NOTE

from: German delegation

No. prev. doc.: 6477/93
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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

Delegations will find attached a note from the German delegation concerning Article 30 of the 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 (see footnote 2 on page 6 of 6477/93).
Note from the German delegation

on the protection of individuals with regard to the processing of
personal data and on the free movement of such data

1. The need for a public authority

Under paragraph 1 each Member State shall designate an independent public authority
to supervise the protection of personal data.

In addition to the public supervisory authorities for data protection, the law of the
Federal Republic of Germany recognizes other public bodies to which the rights of the
public monitoring institutions have been transferred. The bodies in question are the
data protection officials of broadcasting corporations and religious associations
established under public law.

However, such bodies are designated by the relevant institution rather than appointed
by the Member States. They are not government agencies but institutions set up on
the basis of legal requirements under public law.

To bring such institutions within the scope of Article 30, we suggest choosing the term
"public body" rather than "public authority". This phraseology also corresponds to the original French version of the draft Directive which uses the term "publique". In addition the term "designate" should be replaced by "provide for".

In the German text the term "Gewährleistung" ("supervise") should be replaced by "Kontrolle" ("monitor") since supervising data protection is the task of the processor himself. All the supervisory authority can do is monitor compliance with data protection regulations. This terminology also corresponds to the previous version of the draft Directive (first sentence of Article 26(1)).

II. The requirement of independence and the transfer of powers of intervention

Under Article 30(1) of the draft, the monitoring body is to have independent status as well as having sovereign powers of intervention.

Such an arrangement is not possible under German constitutional law.

Under German data protection legislation there are independent supervisory authorities which monitor the public sector and which do not take instructions from any higher authority (Federal or Land data protection officials). Such officials have the right to voice objections but no powers to intervene. Objections are communicated to the entity being monitored or to a higher body. If no remedy is forthcoming the matter may be brought before Parliament.
Monitoring of the private sector, on the other hand, is carried out by supervisory authorities integrated within the hierarchical administrative structure of the Länder. In other words, such bodies can be given instructions by higher authorities. Since the person in charge of the authority (the Minister) is accountable to Parliament for any action taken, such supervisory authorities are able to take sovereign measures.

Under German law only bodies which are ultimately accountable to Parliament can undertake sovereign interventions in individuals' basic rights. Such action cannot be taken by institutions which are independent and therefore not bound by instructions. In other words, the terms "independent" and "empowered to act" describe characteristics which are incompatible under German law.

In Article 30(1) of the draft we therefore suggest stipulating merely that the supervisory authorities shall be independent of the body to be monitored.

The provision in paragraph 2 should furthermore take account of the possibilities open to independent supervisory authorities under German law and recognize the right to object as a measure equivalent to powers of intervention provided that the supervisory authority is empowered to bring the matter before Parliament in the event of non-compliance. This should also be made clear in the explanatory memorandum.

III. Proposal:

Article 30 (Supervisory authority)
1. Member States shall provide for one or more public bodies to be responsible for monitoring the protection of personal data. Such bodies shall be independent of the entity to be monitored.

Such bodies shall be responsible for monitoring the application of the national provisions adopted pursuant to this Directive and for performing all the functions entrusted to them by this Directive.

2. Each supervisory authority shall have:

- investigative powers, including the right of access to data forming the subject of processing operations covered by this Directive and to collect all the information necessary for the performance of its supervisory duties and
- effective powers of intervention, such as the power to order the blocking or erasure of data, a temporary or definitive ban on processing or the destruction of data material or
- the right to lodge a complaint with the processor and in the event of non-compliance to bring the matter before Parliament.