OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 14 and 15 April 1993
No. prev. doc.: 5594/93 ECO 64
No. Conv prop.: 9400/92 ECO 221 COM(92) 422 final SYN 287
Subject: Amended proposal for a Council Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data

1. At its meeting on 14 and 15 April 1993, the Working Party on Economic Questions (Data Protection) continued its first reading of the above amended proposal for a Directive.

The outcome of the discussions on Articles 17(4) and (5) and 17(a) (see 5594/93, pp. 11 and 12), 26 and 27 is set out in the Annex.
"17(4) The obligations referred to in paragraphs 1, 2 and 3 shall also be incumbent on the processor."

"17(5) Any person acting under the authority of the controller or of the processor, including the controller himself, who has access to personal data may not disclose it to third parties without the controller's agreement, unless he is required to do so under national or Community law.

The United Kingdom delegation wanted to replace the text in square brackets by the following: "The processor and any person who, acting under the authority of the controller or the processor", only disclose it to third parties on the controller's instructions.

The French delegation wanted to replace the words in square brackets by the words: "only disclose it to third parties on the controller's instructions".

Several delegations wanted to provide for the written agreement of the controller.

The Italian delegation wanted to delete the part of the sentence in square brackets. This was opposed by the Commission representative.

Several delegations wanted to accommodate the text of paragraph 5 in a separate Article on confidentiality. This was accepted by the Commission.

The Luxembourg delegation wanted to redraft paragraphs 4 and 5 and said that it was prepared to submit a new wording for the two paragraphs.
ARTICLE 17a
PROCESSING ON BEHALF OF THE CONTROLLER

1. Member States shall provide that the controller [must] (1), where processing is carried out on his behalf, [ensure that] (1) security measures are taken and choose a processor who provides sufficient guarantees in that respect (2).

2. When putting into practice the processing operations laid down in the contract or legal act which binds him to the controller, the processor shall carry out instructions he receives from the controller.

3. The contract or legal act referred to in paragraph 2 shall be in writing. (3)

(1) The Irish delegation wanted to replace the words "must ... ensure that" by "should ... take reasonable steps to ensure that".
(2) The Italian delegation suggested amending paragraph 1 as follows: 1. Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor who provides sufficient guarantees with respect to security measures and ensure that those measures are taken.
(3) The Luxembourg delegation undertook to submit a new text for this Article.
CHAPTER IV
TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

ARTICLE 26

Principles

1. Member States shall provide that the transfer, [whether temporary or permanent] (1), to a third country [of personal data] (2) which are undergoing processing [or which have been collected with a view to processing] (3) may take place only if the third country in question ensures an [adequate] (4) level of protection [in the sector concerned by the proposed transfer]. (5)

(1) Several delegations wanted to delete the words in square brackets. The Commission representative agreed.

(2) The Danish and Irish delegations thought that personal data should not include manual data.

(3) Several delegations wanted to delete the words in square brackets. This was accepted by the Commission representative.

(4) The Belgian and Italian delegations wanted to replace the word "adequate" by "equivalent", in accordance with Article 12 of Council of Europe Convention no. 108. The Commission representative said that Article 12 of Convention no. 108 referred to the transfer of data between contracting States whereas here transfers between Member States and third countries were involved.

(5) Insertion requested by the French delegation. Opposed by the Belgian, Italian, Luxembourg and Netherlands delegations and by the Commission representative.
ARTICLE 26 (1) (continued)

(1) Notwithstanding the first subparagraph, Member States shall provide that a transfer to a third country which does not ensure an adequate level of protection may take place on condition that:

- subject, where appropriate, to Article 8[(2)(a)] (4), the data subject has consented to the [proposed transfer in order to take steps preliminary to entering into a contract] (3);

- the transfer is necessary for the performance of a contract between the data subject and the controller, [on condition that the data subject has been informed] (5) [or could reasonably be expected to be aware] (6) of the fact that it is or might be proposed to transfer the data to a third country which does not ensure an adequate (7) level of protection;

(1) General reservation by the German delegation on the derogations provided for in this subparagraph.
(2) See footnote 4 re first subparagraph.
(4) Several delegations wanted the reference in square brackets to be deleted. The Presidency suggested looking into the possibility.
(3) The German, Danish, French and Netherlands delegations wanted to delete the words in square brackets. This was rejected by the Commission representative.
The Luxembourg delegation wanted to incorporate these words in the second indent. The Commission representative could accept that solution if the words were deleted in the first indent.
(5) The German delegation said that it was against the obligation to inform the data subject, given the difficulties for financial transactions. A majority of delegations were in favour of the obligation.
(6) Insertion requested by the Netherlands delegation. Supported by the United Kingdom delegation.
(7) The German delegation wanted to replace the text of the second indent by the following: "the transfer is necessary for the performance of a contract or in order to take steps preliminary to a contract being entered into between the data subject and the controller or between the controller and a third party."
The Belgian, Spanish, French and Luxembourg delegations and the Commission representative said they were opposed to this formula.
The Danish, Irish, Netherlands, Portuguese and United Kingdom delegations were in favour.
- the transfer is necessary [on important public interest grounds] (1) (2); or

- the transfer is necessary in order to protect the vital interests of the data subject.

- (3)

- (4)

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(1) The Portuguese delegation wanted the words in square brackets to be replaced by the words "under national legal provisions".

(2) The Danish and Italian delegations asked whether important public interest grounds also included bilateral and international agreements, and the Presidency said that it thought that the question should be examined by the Council Legal Service.

(3) The French delegation wanted to add a fifth indent which would read as follows:

"The controller shall provide the requisite guarantees prior to the data transfer. These guarantees shall be defined by categories of data transfer, in accordance with the procedure laid down in Article 34(2)."

(4) The Belgian delegation wanted to add the following subparagraph to paragraph 1:

"In such cases the processing must be confined to the minimum data essential for the purposes of the processing operation."
ARTICLE 26 (1) (continued)

2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of the circumstances surrounding a data transfer operation or set of data transfer operations; particular account shall be taken of the nature of the data, the purpose or purposes and duration of the proposed processing operation or operations, the country of final destination, both general and sectoral, in force in the third country in question and the professional rules [and security measures] which are complied with in that country.

3. Member States shall inform the Commission of cases where they consider that a third country does not ensure an adequate level of protection. [8] (10)

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(1) See footnote 4 re first subparagraph of paragraph 1.
(2) At the request of several delegations, the Commission representative stated that it was for Member States to decide which national authority was responsible for assessing the level of protection of a third country.
(3) Insertion accepted by the Working Party and by the Commission representative at the request of the Italian delegation.
(4) Amendment accepted by the Working Party and the Commission representative.
(5) Insertion requested by the French delegation. Accepted by the Working Party and by the Commission representative.
(6) Several delegations wanted this provision to be made optional.
(7) The Danish, French and Italian delegations wanted to provide for a role for the advisory committee in the framework of the committee procedure. The Working Party did not discuss committee procedure aspects.
(8) The Portuguese delegation, supported by the Belgian and Danish delegations, suggested stipulating that the Commission should inform Member States of countries which did not have an adequate level of protection.
(9) The Netherlands delegation thought that it would be desirable to insert a clause stating that there would be no obligation to inform if the Commission was aware that a particular country failed to ensure an adequate level of protection.
(10) Given delegations' comments, the Commission representative suggested the following wording:
"The Member States and the Commission shall keep each other mutually informed [within the advisory committee] of cases where they consider that third countries do not guarantee an adequate level of protection within the meaning of paragraph 2."
ARTICLE 26 (1) (continued)

4. [Where the Commission finds] (1), either on the basis of information supplied by Member States or on the basis of other information, that a third country does not ensure an adequate level of protection [and that the resulting situation is likely to harm the interests of the [Community] (2) or of a Member State] (3), it [may] (4) enter into negotiations (5) with a view to remedying the situation (6).

5. (7) The Commission may decide, in accordance with the procedure laid down in Article 34(2), that a third country ensures [or does not ensure] (8) an adequate level of protection [by reason of the international commitments it has entered into or of its domestic law.] (9)

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(1) At the request of the Belgian delegation, the Commission representative stated that the Commission would arrive at its findings on the basis of the criteria mentioned in paragraph 2.
(2) The Belgian delegation wanted it made clear that this meant the interests of Community citizens.
(3) The Belgian delegation wanted the part of the sentence in square brackets to be deleted. The Commission representative entered a scrutiny reservation on this point.
(4) The Belgian delegation wanted "may" to be replaced by "must". The Commission representative thought the Commission should be left some room for manoeuvre.
(5) Several delegations requested the opinion of the Council Legal Service on the role of Member States should the Commission enter into negotiations on the basis of Article 113 of the Treaty. In this context, the Netherlands delegation said that it favoured a different procedure from that laid down in Article 113.
(6) The question was asked what effects a Commission decision finding that a third country did not ensure an adequate level of protection would have vis-à-vis all the Member States.
(7) The Italian delegation wanted this provision to be preceded by the following words: "Without prejudice to the decision of a national judicial authority ...". The Commission representative did not see any need for such an insertion, given that any Commission decision could be the subject of an appeal before the EC Court of Justice.
(8) Insertion requested by the Belgian delegation with the support of the German and Portuguese delegations.
(9) The Working Party and the Commission representative agreed to delete the text in square brackets. The Commission representative undertook to submit a new text incorporating delegations' comments.
ARTICLE 26 (1) (continued)

6. (1) Measures taken pursuant to this Article shall be in keeping with the obligations incumbent on the Community by virtue of international agreements, both bilateral and multilateral, governing the protection of persons with regard to the automatic processing of personal data.

(1) Examination of this paragraph was deferred pending an opinion of the Council Legal Service on the need for such a provision.
ARTICLE 27
PARTICULAR MEASURES

1. Subject to the second subparagraph of Article 26(1), a Member State may authorize a transfer or category of transfers of personal data to a third country which does not ensure an adequate level of protection [where the controller adduces sufficient justification in particular in the form of appropriate contractual provisions guaranteeing, especially, the effective exercise of data subjects’ rights] [where the controller nonetheless adduces sufficient guarantees regarding the protection of the privacy and basic freedoms and rights of the data subjects and the exercise of those rights, in particular in the form of appropriate contractual clauses] \(^{(1)}\).

2. \(^{(2)}\) The Member State shall inform the Commission and the other Member States in good time of its proposal to grant authorization.

3. If a Member State or the Commission objects before the authorization takes effect, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 34(2).

3a Under the procedure defined in Article 34(2), the Commission may find that certain standard contractual clauses offer sufficient guarantees as referred to in paragraph 1. Paragraphs 2 and 3 shall then not apply to the authorizations which Member States grant on that basis. \(^{(3)}\)

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\(^{(1)}\) Wording suggested by the Belgian delegation. Favourably received by several delegations and by the Commission representative.

\(^{(2)}\) While acknowledging the need for the prior authorization laid down in paragraph 1 of this Article, several delegations (B/DK/IRL/NL/UK) regarded the procedure in paragraphs 2 and 3 as much too cumbersome. They consequently requested the deletion of those paragraphs, in which case the Netherlands delegation undertook to submit a revised version of paragraph 1 fixing more precise criteria on the granting of the authorization. Should paragraphs 2 and 3 not be deleted, the German delegation wanted them to specify deadlines.

\(^{(3)}\) Proposal by the Belgian delegation.
ADDENDUM TO THE OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
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Delegations will find attached a proposal from the Luxembourg delegation on a new wording of Article 17 of the above proposal for a Directive, as announced by that delegation at the Working Party meeting on 14 and 15 April 1993 (see footnote 6, page 2 to 6032/93).
CHAPTER II
GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA
SECTION VII
SECURITY OF PROCESSING

Article 17

Confidentiality of processing

Any person acting under the authority of the controller or of the processor, including the controller himself, who has access to personal data must not disclose it to a third party except on instructions from the controller, unless he is required to do so under national or Community law.

Article 17a

Security of processing

1.

2.

3.

4. The obligations referred to in paragraphs 1, 2 and 3 shall also be incumbent on the processor.

4. Member States shall provide that the controller must, where processing is carried out on his behalf, choose a processor who provides sufficient guarantees in respect of the technical security measures governing the processing to be carried out, and ensure compliance with those measures.
5. Any person acting under the authority of the controller or of the processor, including the controller himself, who has access to personal data may not disclose it to third parties without the controller's agreement, unless he is required to do so under national or Community law.

5. The carrying out of processing on the controller's behalf must be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:
   - the processor shall act only on instructions from the controller;
   - the obligations set out in paragraphs 1, 2 and 3 shall also be incumbent on the processor.

6. The contract or legal act referred to in paragraph 5 shall be in writing.

Article 17a
Processing on behalf of the controller

1. Member States shall provide that the controller must, where processing is carried out on his behalf, ensure that security measures are taken and choose a processor who provides sufficient guarantees in that respect.

2. When putting into practice the processing operations laid down in the contract or legal act which binds him to the controller, the processor shall carry out instructions he receives from the controller.

3. The contract or legal act referred to in paragraph 2 shall be in writing.