NOTE

from: Luxembourg delegation

to: Working Party on Economic Questions (Data Protection)

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 proposal for a new wording of Articles 26 and 27 of the abovementioned proposal submitted by the Luxembourg delegation.
CHAPTER IV
TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

Article 26
Principles

1. Member States shall provide that the transfer, whether temporary or permanent, to a third country of personal data which are undergoing processing or which have been collected with a view to processing may take place only if the third country in question ensures an adequate level of protection.

Notwithstanding the first subparagraph, Member States shall provide that a transfer to a third country which does not ensure an adequate level of protection may take place on condition that:

- subject, where appropriate, to Article 8(2)(a), the data subject has consented to the proposed transfer in order to take steps preliminary to entering into a contract;

- the transfer is necessary for the performance of a contract between the data subject and the controller, on condition that the data subject has been informed of the fact that it is or might be proposed to transfer the data to a third country which does not ensure an adequate level of protection;

- the transfer is necessary on important public interest grounds; or

- the transfer is necessary in order to protect the vital interests of the data subject.
2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular account shall be taken of the nature of the data, the purpose or purposes and duration of the proposed processing operation or operations, the legislative provisions, both general and sectoral, in force in the third country in question and the professional rules which are complied with in that country.

3. Member States shall inform the Commission of cases where they consider that a third country does not ensure an adequate level of protection.

4. Where the Commission finds, either on the basis of information supplied by Member States or on the basis of other information, that a third country does not ensure an adequate level of protection and that the resulting situation is likely to harm the interests of the Community or of a Member State, it may enter into negotiations with a view to remedying the situation.

5. The Commission may decide, in accordance with the procedure laid down in Article 34(2) that a third country ensures an adequate level of protection by reason of the international commitments it has entered into or of its domestic law.
6. Measures taken pursuant to this Article shall be in keeping with the obligations incumbent on the Community by virtue of international agreements, both bilateral and multilateral, governing the protection of persons with regard to the automatic processing of personal data.
Article 27
Particular measures

1. Subject to the second subparagraph of Article 26(1), a Member State may authorize a transfer or category of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 26(2) where the controller adduces sufficient justification in particular in the form of appropriate contractual provisions guaranteeing, especially, the effective exercise of data subjects' rights.

Article 27
Derogations

1. By way of derogation from Article 26(1), Member States shall provide that a transfer of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 26(2) may take place on condition that:

- subject, [...] to Article 8(2)(a), the data subject has consented to the proposed transfer [...], where the transfer relates to particular categories of data, or

- the transfer is necessary for the performance of a contract or the implementation of measures preliminary to entering into a contract between the data subject and the controller, on condition that the data subject has been informed of the fact that it is or might be proposed to transfer the data to a third country which does not ensure an adequate level of protection, without prejudice to Article 8(2)(a), where the transfer relates to particular categories of data, or

- the transfer is necessary on important public interest grounds; or

- the transfer is necessary in order to protect the vital interests of the data subject.

2. Subject to paragraph 1, a Member State may authorize a transfer [...] of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 26(2), where the controller adduces sufficient guarantees with respect to the protection of the private lives, basic rights and freedoms of individuals and as regards the exercise of the corresponding rights; such guarantees may in particular result from appropriate contractual clauses.
2. The Member State shall inform the Commission and the other Member States in good time of its proposal to grant authorization.

3. If a Member State or the Commission objects before the authorization takes effect, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 34(2).

4. If a Member State or the Commission objects on justified grounds involving the protection of the private lives, basic rights and liberties of individuals, the Commission shall take appropriate measures in accordance with the procedure laid down in Article 34(2), before the authorization takes effect.

5. Where the Commission decides, in accordance with the procedure referred to in Article 34(2) and in the light of the opinion of the Working Party on the Protection of Individuals, in accordance with Article 32(1)(b), that certain standard contractual clauses offer sufficient guarantees as referred to in paragraph 2, the Member States shall take the necessary measures to comply with the Commission's decision.