COVER NOTE

from: Presidency

to: Permanent Representatives Committee

No. Cion prop.: 9400/92

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
- Progress report

Further to the proceedings of the Working Party on Economic Questions (Data Protection) delegations will find attached:

- in Annex I a revised version of the Presidency note concerning the progress of work on the above amended proposal for a Council Directive. Changes with respect to 8381/1/93 REV 1 of 10 September 1993 are underlined;

- in Annex II a Presidency note on a recommendation for a Council Decision on the opening of negotiations with a view to the accession of the European Communities to the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data.

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I. Introduction

On 18 July 1990 the Commission submitted to the Council a proposal for a Directive aimed at organizing the protection of individuals with regard to the processing of personal data and on the free movement of such data.

The proposal, which was discussed by the Council Working Party on Economic Questions, was the subject of an Economic and Social Committee Opinion on 24 April 1991 and of an European Parliament Opinion, containing a number of amendments, on 11 March 1992.

Further to the Opinion of the European Parliament, which voted unanimously in favour of the principle of the Directive, the Commission decided to submit an amended proposal to the Council; that proposal is dated 15 October 1992.

The Presidency herewith submits a progress report on the Directive to the Permanent Representatives Committee.
II. **Overall progress made**

Following requests from several delegations which had doubts about the legal bases chosen by the Commission for the Directive, the Council Legal Service issued a positive opinion on Article 100a and a negative opinion on Article 113.

The amended proposal for a Directive submitted by the Commission was very favourably received by all the delegations because of the considerable progress it represented regarding the substance of the provisions and the increased coherence of the form.

The proceedings of the Council's ad hoc Working Party made it possible to complete the first reading of the revised proposal under the Danish Presidency. The various provisions were therefore examined in detail and a large number of textual and translation problems were also settled.

A start was therefore made on the second reading of the amended proposal in July 1993.

III. **Points agreed upon**

Firstly, broad consensus was reached in the Working Party on the need for a Directive.

Secondly, the Working Party agreed that the principles contained in the Directive should install a system that provided at least the same degree of data protection as Council of Europe Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

Thirdly, the need to establish supervisory authorities (whose independent status and methods of operation remain to be defined) in the Member States was also agreed by the whole Working Party.

Fourthly, during the discussion on Article 34 (committee procedure) of the draft Directive, the ad hoc Working Party unanimously came out in favour of a type III committee, with a qualified majority preferring a type III(b) committee.
Fifthly, the principle of the right of the data subject to apply to the national courts in the event of violation of his rights under the Directive was agreed by the Working Party.

Sixthly and lastly, although it is not yet a case of complete and detailed agreement on cross-border flows (Articles 26 and 27), consensus was reached on the general approach.

IV. Major points still to be discussed

A number of major points still need to be discussed in detail before satisfactory harmonization is achieved; they include, for instance, the legal basis; the scope (whether or not to include manual data); how sensitive data should be dealt with; the rules on notification of the supervisory authority, the cost of the measures to implement the Directive, the scientific research, etc.

V. Horizontal co-ordination

Because of current developments in Community legislation, the ad hoc Working Party recently decided that it was necessary to bring to the Permanent Representatives Committee's attention at an early date the question of the horizontal approach to the protection of individuals in the processing of personal data.

Various areas of Community activity would seem to be directly affected by this matter. Customs and fisheries, for which specific proposals exist (4266/93 of 25 January 1993 and 5438/93 of 23 March 1993 respectively), are but two examples.

At the same time, it should be noted that in the framework of intergovernmental negotiations between the Twelve, co-operation schemes are being set up which use personal data (e.g. the European Information System), the processing of which also calls for adequate safeguards based on uniformly agreed principles.
The desirability of a horizontal approach in this field was also referred to in the final conclusion of the Council Legal Service's opinion on the Customs Information System (CIS) and access to personal data (8103/93 of 2 August 1993).

For its part, the Economic and Social Committee, in its unanimously adopted Opinion of 28 April 1993 on the draft Regulation on the creation of a Customs Information System (OJ C 161, 14 June 1993, p. 15), asked for "the Council to adopt the Regulation and Directive at the same time, to provide a watertight legal framework for the right to privacy".

It is therefore for the Permanent Representatives Committee to ensure that there is genuine coherence between the various European instruments concerned with the processing of personal data.

VI. **Principle of subsidiarity**

In the course of the proceedings, the Danish delegation requested that Articles 10 to 16 (rights of the person concerned) and 18 and 19 (notification) of the amended proposal for a Directive be examined in detail by the Commission in the light of the principle of subsidiarity in order to ensure that it had been correctly applied. It wanted the Commission to submit a report on the subject.

VII. **Conclusions**

The Permanent Representatives Committee is requested to:

- take note of the progress of the ad hoc Working Party's proceedings on the proposal for a Directive, as described in points II, III and IV above;

- adopt a position on which the Working Party has reached agreement, particularly as regards committee procedure (see point III above);
- examine the question of horizontal co-ordination of the protection of individuals in the processing of personal data so that coherent solutions can be found across the Community, possibly by speeding up the proceedings of the Group of Experts studying the proposal for a Directive;

- state its position on the Danish delegation's request for a report on the application of the principle of subsidiarity in the Directive;

- ask the Working Party to submit a report with a view to bringing this matter before the Internal Market Council on 16 December 1993 so that the Council can state its views on the outstanding problems and produce the necessary guidelines.
Presidency note

Subject: Recommendation for a Council Decision on the opening of negotiations with a view to the accession of the European Communities to the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data

- Progress report

On 18 July 1990 the Commission submitted to the Council a Recommendation for a Council Decision on the opening of negotiations with a view to the accession of the European Communities to the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data.

On 14 September 1993 the Recommendation was given a first reading by the Working Party of Experts examining the proposal for a Directive on the protection on individuals with regard to the processing of personal data.

The Working Party as a whole thought it important to concentrate on the proposal for a Directive and to speed up the search for a common position on that text.

Misgivings were expressed about the European Communities' acceding to Convention No 108 of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data. The main doubts, which were raised by various delegations, related to the distribution of powers between the European Communities and the Member States and how this might affect the operation of the Consultative Committee under the Convention.

The explanations given by the Council Legal Service shed considerable light on these issues:

- case-law stemming from the AETR Judgment (Judgment 22/70 of 31 March 1971) implied that Member States' powers would be gradually transferred to the Communities as and when the latter came to exercise those powers;

- areas falling within Community competence were not fixed in time because Community law was thus evolving;

- adoption of the Directive would inevitably result in a transfer of powers, whether or not the Communities acceded to Convention No 108.
The Working Party asked the Commission to produce a working paper addressing a number of issues, including the criteria for determining Community competence and the possible nature and form of accession; the Commission agreed to submit such a paper shortly in order to explain its Recommendation to the Council.

In the light of that paper the Working Party would consider whether the Commission should be given an exploratory mandate to seek solutions which might enable the Communities to accede to the Convention.

In the meantime, the Commission and the Member States would continue to take part in any discussions which the Committee under the Convention held on this topic.

The Working Party also decided that at the Committee's next meeting the Presidency and the Member States would affirm the Communities' view that the level of data protection achieved under the Community directive could in no event be lower than that guaranteed by Convention No 108 and that, for the rest, the process of internal co-ordination was continuing on the problem of possible accession.