NOTE

from: Presidency

dated: 14 March 1994

for: the attention of the Working Party on Economic Questions
(Data Protection)

No. prev. doc.: 5244/94 ECO 39
No. Cion prop.: 9400/92 ECO 221

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 below in the Annex, for the Working Party's meeting on 28, 29 and 30 March 1994, the Presidency's proposals regarding Articles 8, 19, 21, 30 and 31 and 26 and 27 of the above proposal.
Section III

Special categories of processing

Article 8

The processing of special categories of data (1)

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 or data resulting from criminal proceedings.

2. Paragraph 1 above shall not apply where:

   (a) the data subject has given his explicit 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 necessary for the performance of a contract of employment entered into between the controller and the data subject, on condition that the latter has been informed, at the time the contract is entered into, of the necessity to process one or more of the categories of data referred to in paragraph 1; or

   (ab) processing is necessary to protect the vital interests of the data subject or of a third party; or

(1) Main questions to be discussed:
1. The exhaustive nature of the list of sensitive data referred to in paragraph 1.
2. Data resulting from criminal proceedings.
3. Health data.
4. Scientific and statistical research.
5. Sensitive data held by employers.

NB: At the meeting on 1 and 2 December 1993, delegations were asked to indicate the categories of sensitive data recognized under national law which would not be covered by the list in Article 8(1).
(b) processing is carried out in the course of its legitimate activities by a foundation, association or any other non-profit-seeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of the body or to persons who have contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects; or

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

2a. A record of criminal convictions may be kept only by the judicial and law-enforcement authorities.

2b. Paragraph 1 shall not apply to health data when processing by a health professional subject to the obligation of professional secrecy as authorized by national law or by another person also subject to that obligation of secrecy is required for therapeutic prevention, the provision of care or the management of health care centres.

3. Member States may, on important public interest grounds, grant derogations from paragraph 1, particularly in the areas of public health, public statistics or scientific research.

The derogations referred to in the preceding subparagraph shall be granted 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.

4. Deleted.

5. Member States shall determine the conditions under which a national identification number or any other identifier of general application may be processed.
Article 19

Examination of notified processing operations

1. Member States shall specify the information to be given in the notification. It shall include at least:

   (a) the name and address of the controller and of his representative, if any;

   (b) the purpose or purposes of the processing;

   (c) a description of the category or categories of data subject and of the data or categories of data relating to them;

   (d) the recipients or categories of recipient to whom the data might be disclosed;

   (e) proposed transfers of data to or from third countries;

   (f) a description allowing an assessment to be made of the appropriateness of the measures taken pursuant to Article 17 to ensure security of processing.

2. Member States shall specify the conditions under which any change affecting the information referred to in paragraph 2 must be notified to the supervisory authority.

3. Member States shall provide that the supervisory authority may, taking into account the risks posed to the rights and freedoms of individuals, particularly when processing relates to data referred to in Article 8(1), decide to examine notified processing operations prior to the commencement of processing. Such an examination must take place within a period set by the Member States which shall not exceed 2 months.
Section VIII

Publicizing of processing operations

Article 21

1. Member States shall take measures to ensure that processing operations are publicized.

2. Member States shall provide that a register of processing operations notified in accordance with Article 18 shall be kept by the supervisory authority.

   The register shall contain at least the information listed in Article 19(1)(a) to (f).

   The register may be inspected by any person.

3. Member States shall provide, in relation to processing operations not subject to notification, that controllers make available the information referred to in Article 19(1)(a) to (f) in an appropriate fashion to any person at least on request.

   Member States may provide that this provision shall not apply to processing operations whose sole object is the holding of registers established by national law in order to provide information to the public.
CHAPTER VI
SUPERVISORY AUTHORITY AND WORKING PARTY ON THE PROTECTION
OF INDIVIDUALS WITH REGARD
TO THE PROCESSING OF PERSONAL DATA

Article 30
Supervisory authority

1. Each Member State shall designate one or more public authorities responsible for monitoring the application of the national provisions which it adopts pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them (^2).

1a. Member States shall ensure that supervisory authorities participate in drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data (^3).

2. Each supervisory authority shall have at least:

– investigative powers, including powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties;

– effective powers of intervention, such as delivering opinions before processing operations are carried out and ensuring appropriate publication of such opinions (^4), ordering the blocking, erasure or destruction of data, a temporary or definitive ban on processing, or warning or admonishing (^5) the controller or referring the matter to national parliaments or other political institutions (^6);

– the power to bring an action before the courts where it finds that the national provisions adopted pursuant to this Directive have been violated.

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(^2) Drafting amendment to this paragraph.
(^3) To meet the concern of several delegations (5594/93, page 5, footnote 2), a measure contained in the Commission proposal in the first sentence of Article 19(2) has been moved to Article 30 and amended.
(^4) Incorporation of the compromise proposal (4522/94, page 8).
(^5) Addition of a measure suggested by the Danish delegation (7272/93, page 3, footnote 3).
(^6) Addition of a measure suggested by D and referring to national parliaments.
Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts (7).

3. Each supervisory authority shall hear claims lodged by any person concerning the protection of his rights and freedoms (8). The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 14 of this Directive apply. The person concerned shall be informed of the outcome of the check while the interests to be protected are fully respected (9).

4. Each supervisory authority shall draw up a report on its activities at regular intervals (10). The report shall be made public.

5. Member States shall provide that their supervisory authorities (11) co-operate with one another to the extent necessary for the performance of their duties, by exchanging useful information or exercising the powers which they possess (12).

They shall co-operate in this manner either on the initiative of the competent authority in accordance with Article 4 of this Directive or on that of the authorities of the other Member States.

Where a person lodges a request with a supervisory authority concerning the processing of data of which the controller is established in the territory of another Member State, the request shall be sent to the competent authority (13).

(7) Addition of a point intended to clarify the scope of decisions by the supervisory authorities.
(8) Drafting amendment to meet the concern of F (7272/93, page 4, footnote 3).
(9) At the request of several delegations, a provision included by the Commission in Article 14 (10293/92, footnote 17) has been moved to Article 30.
(10) Amendment requested by D and agreed to by the Commission (7272/93, page 5, footnote 1).
(11) Amendment suggested by IRL (7272/93, page 5, footnote 3).
(12) Addition of a point intended to meet the concern of several delegations (document referred to above, page 5, footnotes 3 and 5).
(13) Incorporation of the idea suggested by I (above document, page 5, footnote 4).
6. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended (14), are to be subject to a duty of confidence with regard to confidential information to which they have access (15).

(14) Addition suggested by P (document referred to above, page 6, footnote 2).
(15) Addition suggested by DK (document referred to above, page 6, footnote 1).
Article 31

Working Party on the Protection of Individuals with regard to the Processing of Personal Data

1. A Working Party on the Protection of Individuals with regard to the Processing of Personal Data, hereinafter referred to as "the Working Party", is hereby set up.

It shall have advisory status and act independently.

1a. The Working Party shall be composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for Community institutions and bodies, and of a representative of the Commission (16).

Each Member of the Working Party shall be designated by the institution, authority or authorities which he represents. Where a Member State designates more than one supervisory authority, they shall nominate a joint representative. The same shall apply for the authorities established for Community institutions and bodies (1).

1b. The Working Party shall take decisions by a simple majority of the representatives of the supervisory authorities (1).

2. The Working Party shall elect its chairman. The chairman's term of office shall be two years. His appointment shall be renewable.

3. The Working Party's secretariat shall be provided by the Commission.


5. The Working Party shall consider items placed on its agenda by its chairman, either on his own initiative or at the request of a representative of the supervisory authorities or at the Commission's request.

(16) Amendments intended to take account of the conclusions reached by the Working Party at the first reading under the Danish Presidency.
Article 32

1. The Working Party shall:

   (a) examine any question covering the application of the national measures adopted under this Directive in order to contribute to the uniform application of such measures (17);

   (b) give the Commission (1) an opinion on the level of protection in the Community and in third countries;

   (c) advise the Commission on any proposed amendment of this Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed Community measures affecting such rights and freedoms (1);

   (d) give an opinion on codes of conduct drawn up at Community level.

2. If the Working Party finds that serious divergences are arising between the laws or practices of Member States concerning the protection of persons with regard to the processing of personal data and that those divergences might affect the equivalence of protection in the Community, it shall inform the Commission accordingly.

3. The Working Party may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community.

4. The Working Party's opinions and recommendations shall be forwarded to the Commission; they may also be forwarded to the advisory committee referred to in Article 34.

5. The Commission shall inform the Working Party of the action it has taken in response to its opinions and recommendations. It shall do so in a report which shall also be forwarded to the European Parliament and the Council. The report shall be made public.

6. The Working Party shall draw up an annual report on the situation regarding the protection of natural persons with regard to the processing of personal data in the Community and in third countries, which it shall transmit to the Commission, the European Parliament and the Council. The report shall be made public.

(17) Amendments aimed at taking account of the conclusions reached by the Working Party during the first reading under the Danish Presidency.
Chapter IV

Transfer of personal data to third countries (18)

Article 26

Principles

1. Member States shall provide that the transfer to a third country of personal data which are undergoing processing may take place only if the third country in question ensures an adequate level of protection.

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 country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

3. Member States and the Commission shall inform each other of cases where they consider that a third country does not ensure an adequate level of protection within the meaning of paragraph 2.

4. Where the Commission finds, under the procedure provided for in Article 34(2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2, Member States shall take the measures necessary to prevent the transfer of data of the same type to the third country in question.

4a. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

5. The Commission may find, in accordance with the procedure referred to in Article 34(2), that a third country ensures an adequate level of protection within the meaning of paragraph 2, by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of the negotiations referred to in paragraph 4a, for the protection of the private lives, freedoms and basic rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.

(18) The compromise proposal is based closely on the note submitted by the Luxembourg delegation in response to the Working Party's discussions held under the Danish Presidency (see 7134/93 of 7 June 1993).
**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:
   - the data subject has consented to the proposed transfer, or
   - the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of preliminary measures taken in response to the data subject's request, 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, or
   - the transfer is necessary for the performance of a contract concluded in the interest of the data subject between the controller and a third party, 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.

3. The Member State shall inform the Commission and the other Member States in good time of its proposal to grant authorization.

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

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.
NB: It is proposed that the following recital be added in response to a request from the Danish delegation:

Recital 26a

"Whereas, in any event, transfers to third countries may only be effected in full compliance with the provisions adopted by the Member States pursuant to this Directive, and in particular Article 8 thereof;".