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from: Netherlands delegation

to: Working Party on Economic Questions (Protection of Personal Data)

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

Delegations will find attached an alternative proposal for the text of Articles 1 to 3 inclusive of this Directive.
ALTERNATIVE TEXTS FOR THE EC DIRECTIVE ON PRIVACY

Article 1(2) should read:

2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1, unless in accordance with this Directive (1).

Article 2(a) should read as follows:

"personal data" means any information relating to an identified or identifiable natural person ("data subject"). Data presented in such a way that the persons concerned can no longer be reasonably identified are not considered as personal data (2).

Article 2(d) should read as follows:

"controller" means any natural or legal person, public authority, agency or other body which has control over a set of processing operations of the same type intended to serve a single purpose or several related purposes, in the sense that he processes personal data or causes it to be processed and who decides what is the purpose and objective of the processing, which personal data are to be processed, which operations are to be performed upon them and which third parties are to have access to them (3).

(1) The national legislator can still, within the framework of the Directive, adopt more detailed rules. These more detailed rules may not restrict or prohibit the free flow of personal data for reasons relating to the law on the protection of personal privacy, unless such a restriction or prohibition arises out of the provisions of this Directive.

(2) This definition is taken from the Convention on Data Protection. Further details of the way in which identification can take place if there is still any question of personal data can be specified at national level. It should also be within the jurisdiction of the national legislator whether or not to determine that this definition also covers unborn children and the deceased. Cf. also the opinion of all the Registry Offices.

(3) The holding of authority must be related to the general concept of "operations" within the meaning of Article 18(1) of the Directive: it concerns the person who has control over all or part of the process of data processing, and not over a specific operation, therefore. This provides greater clarity as to the level at which authority is held. The point is that there should be a single holder of responsibility. The possibility of a different person being responsible for each specific operation should be avoided.
The first subparagraph of Article 2(g) should read:

"the data subject's consent" means any express indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed (4).

Article 2(h) should read:

"provision of personal data" means disclosing or making available personal data to a third party, including the receipt of personal data at the initiative of the third party by means of on-line consultation (5).

The second indent of Article 3(2) should read as follows:

- to the processing of personal data in the course of a purely private and personal activity (6).

The following should be added to Article 3(2):

- to the processing of personal data for the purpose of their inclusion in books or other publications, as well as the cataloguing thereof;
- to the processing of personal data for the purpose of their inclusion in a public

(4) The conditions for the validity of consent should be omitted from the definition of consent. Under Netherlands law, the data subject's indication of his wishes can be legally valid only if he is or is able to be aware of the circumstances which may reasonably influence the indication of his wishes. If the first subparagraph is retained, we consider that the words "on condition he has available information about ... (followed by a summary of the circumstances)" can be interpreted as meaning that it can reasonably be assumed that the data subject is able to be aware of the circumstances referred to. Only if there can be any doubt as to this should the information be supplied to the data subject for certainty's sake.

(5) It should be clear that personal data can be provided both at the initiative of the holder and at the initiative of a third party in the event of on-line consultation.

(6) The aim of the proposal is to exclude data processing for private or personal purposes from the scope of the Directive. By deleting the words "by a natural person", it is no longer relevant whether the processing is carried out by a natural person or a legal person. It is not the nature of the data-holder, but the purpose for which the processing is carried out which should be the decisive factor here. Consequently, internal business reports are outside the scope of the Directive. By providing that what is involved must be an activity of an exclusively private or personal nature, data processing for strictly personal use in the context of professional activities (e.g. an electronic diary) is also excluded from the scope of the Directive.
register which is established by law (7).

(7) There is little point in declaring that the provisions of the Directive apply to such forms of data processing. Books and other publications and public registers are after all as a rule in the public domain. No rules need therefore be laid down concerning them. Since their content is public, the data subject may dispute any illegal action before the courts. Furthermore, a right of rectification as provided for in the Directive could give rise to considerable practical problems.