NOTE

from : Presidency

dated : 29 March 1994

to : Working Party on Economic Questions (Data Protection)

No. prev. doc.: 5575/94 ECO 49
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 in annex, with a view to the Working Party's meeting on 21 and 22 April next, the Presidency's proposals regarding the following Articles:

**Article 3:** Activities not covered by Community law

**Article 4:** Second reading following the Commission's contacts with the Data Protection Commissioners

**Articles 17 and 17a:** Account to be taken of costs in the definition of an appropriate level of security

**Article 33:** Scope of the Commission's implementing powers

**Article 34:** Committee procedure

**Article 35:** Transitional measures concerning manual data:
- time allowed the Member States;
- establishment of a shorter deadline for sensitive data.
Article 3

Scope

1. This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which forms part of a file or is intended to form part of a file.

2. This Directive shall not apply to the processing of personal data:
   – in the course of an activity which falls outside the scope of Community law such as data to which Titles V and VI of the Treaty on European Union apply;
   – by a natural person in the course of a purely personal or household activity.

Article 4

National law applicable

1. Each Member State shall apply the national provisions adopted under this Directive to all processing of personal data of which (1):

   (a) the controller is established in its territory or in a place where its national law is applicable by virtue of public international law (2);

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(1) Drafting change.

(2) Amendment to reflect better the fact that this is aimed at embassies and consulates.
(b) the controller is not established in the territory of the Community, where for the purpose of processing personal data he makes use of means, whether or not automatic, which are located in the territory of that Member State, except if these means are used solely for the purposes of transit through the territory of the European Community (\(^3\)).

2. In the circumstances referred to in paragraph 1(b) the controller must designate a representative established in the territory of that Member State, without prejudice to legal actions which could be initiated against the controller himself (\(^4\)).
SECTION VII (\(^{5}\))

CONFIDENTIALITY AND SECURITY OF PROCESSING

Article 17

Confidentiality of processing

Any person acting under the authority of the controller or of the subcontractor, including the subcontractor himself, who has access to personal data must not disclose it to a third party except on instructions from the controller, unless he is required to do so by law.

Article 17a

Security of processing

1. Member States shall provide that the controller must implement (\(^{6}\)) appropriate technical and organizational measures to protect personal data against accidental or unlawful destruction or accidental loss and against unauthorized alteration, disclosure or access, in particular where the processing involves the transmission of data over a network (\(^{7}\)), and against all other unlawful (\(^{8}\)) forms of processing.

Having regard to the state of the art and the costs of their implementation, such measures shall ensure a level of security appropriate to the risks represented by the processing and the nature of the data to be protected (\(^{9}\)).

\(^{5}\) This document reproduces the Luxembourg delegation's proposal regarding Articles 17 and 17a(2), (3) and (4) (see 6032/93 ADD 1 of 15 July 1993). Article 17a(1) is a new version of Article 17(1), (2) and (3) of the Commission's amended proposal. This version is intended to take account of discussions during the first reading under Denmark's presidency.

\(^{6}\) Amendment, in response to the expression of concern by I, intended to cover the implementation phase of processing, which implies that security measures have already been taken.

\(^{7}\) Obligations originally imposed in paragraphs 2 and 3 of the amended proposal.

\(^{8}\) Replacement of "unauthorized" by "unlawful" at the request of several delegations.

\(^{9}\) Amendment intended, in response to expressions of concern on the part of several delegations, to clarify the approach to be adopted by the controller in deciding on security measures.

Deletion of the reference to automatic processing in order to make good a lacuna pointed out by several delegations.
2. The Member States shall provide that the controller must, where processing is carried out on his behalf, choose a subcontractor who provides sufficient guarantees in respect of the technical security measures governing the processing to be carried out and must ensure compliance with those measures.

3. The carrying out of processing on the controller's behalf must be governed by a contract or legal act binding the subcontractor to the controller and stipulating in particular that
   – the subcontractor shall act only on instructions from the controller;
   – the obligations set out in paragraph 1, as defined by the law of the Member State in which the subcontractor is established, shall also be incumbent on the subcontractor.

4. The contract or legal act referred to in paragraph 3 shall be in writing.

CHAPTER VII

COMMUNITY IMPLEMENTING MEASURES

Article 33

The Commission's implementing powers (10)

In addition to the measures it is empowered to take under the foregoing provisions of this Directive, the Commission shall, in accordance with the procedure laid down in Article 34(2), adopt such technical measures as are necessary to apply Chapter II of this Directive to the specific characteristics of particular types or classes of processing in order to ensure the consistent application of those provisions.

(10) Terminology used in Article 145 of the EC Treaty.
Article 34

The committee

1. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter.

   The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

   The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

   If the measures envisaged are not in accordance with the opinion of the committee or if no opinion is delivered the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

   If within three months of the referral to it the Council has not acted, the Commission shall adopt the measures proposed.

Gradual application of the Directive to manual files

Article 35(2), second subparagraph

By way of derogation from the preceding subparagraph, Member States may provide that the processing of data already held in manual files on the date of entry into force of the national provisions adopted in implementation of this Directive shall be brought into conformity with Articles 6, 7 and 8 of this Directive as and when those data are further processed. Such conformity shall, however, be fully effected by .. ....... .... (eight years after the adoption of the Directive), save in the case of the data processing referred to in Article 8, where it shall be fully effected no later than .. ....... .... (five years after the adoption of the Directive).