NOTE

from:  German delegation

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to:  General Secretariat of the Council

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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 1(2) and Article 5(2) 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.
NOTE FROM THE GERMAN DELEGATION

ON ARTICLE 1(2) AND ARTICLE 5(2) OF THE AMENDED COMMISSION 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 (DATA PROTECTION DIRECTIVE) FROM THE POINT OF VIEW OF EMPLOYMENT AND SOCIAL SECURITY LEGISLATION

I. Basic assessment:

1. The proposed directive applies to personal data- and therefore also to employee and social security data. It establishes a uniform level of protection throughout the Member States for all personal data and consequently also lays down substantive data protection rules in the specific areas of employment and social security legislation. Although Article 100a(2) of the EEC Treaty expressly states that the provisions of the Article do not apply where employed persons rights and interests are concerned, Article 100a and Article 113 of the EEC Treaty are invoked as the legal basis for this Directive. However, neither provision is capable of justifying the standardization of all employment and social security protection in Europe.

2. Even leaving aside the choice of a legal basis and the fact that the draft Directive lays down rules for the areas of employment and social security legislation, the special features of these legal matters are in no way sufficiently taken into account.
(a) It is firstly of considerable importance that the draft makes no provision for an enabling clause which, would allow Member States to retain or impose special area specific provisions with a higher level of protection. (Even Article 100a of the EEC Treaty would not exclude the possibility of such an enabling clause; see, for example, the Council Directive of 21 December 1989 amending for the eighth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, OJ L 398, 30.12.1989, p. 19). Article 5(2) of the draft Directive cannot be interpreted as an enabling clause for a higher level of data protection. In the Member States in which there is already a higher level than that provided for by the draft Directive, that level is jeopardized by the proposal for a Directive.

In the Federal Republic of Germany the rights of individual employees as regards data protection are further strengthened by the rights of employees collectively in the form of the extensive powers of the employee-elected works council. This has at its disposal, by virtue of its right of co-management - together with the employer - the legally-recognized, original and autonomous power to set data protection standards by means of which, for example, more favourable binding regulations on the admissibility, scope and purpose of the processing of employee data by technical equipment (e.g. personal information systems) may be established. The works council oversees the enforcement of the data protection provision within the undertaking and has extensive supervisory powers.
Nowadays all large undertakings have their own employee data protection, specific to their undertaking, which has a different aim from and, on the whole, a higher level of protection than that of the proposed Directive, but which may also provide for data processing to be allowed in circumstances in which it would not be permissible under the proposed Directive.

Institutional data protection provided by the firm's data protection representative would also no longer be guaranteed by the draft Directive. The data protection representative has the task of directly supervising the enforcement of data protection regulations relating to employees in the legal, collective agreement and operational field.

(b) Finally, the provisions for protecting social security data are in some cases considerably stricter in Germany and would be undermined by this Directive, while at the same time, data transfer between different social security institutions would be limited and therefore the work of the social security institutions would be rendered considerably more difficult.

II. Comments on certain Articles of the draft Directive

1. Object of the Directive (Article 1(1))

This provision stipulates that data protection must be guaranteed exclusively in accordance with the provisions of this Directive. This is incompatible with the autonomous power of the employer and works council to set data protection standards.
2. **Earmarking data for specific purposes (Article 6(1) and (b))**

Under Article 6(1)(b), the data must be collected for specific and explicit purposes and used in a way compatible with those purposes.

The areas of employment and social security law have to be treated separately as regards the question of earmarking data.

(a) The use of data "in a way compatible with the purposes of collection", as proposed in the draft Directive, is not a concept recognized in German legislation on social security data protection. The social security institution may use data once collected, for any purpose considered to be one of its legitimate tasks. It may also transfer the data to other social security institutions for all purposes which fall within their responsibilities, if transfer is necessary for one of those purposes. For example, if information is obtained by one social security institution for the purposes of collecting health insurance contributions, then that institution may communicate the information to another institution, if the latter requires it for the purposes of pension allocation.

(b) However, strict earmarking of data applies in German employment law both for the establishment, execution and conclusion of the employment relationship and for the fulfilment of legal requirements.

3. **Special categories of personal data (Article 8(1))**

Article 8 covers particularly "sensitive" data, treatment of which differs in
employment law and social security law and furthermore in the content of employment law, a distinction also has to be made between the period before and after establishment of the employment relationship.

These nuances are clearly exemplified with, for example, data on Trade Union membership and health.

While it is not permitted in Germany to question an employee on his trade union membership in the context of an interview for employment and then base recruitment on the candidate's response, knowledge of trade union membership and the recording of that data is nevertheless indispensable during the course of the employment relationship. By virtue of the autonomy in negotiating rates of pay laid down in the constitution (Article 9(3) of the Basic Law) it is the responsibility of the parties to the collective agreement to determine wages, salaries and other working conditions. Whether the specific working conditions determined in a collective agreement are applicable to the actual working relationship generally depends on whether the parties to the contract of employment are bound by a collective agreement i.e. in the case of the employee whether he belongs to the trade union which has entered into the collective agreement. The employer's knowledge of his employee's trade union membership as well as the recording of those data is consequently required even without the employee's consent (see Article 8(1)(a)). In this respect, it is questionable whether an exception to Article 8(3) would be allowed, since this provision lays down exceptions only "on grounds of important public interest." The fundamental ban on the processing of data which may
reveal trade union membership, as laid down in Article 8(1), is thus in conflict with important principles of employment law.

Article 8(1) also prohibits the Member States from processing data concerning, inter alia, health. A significant part of social security processing data, however, involves the processing of health data: in health insurance the illnesses to which benefits are or should be paid are laid down, in pension insurance data on illness are necessary for the confirmation of incapacity to work, as they are in the case of rehabilitation benefits or accident insurance and war victims' benefits. Admittedly, under Article 8(3) Member States may provide for exemption from the prohibition on processing by means of a national legal provision (see above). However, in that legal provision the categories of data which may be processed and the institutions receiving the data must be clearly defined and this is impossible because of the complexity of the health data to be processed.

Although the Federal Republic of Germany endorses the basic prohibition on the processing of "sensitive" data, it considers that it is too rigidly stipulated in the Directive and does not allow for the necessary differentiation between employment and social security law. Rather it is necessary to have a provision which guarantees the required flexibility.

4. Article 1(2) and Article 26

The proposed provisions for the cross-border transfer of data within
the EC (Article 1(2)) and within third countries are inadequate for German employment and social security law. Under Article 1(2) employee data and social security data may be transferred to other EC Member States provided that the level of protection stipulated by the Directive is maintained. As a result, any higher restrictions on the free movement of data are prohibited and stricter national provisions may thus be circumvented. Undertakings are given the possibility of transferring the processing of their employee data abroad, thereby avoiding German regulations, which in some cases are stricter, or provisions on data protection arising out of collective agreements.

The same problem presents itself in a more acute form in the case of data transfer to a third country.

III. Result

The problem areas outlined above show that general rules on the protection of personal data cannot meet the special requirements of employee and social security data protection. For that reason, in addition to the data protection principles in Convention No 108 for the protection of individuals with regard to the automatic processing of personal data of 28 January 1981, the Council of Europe has also considered regulations in specific fields, inter alia employment and social security law, and adopted the Recommendation on the protection of personal data used for social security purposes on 23 January 1986 and the Recommendation on the protection of personal data used for employment purposes on 18 January 1989.
Since it is indispensable to have independent rules for employee and social security data protection, these data should be removed from this Directive and dealt with without delay in their own area-specific Directive. As is customary in the case of EC rules on employment legislation, the Directive would establish minimum conditions for employee and social security data protection. However, the draft Directive must include an unambiguous enabling clause, whereby the individual Member States are not prevented from retaining or taking measures which provide a higher level of protection for employee and social security data.