OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 6 May 1993

No. prev. doc.: 6032/93 ECO 87
No. Cion. 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

At its meeting on 6 May 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 28, 29 and 30 is set out in the Annex.
CHAPTER V

CODES OF CONDUCT

ARTICLE 28 - National codes

1. Member States may provide that [codes of conduct] (1) drawn up by [trade associations] (2) may make additional provisions for the special features of particular sectors, [subject to] (3) the national measures taken under this Directive. (4)

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(1) It was pointed out that the codes of conduct were not binding either on third parties or, in the event of litigation, on judges, though they could give the latter certain indications. A large majority of the Working Party was able to accept this principle.

(2) The Irish delegation, backed by other delegations, wanted to broaden this reference, particularly in the English version (trade associations). It suggested "trade associations and other categories of data controllers". In the same context, the French delegation suggested "trade and association circles". However, a majority of delegations expressed doubts as to whether the public sector also needed to be covered.

The Irish delegation also thought that taking the initiative regarding codes of conduct was a matter for the supervisory authority rather than for trade associations. It therefore suggested the following wording: "Member States shall provide that the national supervision authority shall encourage trade associations and other categories of data controllers to prepare codes..."

(3) The Commission representative agreed to a request by the German delegation which does not affect the English version of the text.

(4) The Belgian delegation proposed deleting paragraphs 2, 3 and 4 of the Article and replacing paragraph 1 with the following words:

"Member States may provide that codes of conduct may make additional provision for the special features of particular sectors subject to the national provisions taken under this Directive.

Member States shall also determine how binding these codes are to be".

This text met with a favourable reception on the part of the Spanish, Italian and Luxembourg delegations. It was opposed by the Commission representative, who emphasized the legal certainty resulting from the opinion of the supervisory authority.
ARTICLE 28 (continued)

2. The draft codes [shall] [may be] (1) [reviewed by the national supervisory authority] (2), which shall ascertain [whether or not they are justified and the representativeness of the organizations] (3) which prepared them. The authority [shall seek] (4) the views [of data subjects] (5) or their representatives.

(1) At the request of the German, Danish and United Kingdom delegations, the Commission representative agreed to have the provision drafted in such a way that it was optional for Member States and to replace the words "adapting ... to" in the 27th recital (6th line) with the words "spelling out".

The French delegation entered a reservation on the optional nature of this provision, taking the view that for reasons of harmonization, and because of the optional nature of paragraph 1 of the Article, draft codes must always be examined by national supervisory authorities.

(2) Several delegations thought that the supervisory authority should also be able to amend the draft codes. This was opposed by the Commission representative on the grounds that the professional organizations were responsible for the codes and that if they were amended they might not be applied.

Instead of an examination by the supervisory authority, the Irish and United Kingdom delegations wanted provision for a consultation procedure between the authority and the trade associations.

(3) The Portuguese delegation wanted provision for examining not only whether draft codes were justified and the representativeness of the organizations, but also their desirability. The Commission representative opposed this. The Working Party and the Commission representative agreed, on the other hand, to provide for an examination of the legality of the codes of conduct, particularly in relation to national measures taken under this Directive.

(4) The Irish delegation wanted these words to be replaced by "may, as appropriate, seek". The Commission representative emphasized that the text was already flexible enough in providing for the consultation of data subjects, in particular consumer organizations.

(5) The Netherlands delegation wanted to replace the term "data subjects" with "any persons interested in the codes of conduct".
ARTICLE 28 (continued)

3. Member States [shall ensure] (1) the [official publication] (2) of codes which [have been the subject of a [favourable opinion] (3) on the part] (4) of the supervisory authority.

4. Any extension or amendment of the codes shall be subject to identical procedures.

(1) Several delegations wanted to make this provision optional. The Commission representative opposed any such move on the grounds that publication had to be compulsory in the interests of transparency.

(2) Several delegations wanted to leave Member States free to choose the form of publication. The Commission representative accepted that codes should be published "in an appropriate manner".

(3) Several delegations wanted the consequences of a favourable or unfavourable opinion to be spelled out.

(4) The Irish delegation wanted to replace the words "have been the subject of a favourable opinion on the part of" by "have been approved by". This was opposed by the Commission representative and several delegations, given that approval could be interpreted as making the code of conduct binding.
ARTICLE 29

Community codes

1. Member States and the Commission shall encourage [the trade associations concerned] (¹) to participate in drawing up Community codes of conduct [intended to contribute to the proper application of this Directive] (²) in the light of the specific characteristics of each sector.

2. The Commission may, for the purposes of information, publish codes of conduct in the Official Journal of the European Communities, together with the opinion of the Working Party provided for in Article 31 on the content of the codes and the representativeness at Community level of the organizations which prepared them. The Working Party [shall seek] (³) the views of data subjects or their representatives. (⁴)

(¹) See Article 28(1) footnote 2.
(²) The Netherlands delegation, supported by other delegations, thought that the Community codes of conduct should contribute to the proper application of national legislation enacted under this Directive. The Commission representative agreed.
(³) The Irish delegation wanted to make this provision optional (see Article 28(2), footnote 4).
(⁴) It was agreed that the text of Article 29 should be aligned on that of Article 28.
CHAPTER VI

SUPERVISORY AUTHORITY AND WORKING PARTY ON THE
PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

ARTICLE 30

Supervisory authority

1. Each Member State shall designate and [independent public authority] (1) to supervise the protection of personal data. The authority shall be responsible for monitoring the application of the national provisions adopted pursuant to this Directive and for performing all the functions entrusted to it by this Directive. Each Member State may designate more than one supervisory authority.

2. Each supervisory authority shall have:

- investigative powers including the right of access to data forming the subject-matter of processing operations covered by this Directive and the right to collect all the information necessary for the performance of its supervisory duties;

- effective powers of intervention (2) such as ordering the blocking or erasure of data, a temporary or definitive ban on processing or the destruction of data material, or warning the controller;

- the power to bring an action before the courts where it finds that the national provisions implementing this Directive have been infringed.

(1) Reservation by the German delegation on the words "independent public authority".
(2) Reservation by the German delegation regarding the supervisory authority's actual powers of intervention, given that such powers would raise constitutional problems in Germany. The German delegation undertook to submit a document containing a detailed analysis of those constitutional problems for the Working Party to examine at a forthcoming meeting before looking at the wording proposed by the Commission.