularly amongst developing countries and the emergence of a strong demand for access to international data banks. He suggested that the second IBI Rome meeting had evidenced a greater maturity in the debate than in the first such meeting. The representative of FRG said that it was clear that IBI wished to become a centre for co-operation in informatics in developing countries. It saw a role in the negotiation on North/South issues in informatics. He asked whether it was in the interest of OECD members for IBI to seize this role as distinct from eg the United Nations Centre on Transnational Corporation (UNCTC), ITU, GATT and UNCTAD. This view was supported by Switzerland and in part by France, although France also pointed out that the actual resolutions adopted by IBI had been modest. France pointed out that it would depend upon the initiatives taken by OECD, EEC and other partners as to whether greater international co-operation could be achieved in TBDF issues affecting many countries outside OECD. The French representative said that there was a feeling in UNCTC that OECD countries had blocked the setting up of a group of experts on TBDF issues. Yet that OECD had not taken an adequate lead in co-operation with developing countries on TBDF issues.

8. The Chairman said that he detected a feeling in the meeting that the OECD should enhance its links with developing countries, that IBI was not necessarily the best forum, although it had merely offered its good services and that it might be desirable for UNCTC to be reconsidered by OECD member countries as an appropriate forum for involvement with developing countries. He acknowledged that the issues of TBDF go well beyond trans national corporations.

STATEMENT OF GENERAL INTENT

9. 'Crossroads' document. The Chairman (Dr Peter Robinson, Canada) declared that the Working Party was at a 'crossroads' in relation to a statement of general intent. He tabled, without notice, a draft document which he had prepared and which is Annexure 2. He said that this had been prepared by him without involvement of the Secretariat. It was to be a catalyst. It sought to capture the main points in past debates. Unless some such document could be concluded, he believed that the utility of the Working Party would be brought into question.

10. Discussion of statement. There was then a lengthy discussion of the draft statement tabled by Dr Robinson. Australia had to proceed without the benefit of home instruction. The points made included the following:

- . Sweden stressed again the need to see such a statement in the context of human rights developments, including the human right to communicate;
- . France expressed concern about signing general texts, particularly as negotiations for more precise international agreements were about to commence in UNCTAD and GATT. It was suggested that general texts should be approached with restraint at this time;
- . the United Kingdom generally supported the idea of a statement and the need to get a momentum which would emphasise OECD concerns with the value of free flows of data;
- . the United States supported the notion of a statement of intent;
- . Australia mentioned the importance of the decision on how to handle the document produced without notice. Clearly it could not be settled at the present meeting without the opportunity of home consultation. Yet if a 'drafting mode' was to be adopted, very many suggestions would be made without necessarily addressing the basic issue of methodology and the concepts in the statement;

- . France took up this point, declaring its previously stated view that there is an appropriate differentiation in policies between various kinds of data flows. France said that it was necessary to divide the subject up as had been done at the IBI meeting. It was also essential to consider methodology and to avoid starting an exercise which the Working Party was not authorised to undertake, without considering the basic purpose and structure of the document;
- . Switzerland made the same point, emphasising that the survival of the committee did not depend upon the production of a declaration or statement of general intent. The Swiss representative said that there were more than enough issues in TBDF to assure the continuance of the committee and there may be necessity to divide data flows into various categories in which a general statement in general terms would be inappropriate;
- . the United States and the United Kingdom both asserted that the Chairman's paper was a good 'starting point' and would help to focus the debate on broad issues of OECD consensus without getting into too much fine detail such as concerning 'harmonisation' of laws (see page 2 first expression of intention);
- . Norway also supported the Chairman's effort, whilst making a number of textual amendments;
- . Canada stressed that the document had not received official approval in Canada and was a proposal of the Chairman. However, it emphasised that this was a step in the right direction, a point taken up by FGR which urged that the Secretariat be given a mandate to develop the document;
- . Japan said that it had not received instructions on the document and so was at a disadvantage;
- . Australia proposed that if such a document was to be produced it should contain much more preambular explanatory information on changes in technology and OECD initiatives, so that non expert readers could understand what was being aimed at. Furthermore, each and every paragraph would have to be carefully considered.

11. The issue of methodology. At this stage in the meeting there was a clear division between (put broadly):

- . the anglophone countries with their pragmatic administrative traditions, which generally welcomed the Chairman's initiative in order to focus the debate and saw it as a useful catalyst for further discussion; and
- . the francophone countries with their more conceptual approach to problems, which questioned the methodology adopted, the attempt to find a broad statement for what were perceived as different categories of data flow and the perceived undue concern to produce something.

12. Mr R Beca (France) said that in the view of France it was much more important to identify real problems posed by TBDF ie by empirical research and analysis rather than by theory and general statements of vague intent which might be applicable in some circumstances but not others. He said that France insisted on different categories of data flows and could require different approaches to:

- . information exchange intra multinational corporations;
- . flows of commercial information;
- . flows of information about identifiable persons.

13. Australia then suggested that it might be possible to 'marry' the proposed document and the concerns of France and others by inserting preliminary words to the effect that particular problems would need particular approaches to TBDF issues but that it was useful at this stage for OECD to state general propositions of general application only. This approach was supported by the representatives of the FGR, Sweden and Norway.

14. Japan then intervened to state that its preliminary view was that the Chairman's document was a 'good starting point'. However, it should be regarded simply as a preliminary draft. Concern was expressed about the reference to 'institutional changes' which he considered beyond the remit of the Working Party.

15. New Secretariat document. After further discussions, it was proposed that the Secretariat should, starting from the Chairman's draft statement, prepare another document for distribution if possible by the end of July 1984, to allow time for consultation. The Chairman invited written comments on the draft. He said that there would be a need to try to reconcile the two approaches that had been urged:

- . that of a broad general statement (Chairman's document); and
- . that of developing particular guidelines on particular topics (France, Switzerland, Belgium).

The majority of participants appeared to favour the view that an 'update' of the Chairman's draft would be useful for consideration at the next meeting of the Working Party, probably on 12 October 1984. In response to a Belgian intervention, the Chairman acknowledged that it was difficult (in the light of differing policies in member countries to the public PTT monopoly issue) to come up with a statement of intention relating to the provision of a 'wide variety of different providers of information and information services'. Some European member countries expressed concern that expressing this might be perceived as support for privatisation of PTT which was contrary to their government policy.

16. France returned to the fray asserting that this concern simply illustrated the lack of clarity about the purpose of the document which, valid for some data flows, was invalid for others. The debate was then adjourned to the next meeting of the Working Party. The Chairman acknowledged the concerns expressed by France and other delegations and the need to soften the language to qualify support for 'free flows' and possibly to distinguish between different kinds of data flows. The Chairman said that it would not be necessary completely to 'rewrite' the document. However, the comments received and others to be received would be taken into account in the preparation of the next version by the Secretariat.

TRADE IN INFORMATION SERVICES

17. Secretariat research. The Working Party then turned to receiving reports by Secretariat officers (Mrs Reid and Mr Gonnanch) on the project investigating trade in ICC services. The methodology of the project was described. The aim was to secure information from the leading information service firms for the purpose of developing a questionnaire that could be administered to such firms in all OECD countries. Contact had been made with about 20 large firms. A number of points had been made including:

- . some service firms were not happy about supplying information to trade groups for fear of loss of confidentiality to competitors. They had less concern in supplying such information to OECD; and
- . in the survey done through BIAC on TBDF, BIAC gave guarantees of confidentiality of data. However, BIAC does not have the same contact with service companies and therefore it is necessary to go beyond BIAC for the presently proposed survey.

18. National government involvement. The researchers then asked whether national governments would be willing to administer the survey. Mr Gonnanch said that it would amount to six or seven pages. The extent of administrative involvement would be for governments in member countries to ask service firms in their jurisdiction to take the questions seriously and to supply the OECD with as much information as possible. A number of representatives responded to this briefing:

- . Switzerland urged consideration of a sectoral rather than an overall approach to trade in information services;
- . the United States stressed the importance of the methodology of the survey and that the results, as in Mr Ergas' earlier efforts, would not be scientifically accurate; but would be a good basis of dealing with valuable information;

- . France said that it would not be workable in France to ask a particular Ministry to distribute the survey. The Ministry of Industry already conducted a mandatory survey of its own which imposes a heavy workload. An additional and separate but different survey from the Government of France would be considered unreasonable;
- . Norway stressed the importance of the Working Party keeping within its field of competence and not cutting across work of the OECD Trade Committee;
- . the United Kingdom expressed concern about involvement of national governments in more work. It preferred the survey to be conducted directly by the OECD;
- . Sweden urged that BIAC should be again involved;
- . Mr Gassmann said that normally the OECD operates through member countries. Concern would be expressed if the OECD operated directly that it was utilising public funds to do things that should be done by private research organisations. He also asked whether there should be co-operation with UNCTC;
- . Switzerland expressed doubts about co-operation with UNCTC;
- . Mr Gassmann said that in his view it was important to have more formal links with ITU and not to duplicate work being done by CCITT in this area;
- . Canada expressed itself strongly in favour of the proposed OECD survey;

19. Conclusions : Secretariat Paper. The Chairman then said that the Secretariat would come forward in October 1984 at the next meeting of the Working Party with a more precise document proposing specific work that would be done in the survey. The Secretariat paper should :

- . avoid duplication, particularly in respect of any investigations being done by international telecommunications bodies;
- . express the proposed survey in a more precise and accurate way.

LEGAL ISSUES

20. Secretariat overview. Mr Gassmann then gave an overview of concerns about legal issues and TBDF. He mentioned:

- . the meeting in Canberra, Australia, on 2-6 April 1984 of a group of experts to discuss the problems of software copyright;
- . the work of UNCITRAL with a series of six reports on various issues;
- . the work of the Economic Commission for Europe;
- . the conclusions of the recent IBI meeting in Rome;
- . developing concern about EDP fraud.

21. Delegate interventions. The Canadian delegation then tabled a proposal for a group of experts on legal issues raised by TBDF. This had been made available shortly before the meeting. Australia, along with the other participants, did not have time to get instructions on the Canadian document which is Annexure 3. Some division of view about the way in which the Working Party should handle legal issues then emerged in delegate interventions:

- . Switzerland conceded that the legal problems were 'diabolically complex'. It was said that one of the fears about involving lawyers was that the law might be misused as a source of economic protectionism, ostensibly for ostensibly legal reasons;
- . Australia stressed the importance of linking legal work in the OECD with work being done elsewhere eg in ITU. The need also to provide institutional means for tackling legal questions having an international dimension was also emphasised;
- . Ms M Briat (Secretariat) reported on Document 84.16 concerning conflicts of laws. She said that the aim was to suggest a procedure to try to resolve difficulties about conflict of laws. He stressed that in the OECD legal questions could only be examined to the extent that they were raised by trans national contacts. The definition of TBDF itself caused problems. Earlier work on privacy was comparatively simple when compared with the difficult issues of theory and co-operative practice would be raised in conflicts of laws, copyright, fraud etc;
- . Norway said that it was desirable to develop rules that would facilitate TBDF;
- . Canada suggested the creation of a Working Group that would look at specific issues just as the Expert Group on the Privacy Guidelines had done. Such issues could involve international criminal law, intellectual property law as well as practical subjects such as the pursuit of interjurisdictional assistance;
- . Sweden expressed doubts about the need for general machinery or co-ordinated consultation on legal issues. It suggested that it would be hard to write down general principles of private international law in different areas such as family law and trade law;
- . Mr Gassmann referred to Part III of the OECD Privacy Guidelines dealing with rules of international application. He said that these had already contemplated further work. It had been assumed that work would be done by the Hague Conference but this has not been borne out. New 'rules of the road' were needed eg in conflicts of laws. He considered it would be a 'good investment in time and money' if the OECD could prevent future problems, including litigation and establish machinery for carrying forward the work commenced with the Privacy Guidelines.

- . the United States said that it was agreeable so long as it was not implied that there be a permanent group. The issues were complex and often different. Any consultative group established to assist the Secretariat should focus on practical problems. One issue that was raised was whether government representatives were appropriate to develop 'rules of the road' in what were essentially private legal matters could more effectively be dealt with by the private legal profession and the judiciary in each country;
- . Sweden clarified its position. It was not opposed to machinery for the study of practical problems. It was against a merely theoretical study of reported general legal principles. This position was supported by Denmark;
- . Norway said that it never had in mind a permanent general Expert Group on Legal Questions. Instead it had in mind an ad hoc group working under the Working Party to assist the Secretariat and the Working Party. Professor Seip (Norway) mentioned Kirby J (Australia), Professor Simitis (FGR), Professor Bing (Norway) and Ms Hummer (USA) as possible members of this 'small group'. It would, in the words of Mr Martin Lof, of the need for a 'nucleus of key persons'.

22. Research work. At this point Australia indicated that there seemed little point in considering the establishment of such a 'nucleus' without:

- . definition of the areas in which a nucleus would be of assistance to the Secretariat;
- . consideration of the resources that were available from within the Secretariat particularly, to fund any such work; and
- . consideration of the necessity to appoint a key legal researcher to work on defined projects as had been done with Dr Peter Seipel in the Expert Group on Privacy.

23. Ad hoc 'pragmatic' group. The debate on this topic then resolved into an apparent consensus that:

- . there should not be established a formal sub-committee or expert committee with a broad mandate on legal issues and with a regular program of meetings; but
- . there should nonetheless be available to the Secretariat a 'non-permanent pragmatic group' of legal experts designed to assist the Secretariat where it felt it needed assistance [as expressed by FGR]. Sweden said that it did not have objection to such an ad hoc group, though its work would have to be co-ordinated with work in other sectors such as the follow-up of the Privacy Guidelines and consideration of legal issues such as conflicts of laws, intellectual property etc.

24. The Chairman concluded that the Working Party was averse to the establishment of a permanent group of legal experts. That it wished to ensure that if any group of legal experts was set up, as proposed in the Canadian paper, it should deal with pragmatic rather than theoretical questions. Specifically, it should not be launched into a broad theoretical study of general legal questions ie the identification of possible problems and answers before these had been identified as real problems in practice. Nonetheless, the Working Party considered that if any collection of experts was established, however it was established it should have a finite life. Dr Robinson declared that there was no inherent difference between the anxiety expressed on the one hand by Sweden and other countries and the proposal of Canada supported by Norway and other countries. It would be possible to establish a small group of legal experts, yet at the same time avoid moving into areas that were already well defined and the subject of work within the OECD (such as copyright, computer crime etc). The Chairman suggested that at this stage there should be no final agreement on the establishment of an expert or other group as such. Nevertheless it was agreed that there should be ongoing consideration of the development of terms of reference and a list of specific topics that should be dealt with. The Secretariat was therefore to produce a paper but with the help of a small group of legal experts it may call to assist it informally.

25. The delegations present appeared to agree to this summation, although a number of them (Japan, Switzerland and Belgium) insisted on the need to consult home governments and to consider the matter again in October. The Chairman acknowledged that the Canadian proposal had come too late for study in home capitals. He said that the Secretariat should propose the areas that might be investigated and these could be discussed in October at the meeting of the Working Party. This would not preclude, if the Secretary wished it, calling together a small group to help the Secretariat. This would be the responsibility of the Secretariat. It would be left to the Secretariat to consider whether this would be the best way to proceed. Mr Gassmann agreed to this proposal. He said that what the Secretariat needed was a group of appropriate experts who would be 'friends', to assist Secretariat officers. I again emphasised the value of the work done by Dr Seipel and its critical importance in the privacy exercise, pointing the need for at least some expertise which was:

- . familiar with the common law and civil law legal and administrative traditions;
- . familiar with the new information technology; and
- . able to draft precisely in the English and French languages.

Mr Gassmann said that any assistance sought would be 'very informal'. There would 'perhaps be one meeting'. But he said that it may be possible to proceed by way of correspondence or by way of a telephone conference. The Chairman said that the Secretariat would produce a document for consideration by the Working Party in October. In the meantime it would invoke informal means to obtain assistance on the identification and pursuit of practical legal issues raised by TBDF.

OTHER BUSINESS

26. Developing countries and ITU. Australia raised again the importance of pursuing the earlier expressed concern about OECD relationships with developing countries in mutual interests about TBDF and informatics. Mr Gassmann acknowledged that a number of 'newly industrialised' developing countries had strong interests in TBDF, notably Hong Kong, Singapore, Thailand, South Korea and Brazil. He referred to the role of the ITU. I stressed again the need for the OECD to establish firmer links with the ITU, even possibly the consideration of a special provision for participation by ITU as an observer in some OECD meetings relevant to TBDF questions. Mr Gassmann said that OECD should seek observer status in CCITT. The Chairman reverted to the reluctance of OECD countries to co-operate with UNCTC and suggested that this should be reconsidered by OECD members, at least to the extent of informal co-operation in areas of mutual interest.

27. OECD data. Switzerland drew attention to a circular which had indicated that a Canadian firm had access to the OECD information data bank. According to the circular, dated 14 June 1984, free access to OECD data was now available through this Canadian firm. The Swiss representative raised the issues of privacy, confidentiality and commercial advantage which he suggested should be studied by participants.

28. EEC paper. The representative of the EEC referred to a paper by Emile Peters, 'Summary Report Data Security and Confidentiality' (reference TFTI/2225/84/EN). He said that this paper would be available from the EEC Secretariat on request.

NEXT MEETING

29. The date of the next meeting of the Working Party on TBDF is to be finally determined, but it was suggested that it should be 12 October 1984. The meeting concluded with the usual words of appreciation for the initiatives of the Chairman. In respect of the proposed statement of intent and the proposed group of legal experts, there is no doubt that the Canadian delegation and the Chairman took leading initiatives in this meeting.

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Encl: Canadian Adherence to Privacy Guidelines
Chairman's draft Statement of General Intent
Canadian proposal on Legal Experts on TBDF Issues.

M D KIRBY
20 July 1984