COVER NOTE

from: Belgian delegation
dated: 30 June 1993
to: Mr Niels ERSBØLL, Secretary-General of the Council of the European Communities

No. prev. doc.: 7272/93 ECO 156
No. Cion prop.: 9400/92 ECO 221 COM(92) 422 final SYN 287

Subject: Proposal for a 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 the Belgian Presidency's proposals for a compromise on the above Directive.
ADDENDUM TO NOTE

from: Belgian delegation
dated: 30 June 1993
to: Mr Niels ERSBØLL, Secretary-General of the Council of the European Communities

No. prev. doc.: 7272/93 ECO 156
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Subject: Proposal for a 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 the Belgian Presidency's compromise proposals for Article 7 of the above Directive.
APPENDIX

Presidency proposal

SECTION II

PRINCIPLES RELATING TO THE GROUNDS FOR PROCESSING DATA

Article 7

Member States shall provide that personal data may be processed only if;

(a) the data subject has consented; or

(b) processing is necessary for the performance of a contract to which the data subject is party (1), or in order to take steps at the request of the data subject prior to entering into a contract; or

(c) processing is necessary for compliance (2) with an obligation imposed by national law or by Community law; or

(d) processing is necessary in order to protect the vital interests of the data subject; or

(e) processing is necessary for the performance of a task carried out in the exercise of official authority (3) vested in the controller or in a third party to whom the data are disclosed; or

(1) amendment incorporating the change suggested in footnote 57 on page 19 of 9388/92
(2) drafting change
(3) amendment designed to simplify the text by employing the concept which is more familiar in Community law ("the exercise of official authority") and which is used in Article 55 of the EEC Treaty. This subparagraph should cover both processing carried out by public authorities and that carried out by persons or private bodies when exercising official authority.
(f) processing is necessary for the purposes of (4) the legitimate interests pursued by (4) the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the fundamental rights and freedoms of the data subject, particularly the right to privacy (5).

(4) This amendment is designed to meet the point raised in footnote 64 on page 20 of 9388/92. The concept of "general interest" has been deleted. On the other hand, the new text broadens the concept of controllers' interests. It covers both the controller's own interests and the interests which he is pursuing, which may be general interests within the meaning of the case law of the CJEC (for example, consumer protection, worker protection etc. Cf. in particular the judgment of 25 July 1992 in case C 288/89).

(5) As requested in footnote 69 on page 21 of 9388/92, the term "interests of the data subject" has been deleted. It has been replaced by "the fundamental rights and freedoms of the data subject", reflecting the aim of the Directive.
ADDENDUM TO COVER NOTE

from: Belgian delegation

dated: 30 June 1993

to: Mr Niels ERSBOLL, Secretary-General of the Council of the European Communities

No. prev. doc.: 7695/93 ADD 2 ECO 173
No. Cion prop.: 9400/92 ECO 221 COM(92) 422 final SYN 287

Subject: Proposal for a 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 the Belgian Presidency's compromise proposals for Article 8 and a new Article 9a of the above Directive.
Section III

Special categories of processing

Article 8

The processing of special categories of data

1. Member States shall prohibit the processing of data revealing racial or ethnic origin, political opinions, religious, philosophical or ethical beliefs or trade-union membership, and of data concerning health or sex life.

2. Paragraph 1 above shall not apply where:

   (a) the data subject has indisputably given his consent to the processing of that data, except where the laws of the Member State provide that the prohibition referred to in paragraph 1 may not be waived by the data subject giving his consent; or

   [(aa) processing is carried out on the basis of Article 7(d); or (\textsuperscript{a})]

   (b) processing is carried out by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim in the course of its legitimate activities and on condition that the processing relates solely to its members or to persons who have regular contact with the foundation, association or body in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; in such cases the processing shall be exempt from the obligation to notify laid down in Section VIII of this Chapter; or

   (c) the processing relates to data which are manifestly public.

3. Member States may, on grounds of important public interest, provide for derogations from paragraph 1 by national legislative provision or by decision of the supervisory authority, stating the types of data which may be processed, the persons to whom such data may be disclosed and the persons who may be controllers, and specifying suitable safeguards.

3a. Member States shall prohibit the processing of data relating to health except where:
(a) the processing is carried out under the supervision and responsibility of a health professional subject to the obligation of professional secrecy and compliance with rules of professional ethics; or

(b) the processing is imposed by national law on public health grounds; or

(c) the data subject has given his written consent to such processing; or

(d) the processing is carried out on the basis of Article 7(d).

The objective of the processing referred to in subparagraphs (c) and (d) shall be strictly limited and the controller of such processing may process the data solely for the purpose of achieving that objective (4).

4. A record of criminal convictions may be kept only by the judicial and law-enforcement authorities (15). Member States may, however, provide for derogations by means of a legislative provision specifying appropriate safeguards. Data relating to parties to legal proceedings which are processed by the parties themselves or by their lawyers shall not be regarded as a record of criminal convictions (15).

5. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed. (16)

(1) The conjunction "and" is replaced by "or" to make it clear that the data in question are alternative and not cumulative.

(2) Drafting amendments.

(3) "Moral" is replaced by "ethical" as proposed by D and acceptable to the Commission. See footnote on page 2 of 9918/92.

(4) Health data have an alternative: they could be made subject to the general arrangements applicable to the bulk of sensitive data or be governed by a separate provision such as paragraph 3a.

(5) Drafting amendment intended to guarantee consistency with the other provisions of the Directive.

(6) Deletion of the reference to written consent to meet the concerns of DK/F/NL and UK (see footnote on page 5 of the abovementioned document) and insertion of "explicit" to take account of the discussions on the definition of consent in Article 2(g).

(7) Addition of the conjunction "or" to make clear that cases listed are not cumulative.
(8) Addition to ensure conformity with the amendment to Article 7(d).

(9) Addition to accommodate the concerns of D, GR and I (see footnote on page 6 of 9918/92).

(10) Drafting amendment.

(11) Drafting amendment.

(12) Expression replacing "correspondant" in the French version with a more precise translation of the expression in the other languages (see footnote on page 8 of the abovementioned document).

(13) Repositioning of the provision originally placed at the end of Article 8(2) to make for easier reading of the text.

(14) Addition of circumstances covering the extreme case in which there can be no appropriate safeguards other than the normal protection arrangements provided for by the Directive (e.g. processing of client lists where some have a patronymic which in itself reveals racial origin or religious beliefs).

(15) Drafting amendments to clarify the objective of the provisions intended to prevent the creation of parallel criminal records.

(16) The underlined words replace the words "be used", as suggested by I, to ensure the consistency of this provision with the text of the proposal as a whole.
PRESIDENCY PROPOSAL

Scientific and statistical research

(Article 9a)

1. Processing of personal data may be carried out, even without the consent of the data subject and even where the data referred to in Article 8 are involved, if its exclusive objective is scientific or statistical research and provided the following conditions are met:

- the research is in pursuit of an aim of general interest;

- the research could not be completed unless the data kept their personal nature at some stages of the processing;

- the research findings will not be presented in a form enabling the data subjects to be identified, except in the event of authorization by the supervisory authority referred to in Article 30;

- the controller must, during processing, substitute an identification number specific to the processing for any item likely to allow direct identification of the data subject; the table of concordance between the numbers and the elements enabling the data subject to be identified must not be consultable under the same procedure as the data involved in processing;

- the controller must, prior to the commencement of processing, make to the supervisory authority referred to in Article 30 a statement containing the information referred to in Article 18 and the maximum period for which the data will be kept or the absence of such period.

2. The controller of processing for research purposes may obtain communication of data deriving from other processing operations, even where the latter originally pursued
a different objective, provided the conditions laid down in paragraphs 1 and 5 are fulfilled.

3. Where processing is authorized on the basis of paragraphs 1 and 5, its controller shall be exempt from the obligation to inform the data subject. Controllers who communicate data to the controller of such processing shall likewise be exempt from the obligation to inform the data subject of such communication.

4. Data may be kept for an unlimited period in a processing operation which complies with the conditions laid down in paragraphs 1 and 5 where its objective is the provision of data for scientific or statistical research processing operations.

5. Member States may, after consulting the supervisory authority, prohibit certain specific processing operations for research purposes or the communication of personal data for the purposes of such processing operations or impose additional special conditions.
EUROPESE GEMEENSCHAPPEN

DE RAAD

Brussel, 7 oktober 1993 (25.10)

7695/93
ADD 2
RESTREINT
ECO 173

ADDENDUM BIJ HET INGEKOMEN STUK

van  de Belgische delegatie

d.d.   30 juni 1993

aan   de heer Niels ERSBØLL, Secretaris-Generaal van de Raad van de Europese Gemeenschappen

Nr. vorig doc. : 7695/93 ECO 173 ADD 1
Nr. Conv.      : 9400/92 ECO 221 - COM (92) 422 def./SYN 287

Betreft : Voorstel voor een richtlijn betreffende de bescherming van natuurlijke personen in verband met de behandeling van persoonsgegevens en betreffende het vrije verkeer van die gegevens

Hierbij gaan voor de delegaties de compromisvoorstellen van het Belgische Voorzitterschap in verband met artikel 9 van voornoemde richtlijn.
Artikel 9

Behandelingen van persoonsgegevens en vrijheid van meningsuiting

Voor zover nodig om (1) het recht op bescherming van de persoonlijke levenssfeer met de regels betreffende de vrijheid van meningsuiting te verzoenen, voorzien de Lid-Staten voor de behandelingen van persoonsgegevens voor uitsluitend (2) journalistieke, literaire of artistieke (2) doeleinden, in afwijkingen van de bepalingen van dit hoofdstuk en van hoofdstuk IV (3).

(1) Heropneming van het criterium dat in het oorspronkelijke voorstel stond alsook door NL werd voorgesteld in voetnoot (3) in document 10293/92.

(2) Toevoeging ter verdere afbakening van het doel van de behandelingen in verband met de uitoefening van de vrijheid van meningsuiting waarvoor afwijkingen noodzakelijk zijn, zulks in antwoord op het verzoek om nadere precisering dat is vervat in voetnoot (5). Deze opsomming maakt een opsomming van de personen die voor een afwijking in aanmerking kunnen komen, overbodig.

(3) Wijziging ter verduidelijking van de begrenzing van het terrein waarop afwijkingen kunnen toegestaan worden voor zover zij noodzakelijk zijn.
COVER NOTE

from: Belgian delegation
on: 30 June 1993
to: Mr Niels ERSBØLL, Secretary-General of the Council of the European Communities

No. prev. doc.: 7272/93 ECO 156
No. Cion prop.: 9400/92 ECO 221 COM(92) 422 final SUN 287

Subject: Accession of the Community to Council of Europe Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data

Delegations will find attached a Presidency note on the start of negotiations for the accession of the Community to the above Council of Europe Convention No 108.
Presidency note on the start of negotiations between the Commission of the European Communities, on the one hand, and the Council of Europe and the Parties to Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, on the other, with a view to the accession of the European Communities to that Convention.

I. Assignment to the Commission of a negotiating brief

Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data currently constitutes the only legally binding international legal instrument enunciating basic principles regarding protection of personal data.

It has hitherto been ratified by fourteen countries.

Of these, nine are Member States of the European Communities, which demonstrates widespread acceptance of its principles within the European Community.

On 29 July 1981, the Commission of the European Communities recommended that the Member States ratify the Convention.

It then proposed to the Council, on 13 September 1990, a Recommendation for a Decision concerning the opening of negotiations with a view to the accession of the European Communities themselves to the Convention.

Some informal exchanges of views have already taken place on the matter in the context of meetings of the Consultative Committee of Convention 108.

It now appears necessary for preliminary negotiations for the accession of the European Communities to begin in earnest, so that that accession can take effect as soon as possible after the entry into force of the Directive on the protection of individuals with
regard to the processing of personal data and the free movement of such data.

Account must be taken of the time necessary to complete the negotiations and of the long duration of the procedure for amending the Convention, laid down in Article 20.

It is also important to stress that the accession of the European Communities to Convention 108 will facilitate cross-border flows of data to and from certain third countries.

II. Terms of the brief

The Recommendation for a Council Decision submitted by the Council should serve as a basis for discussions within the Council.

However, there is no actual text of the brief, unless it is considered to be included in paragraphs 7 and 8 of the explanatory memorandum to the Recommendation.

The Council should therefore describe the brief in its conclusions.

As a basis for discussion, the Presidency proposes the following form of words, which is based on precedents relating to other Conventions:

"Council conclusions:

The Commission shall negotiate, with regard to matters falling within Community competence, with the Council of Europe and the Consultative Committee of Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, the conditions for the Community's accession to that Convention.

The Commission will conduct these negotiations side-by-side with the Member States and in consultation with them, in accordance with the negotiating directives below."

III. Tenor of the negotiating directives

Negotiating directives are proposed by the Commission in the abovementioned document.

It seems advisable nevertheless to give more weight to certain provisions of the Convention, to precedents regarding the brief assigned to the Commission and to the specific objectives of accession to the Convention.
It is also important to take account of the fact that the Convention has already been ratified by nine Community Member States and of the conditions under which ratification took place.

The tenor of the negotiating directives should therefore be examined on the basis of these various considerations.

With this in view, the Presidency suggests examining the following questions:

– The objective of paragraph 1 of the negotiating directives is to conclude an additional protocol to Convention 108 concerning the accession of the Communities to that Convention: since the Convention makes no provision for the accession of supranational or international organizations, it will need to be amended in this respect.

This can be achieved by means of either a protocol or a formal amendment.

Paragraph 1 should be amended accordingly.

– Paragraph 2 corresponds to the provisions in a number of precedents. The Member States must decide whether they wish to retain the same provisions in respect of Convention 108.

– Paragraph 3 states that any protocol to Convention 108 designed to enable the European Communities to accede to the Convention should be adopted by means of an opting out procedure (negative notification). Such a provision differs considerably from the amendment procedure established by Article 21 of Convention 108, which requires acceptance of an amendment by all the Parties.

Not only is it likely to be difficult to obtain the consent of all the Parties to the Convention to an amendment procedure which differs radically from that laid down in the Convention but it also appears legally inconceivable that a State party to a convention should suddenly be bound by a protocol on which it has not stated a view. This would be contrary to the law of treaties.

Here, it seems useful to examine the procedure laid down in Article 8 of the Protocol to the Convention on the Elaboration of a European Pharmacopoeia (ETS No 134).

The negotiating directives could also be supplemented or made more specific in various respects.
A number of questions in particular could be examined with this in mind:

– the pointlessness of introducing a disclaimer clause since nine Community Member States have already accepted the original text of Convention 108;

– the pointlessness of asking for the introduction of special derogations for the European Communities, for the same reason;

– the possible restriction of statements which the European Communities would be authorized to make on the basis of Article 3(2)(a) of the Convention.