OUTCOME OF PROCEEDINGS

of: Working Party on Economic Questions (Data Protection)
on: 28, 29 and 30 March 1994

No. prev. doc.: 6032/94 ECO 65
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

During its discussions on 28, 29 and 30 March, the Working Party finalized the text of Articles 8, 11, 26, 27, 30, 31 and 32 of the above proposal on the basis of the compromise texts submitted by the Presidency. (1)

The outcome of these discussions is summarized below.

(1) The Presidency pointed out in particular during this meeting that the objective was to confine the debate to the main issues raised by the Directive and as far as possible to attempt to work out guidelines on these issues for the report to Coreper.
1. Special categories of processing: Article 8

The following positions were adopted on the text submitted by the Presidency (5575/94, page 2):

(i) Reservations by IRL and UK on the Article as a whole

(ii) Paragraph 1

The proposed list of data gave rise to objections on two levels:

– F/I/NL and P were dissatisfied with the expression "ethical beliefs" (B and I suggested "other beliefs" and GR "personal beliefs").

– Most delegations entered reservations on the expression "data resulting from criminal proceedings", mainly as it was unclear.

F suggested deleting these data from the present list in paragraph 1 (which should remain exhaustive) and drafting paragraph 2a as follows:

"A compilation of criminal convictions may be kept only under the control of the official authorities. The same shall apply to the processing of data relating to offences, criminal convictions or security measures. In these cases, Member States may, however, provide for derogations on the basis of national legal provisions providing for suitable specific safeguards.

Member States may decide that the processing of data relating to administrative or judicial decisions should also be kept under the control of the official authorities".

This suggestion was welcomed by B/E/I/L and P and by the Commission; UK and IRL for their part said they would give this solution careful examination.
(iii) Paragraph 2

– In subparagraph (a), first line, DK/IRL and UK wanted the word “explicit” deleted; B/F/I/L and Commission, however, wished to keep this clarification (L preferring consent to be given in writing as proposed by the Commission).

– In subparagraph (aa)

IRL entered a reservation on the second part of this subparagraph (beginning with "on condition that").

D submitted the following text:

"processing is necessary for the establishing, enforcement and conclusion of a contract of employment between the controller and the data subject, provided that the latter has been informed of the necessity of processing one or more of the categories of data mentioned in paragraph 1."

– subparagraph (ab)

Reservation by I on this subparagraph (which conflicted with Italian law concerning Aids sufferers), UK proposed adding, alongside the data subject or third party, the processor.

– subparagraph (b)

I and UK upheld a reservation on this subparagraph.

– paragraph (c)

The expression "data which are manifestly public" elicited objections from I and UK; F suggested replacing it by "data to which the data subject has given a public character" (B supported this alternative text).
(iv) **Paragraph 2(a)**

- see **F** proposal recorded above in point (ii).

- **UK** objected to the word "record" in the English version (the **F** version refers to "recueil" (compilation)).

(v) **Paragraph 2(b)**

The Presidency's text was welcomed subject to certain drafting amendments.

- **UK** in particular suggested the following redraft:

  "Paragraph 1 shall not apply to health data or data relating to health when processing by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy is required for the prevention of disease, provision of care and treatment, and management of health care services." (This text no longer refers to national legislation on professional secrecy, which posed problems for certain delegations.)

- **I** wanted reference made to data on sexuality and also raised the problem of deontological codes.

- **NL** suggested replacing the words "when processing" by "in the context of processing".

(vi) **Paragraph 3**

- six delegations (**DK/B/E/IRL/NL and UK**) wanted scientific or statistical research covered by specific provisions (some delegations referred in particular to Article 9a proposed by the B Presidency and recorded in 7695/93 ADD 3); two other delegations (**F and I**) said they were amenable to such a solution. **D** recorded its agreement to the Presidency’s text.
– F wanted explicit reference made in this paragraph to public safety and State security.

– D put forward the following suggestions:

Text to be added to the 8th recital:

"whereas this measure is being taken in observance of the principles laid down in Title I, Article F(1) and (2), of the Treaty on European Union and of the rights of religious communities, having regard to the specific features of national constitutional law;".

Statement for entry in the minutes concerning Article 8:

"Member States may also permit derogations from the provisions of Article 8(1) for personal data processed for religious communities and relating only to natural persons resident within a Member State."

– IRL, which wanted it made clear in the first line that Member States could grant "other derogations from paragraph 1", also wanted the phrase in the second subparagraph beginning "stating the types of data ..." deleted; F and P and the Commission were opposed to this deletion (on this last point D preferred "categories of data" rather than "types of data").

– NL called for the derogations to be justified on general interest grounds (as in the Dutch version) and not on public interest grounds.

(vii) Paragraphs 4 and 5

Regarding paragraph 5, DK and UK wanted the measures it provided for to be left to Member States.

The Presidency will submit a new text for Article 8 taking account of these positions as far as possible.
2. Information when data are collected: Article 11

After a final reading of the Presidency's compromise text (see 4382/94), the following reservations were upheld:

– DK/IRL and UK wanted information relating to recipients of data (c) and the possible consequences of failure to reply (second part of (d)) not to be compulsory and provided only at the request of the person concerned.

– DK/NL and UK wanted "recipients" replaced by "third parties".

In addition, UK and IRL wanted the wording of the introductory sentence of this Article made more flexible (for example: "Member States shall ensure that the following information is supplied to the person from whom data relating to himself are collected, except where it is clear that it is already in his possession.").

3. Transfer of personal data to third countries: Articles 26 and 27

(see pages 11 and 12 of the Presidency's note)

After a very detailed discussion of the problems raised by the transfer of personal data to third countries:

– a large majority of delegations said they were generally satisfied with the Presidency text, subject to a number of clarifications and drafting changes;

– 4 delegations (D/DK/IRL and UK) still had considerable misgivings on the Presidency's approach to assessing the adequacy of protection in third countries; D, which
submitted alternative texts at the meeting, also undertook to submit proposals in writing. (†)

The Presidency amended its text to take account of some of the comments submitted by delegations. The amended text, which was circulated at the meeting, is attached.

4. Supervisory authority: Article 30

The following comments were submitted on the Presidency text (page 6 of 5575/94).

(i) Paragraph 1

– D wanted the beginning of this paragraph to be altered slightly to take into account the method of designating supervisory authorities in Germany.

– F/I and P wanted to retain the old text, which guaranteed that the supervisory authority would be completely independent.

(ii) Paragraph 1a

The word "participate" gave rise to many reservations; "are consulted when ... measures are ... drawn up" seemed more appropriate.

(iii) Paragraph 2

– IRL reservation on the first indent.

(†) D asked for the addition of the following paragraph immediately:
"A Member State can restrict or deny the transfer of data concerning employees, social or health matters to a third country, when the level of protection of the Member State exceeds the level of protection of the third country concerning these data."
– with regard to the second indent, F and P felt the powers of intervention it assigned to the supervisory authority were too great; F in particular expressed reservations on the power to order blocking, erasure or destruction of data and to ban processing. (The French delegation, supported by I and NL, also wondered whether it was appropriate to provide for referral to national parliaments). Moreover, some drafting changes were suggested (add "for example" in the first line after the words "such as"; insert "in accordance with Article 19(3)” in the second line after "processing operations are carried out”).

– DK wanted the third indent clarified.

(iv) Paragraph 3

– in the first subparagraph UK and IRL suggested adding "with regard to the processing of personal data“ after "the protection of his rights and freedoms”; NL wanted associations also to be able to refer claims to the supervisory authorities;

– the second subparagraph was the subject of express reservations by DK/IRL and UK; F and D, meanwhile, objected to the last sentence of this subparagraph (informing the person concerned of the outcome of a check on the lawfulness of data processing).

(v) Paragraph 4

B, supported by L, suggested stating that the activity report "shall be made public or sent to the Parliament.”.

(vi) Paragraph 5

– first subparagraph: reservations by D and DK

– second subparagraph: deletion suggested by F and L

– third subparagraph: B wanted the supervisory authority of the other Member State to be subject to an obligation to intervene.
NB: a new version of this Article taking account of delegations' concerns was drafted by the Presidency and given to delegations before the end of the Working Party's meetings. That version is annexed to this document for the record.

5. Working Party on Protection: Article 31
   (see Presidency text, page 9)

   All delegations were able to agree on the text submitted by the Presidency, with the exception of D, which entered two reservations: the first regarding the method of designating authorities' representatives (these should be nominated by each Member State and not by the authorities); the second relating to the number of representatives (two per Member State).

   (see page 10 of the Presidency note)

   There was consensus on deleting the word "serious" in the first line of paragraph 2 (the wording of which should be simplified if possible) and on stipulating in paragraph 4 that the Working Party's opinions must be forwarded to the advisory committee referred to in Article 34.

   However, I entered a reservation on paragraph 1a, DK maintained a waiting reservation on paragraph 1(c) and D wanted provision for making the opinions and recommendations referred to in paragraph 4 public.

   NB: a new version of this Article was drafted by the Presidency and circulated to delegations before the end of the Working Party's meeting; the new version is annexed to this note.
Chapter IV
Transfer of personal data
to third countries

Article 26

Principles

1. Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer 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 and basic freedoms and rights of individuals.

Member States shall take the measures necessary to comply with the Commission's decision.
Article 27

Derogations

1. By way of derogation from Article 26, 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 explicitly 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 and 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 of the authorizations in grants pursuant to paragraph 2.

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

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

5. Where the Commission decides, in accordance with the procedure referred to in Article 34(2), that certain standard contractual clauses offer sufficient guarantees as referred to in paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision.

NB: The Presidency suggests including a general recital interpreting the concept of important public interest, incorporating examples given during the meeting concerning exchanges of data between tax or customs authorities, police departments or data exchanges for national security purposes.
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 ensure that one or more public authorities is 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.

1a. Each Member State shall ensure that supervisory authorities are consulted when administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data are drawn up.

2. Each supervisory authority shall have, inter alia:

– 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, for example, delivering opinions before processing operations are carried out in accordance with Article 19(3) and ensuring appropriate publication of such opinions, ordering the blocking, erasure or destruction of data, a temporary or definitive ban on processing, warning or admonishing the controller or referring the matter to national parliaments or other political institutions;

– the power to bring legal proceedings where the national provisions adopted pursuant to this Directive have been violated.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

3. Each supervisory authority shall hear claims lodged by any person, or an association representing him, concerning the protection of his rights and freedoms with regard to the processing of personal data. 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.
4. Each supervisory authority shall draw up a report on its activities at regular intervals. The report shall be made public.

5. Member States shall provide that their supervisory authorities 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.

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 of that other Member State.

6. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of confidence with regard to confidential information to which they have access.
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;

   (b) give the Commission 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;

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

2. If the Working Party finds that divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the Community are arising between the laws or practices of Member States, 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 and to the 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.
DRAFT DIRECTIVE
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF
PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA

THE EUROPEAN PARLIAMENT

THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty establishing the European Economic Community, and in particular
Articles 100a (1),

Having regard to the proposal from the Commission (2),

Having regard to the opinion of the Economic and Social Committee (3),

(1) confer opinion of the judicial service of the Council (8987/91).

(2) OJ No C 277, 5.11.1990, p. 3.

OJ No C ...

(1) Whereas the objectives of the Community, as laid down in the Treaty, as amended by the Single European Act, include establishing an ever closer union among the peoples of Europe, fostering closer relations between the States belonging to the Community, ensuring economic and social progress by common action to eliminate the barriers which divide Europe, encouraging the constant improvement of the living conditions of its peoples, preserving and strengthening peace and liberty and promoting democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States and in the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(2) Whereas data-processing systems are designed to serve society; whereas they must, whatever the nationality or residence of natural persons (¹) respect the fundamental freedoms and rights of individuals, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals;

(3) Whereas the establishment and the functioning of an internal market in which, in accordance with Article 8a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded;

(4) Whereas increasingly frequent recourse is being had in the Community to the processing of personal data in the various spheres of economic and social activity; whereas the progress made in information technology is making the processing and exchange of such data considerably easier;

(¹) 8113/93, p. 3 note (3).
(5) Whereas the economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 8a of the Treaty will necessarily lead to a substantial increase in cross-border flows of personal data between all those involved in a private or public capacity in economic and social activity in the Member States; whereas the exchange of personal data between undertakings in different Member States is set to increase; whereas the national authorities in the various Member States are being called upon, by virtue of Community law, to collaborate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State within the context of the area without internal frontiers as constituted by the internal market;

(6) Whereas, furthermore, the increase in scientific and technical co-operation and the co-ordinated introduction of new telecommunications networks in the Community necessitate and facilitate cross-border flows of personal data;

(7) Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law; whereas this difference in levels of protection is due to the existence of a wide variety of national laws, regulations and administrative provisions;

(8) Whereas, in order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all the Member States; whereas this objective is vital to the internal market but cannot be achieved by the Member States alone, especially in view of the scale of the divergences which currently exist between the relevant laws in the Member States and the need to co-ordinate the laws of the Member States so as to ensure that the cross-border flow of personal data is regulated in a consistent manner that is in keeping with the objective of the internal market as provided for in Article 8a of the Treaty; whereas Community action to approximate those laws is therefore needed;
(8a) Whereas, given the equivalent protection resulting from the approximation of national laws, the
Member States will no longer be able to inhibit the free movement between them of personal data on
grounds relating to protection of the rights and freedoms of individuals, and in particular the right to
privacy; whereas a margin of manoeuvre is left to the Member States, which within the limits set by
this Directive, may specify in their national legislation the general conditions governing the lawfulness
of data processing; whereas the free movement of personal data within the Community must not result
in the application of the rules for the protection of individuals guaranteed by the Member States under
this Directive being set aside; (3)

(9) Whereas the object of the national laws on the processing of personal data is to protect fundamental
rights and freedoms, notably the right to privacy, which is recognized both in Article 8 of the European
Convention for the Protection Of Human Rights and Fundamental Freedoms and in the general
principles of Community law; whereas, for that reason, the approximation of those laws must not result
in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of
protection in the Community;

(10) Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to
privacy, which are contained in this Directive, give substance to and amplify those contained in the
Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to
Automatic Processing of Personal Data;

(11) Whereas the protection principles must apply to all processing of personal data by any person whose
activities are governed by Community law; whereas processing carried out by a Member State's own
authorities, organizations or other bodies in the course of activities which are not governed by
Community law should, as is provided for in the Resolution of the Representatives of the Governments
of the Member States of the European Communities meeting within the Council of ..., be subject to the
same protection principles set out in national laws; whereas processing carried out by a natural person
for purely personal or household activity, for example, with correspondence or the maintenance of lists
of addresses must be excluded;

(3) 9099/93, p. 2 note (2).
(12) Whereas, in order to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States; whereas, in this connection, processing carried out by a person who is established in a Member State should be governed by the law of that State; whereas, the fact that processing is carried out by a person established in a third country must not stand in the way of the protection of individuals provided for in this Directive; whereas, in that case, the processing should be governed by the law of the Member State in which the means used are located, and there should be guarantees to ensure that the rights and obligations provided for in this Directive are respected in practice;

(13) Whereas Member States may more precisely define in the laws they enact or when bringing into force the measures taken under this Directive the general circumstances in which processing is lawful; whereas, however, more precise rules of this kind cannot serve as a basis for supervision by a Member State other than the Member State of residence of the person responsible for the processing, since the obligation on the part of the latter to ensure, in accordance with this Directive, the protection of rights and freedoms with regard to the processing of personal data is sufficient, under Community law, to permit the free flow of data;

(14) Where as the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises or bodies carrying out processing, in particular regarding quality, technical security, notification to the supervisory authority, and the circumstances under which processing is admissible, one such possible circumstance being that the data subject has consented, and, on the other hand, in the rights conferred on individuals, the data on whom are the subject of processing, to be informed that processing is taking place, to consult the data, to demand corrections and even to object to processing;
(14a) Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas to determine whether a person is identifiable account should be taken of all the means likely reasonably to be used either by the controller or by a third party to identify the said person; (4)

(15) Whereas any processing of personal data must be lawful and fair to the person concerned; whereas, in particular, the data must be relevant and not excessive in relation to the purposes for which they are processed; whereas such purposes must be explicit and lawful;

(16) Whereas, in order to be lawful, the processing of personal data must be carried out with the consent of the data subject or with a view to the conclusion or performance of a contract, binding on the data subject, or be required by Community law, by national law, by the general interest or by the interest of an individual, provided that the data subject has no legitimate grounds for objection; whereas, in particular, in order to maintain a balance between the interests involved, while guaranteeing effective competition, Member States remain free to determine the circumstances in which personal data may be disclosed to a third party for mailing purposes or research being carried out by an organization or other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the disclosure of data regarding him, at no cost and without having to state his reasons;

(16a) Whereas the processing of personal data must be regarded as lawful where it is carried out in order to protect an interest which is essential for the data subject's life; (5)

(16b) Whereas it is for the Member States to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or a person governed by private law such as a professional association; (5)

(4) 8113/93, p. 7 note (3).
(5) 9099/93, p. 6 notes (1) and (2).
(17) Whereas data which are capable by their nature of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his written consent; whereas, however, processing of these data must be permitted if it is carried out by an association the purpose of which is to help safeguard the exercise of those freedoms;

(18) Whereas the processing of personal data for purposes of journalism should qualify for exemption from the requirements of this Directive wherever this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(19) Whereas, if the processing of data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and must be given accurate and full information where data are collected from him, and not later than the time when the data are first disclosed to a third party if the data subject was not informed at the time the data were collected;

(20) Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify the accuracy of the data and the lawfulness of the processing; whereas, therefore, any person should be entitled to object to the processing of the data on legitimate grounds;

(21) Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical measures be taken, both at the time of the design of the techniques of processing and at the time of the processing itself, particularly in order to maintain security and thereby to prevent any unauthorized processing;
(22) Whereas the notification procedures are designed to ensure disclosure of the purposes and main features of any processing operation, for the purpose of verification that the operation is in accordance with the national measures taken under this Directive; whereas, in order to avoid unsuitable administrative formalities, exemption from the obligation to notify and simplification of the notification required must be provided for by Member States in cases where processing does not adversely affect the rights and freedoms of data subjects provided that it is in accordance with a measure taken by a Member State and specifying its limits; whereas exemption or simplification could be provided for in particular in cases of processing operations whose object is the holding of registers intended, according to national law, to provide information to the public or to categories of individuals having a legitimate interest;

(22a) Whereas, nevertheless, simplification or exemption from the obligation to notify shall not release the controller from any of the other obligations resulting from this Directive; (6)

(23) Whereas ex post facto verification by the competent authorities must, in general, be considered a sufficient measure; whereas, however, Member States must provide for checking by the supervisory authority prior to any processing which poses a particular threat to the rights and freedoms of data subjects by virtue of its nature, scope or purpose, such as processing which has as its object the exclusion of data subjects from a right, a benefit or a contract; whereas Member States should be entitled to replace such prior checking by means of a legislative measure or a decision of the supervisory authority authorizing the processing operation and specifying suitable safeguards;

(24) Whereas, if the person carrying out processing fails to respect the rights of data subjects, national legislation must provide for a judicial remedy; whereas any damage which a person may suffer as a result of unlawful processing must be compensated for by the person responsible for the processing, who may be exempted from liability only if he proves that he has taken suitable security measures; whereas dissuasive penalties must be imposed on any person, whether governed by private or public law, who fails to comply with the national measures taken under this Directive;

(6) 5244/94, p. 6.
(25) Whereas cross-border flows of personal data are necessary to the expansion of international trade; whereas the protection of individuals guaranteed in the Community by this Directive does not stand in the way of transfers of personal data to third countries which ensure an adequate level of protection; whereas the adequacy of the level of protection afforded by a third country must be assessed in the light of all the circumstances surrounding the transfer operation or set of transfer operations;

(26) Whereas, on the other hand, the transfer of personal data to a third country which does not ensure an adequate level of protection must be prohibited; whereas provision should be made for exemptions in certain circumstances where the data subject has given his consent or has been informed or where protection of the public interest so requires; whereas particular measures may be taken to rectify the lack of protection in a third country in cases where the person responsible for the processing offers appropriate assurances; whereas, moreover, provision must be made for procedures for negotiations between the Community and such third countries;

(27) Whereas Member States may also provide for the use of codes of conduct drawn up by the business circles concerned and approved by the supervisory authority, with a view to spelling out the national measures taken under this Directive to the specific characteristics of processing in certain sectors; (1)

(28) Whereas Member States must encourage the business circles concerned to draw up Community codes of conduct so as to facilitate the application of this Directive; whereas the Commission will support such initiatives and will take them into account when it considers the appropriateness of additional specific measures in respect of certain sectors;

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(1) 6477/93, p. 3 note (1).
(29) Whereas the establishment in each Member State of an independent supervisory authority is an essential component of the protection of individuals with regard to the processing of personal data; whereas such an authority must have the necessary means to perform its duties, including powers of investigation or intervention and powers in connection with notification procedures; whereas such authority must help to ensure transparency of processing in the Member State within whose jurisdiction it falls; whereas the authorities in the different Member States will need to assist one another in performing their duties;

(30) Whereas, at Community level, a Working Party on the Protection of Individuals with regard to the Processing of Personal Data must be set up and be completely independent in the performance of its functions; whereas, having regard to its specific nature, it must advise the Commission and, in particular, contribute to the uniform application of the national rules adopted pursuant to this Directive;

(31) Whereas the adoption of additional measures for applying the principles set out in this Directive calls for the conferment of rule-making powers on the Commission and the establishment of an Advisory Committee in accordance with the procedures laid down in Council Decision 87/373/EEC (8);

(32) Whereas the principles set out in this Directive regarding the protection of the rights and freedoms of individuals, notably their right to privacy, with regard to the processing of personal data may be supplemented or clarified, in particular as far as certain sectors are concerned, by specific rules based on those principles;

(33) Whereas Member States should be allowed a period of not more than three years from the entry into force of the national measures transposing this Directive in which to apply such new national rules gradually to all processing operations already under way;

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(8) OJ No L 197, 18.7.1987, p. 33.
Whereas this Directive does not stand in the way of a Member State's regulating market research activities aimed at consumers residing in its territory insofar as such regulation does not concern the protection of individuals with regard to the processing of personal data,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

1.2

Article 1

Object of the Directive

1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data. (10)

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.

Article 2

Definitions

(a) "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity; (11)

(9) Statement in the Council minutes "The Council and the Commission note that the laws on the protection of legal persons regarding the processing of data relating to them are not affected by this Directive."

(10) 8113/93, p. 3.

(11) 8113/93, p. 5; see new recital 14a.
(b) "processing of personal data" ("processing") means any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

(c) "personal data file" ("file") means by structured set of personal data accessible according to specific criteria whether this set of data is centralized, decentralized or dispersed on a functional or geographical basis. (12)

(d) "controller" means any natural or legal person, public authority, agency or other body which determines the purposes of the processing of personal data.

Where the purposes of processing are determined by national or Community laws or regulations, it will be for the national or Community law concerned to name the controller or the specific criteria for the nomination thereof. (13)

(e) "processor" means any natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller; (2)

(f) "third party" means any natural or legal person, public authority, agency or other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data;

(f)bis "recipient" means any natural or legal person, public authority, agency or other body to whom data are disclosed, whether a third party or not; (2)

(12) 8113/93, p. 7 note (6).
(13) 8431/93, p. 3
"the data subject's consent" means any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed; (14)

[Withdrawal of consent by the data subject shall be without retroactive effect.] (1) (15)

CHAPTER II

GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING
OF PERSONAL DATA

Article 5 (16)

Member States shall, [within the limits of the provisions of this chapter.] (17) determine more precisely the conditions under which the processing of personal data is lawful.

SECTION I

PRINCIPLES RELATING TO DATA QUALITY

Article 6 (18)

1. Member States shall provide that personal data must be:

(a) processed fairly and lawfully;

(14) 8431/93, p. 3.
(15) Text to re-examine.
(16) 9099/93, p. 2; see new recital 8a.
(17) 9099/93, pp. 3–4.
(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected or for which they are further processed;

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete [having regard to the purposes for which they were collected] (19) are erased or rectified;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. [Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.]

2. It shall be for the controller to ensure that paragraph 1 is complied with.

SECTION II

PRINCIPLES RELATING TO THE GROUNDS FOR PROCESSING DATA

Article 7 (20)

Member States shall provide that personal data may be processed only if:

(a) the data subject has given his [explicit] consent [unambiguously];

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(19) 9099/93, pp. 3–4.
(20) 9099/93, pp. 5–6.
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject; \(^{(21)}\)

or

(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; \(^{(22)}\)

or

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests of the data subject which require protection under this Directive.

SECTION III

SPECIAL CATEGORIES OF PROCESSING

Article 8
The processing of special categories of data

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\(^{(21)}\) See new recital (16a).
\(^{(22)}\) See new recital (16b).}
Article 9
Processing of personal data
and freedom of expression (23)

Member States shall provide for exemptions from the provisions of this Chapter, Chapter IV [and
Chapter VI] for the processing of personal data carried out solely for journalistic purposes [or the purpose of
artistic or literary creation] which prove necessary to reconcile the right to privacy with the rules governing
freedom of expression. (24)

SECTION IV

INFORMATION TO BE GIVEN TO THE
DATA SUBJECT

[Article 10
The existence of a processing operation] (25)

Article 11
Information when data are collected
from the data subject (26)

Member States shall provide that the controller or his representative must provide to a data subject from
whom data relating to himself are collected at least the following information, except where it is already in
his possession:

(23) 9713/93, p. 2.
(24) Statements for the minutes (9099/93, p. 8)
1. The Council and the Commission consider that reconciling the right to privacy with freedom of
expression should not lead Member States to prescribe exemptions from Article 17 on the security
of processing.
2. In its regular reports on the implementation of this Directive, the Commission will pay close attention
to the application by Member States of Article 9 with a view to submitting any necessary proposals.
(25) Article deleted.
(26) 4382/94, p. 2.
(a) the identity of the controller and of his representative if any,

(b) the purposes of the processing for which the data are intended,

(c) the recipients or categories of recipients of the data, and

(d) the obligatory or voluntary nature of any reply as well as the possible consequences for him if he fails to reply.

Article 12
Information given to the data subject when data are recorded or disclosed to a third party (27)

1. Member States shall provide that the controller or his representative must provide to the data subject at the time when undertaking the recording of personal data, or if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed, at least the following information, except where it is already in his possession:

(a) the identity of the controller and of his representative if any,

(b) the purposes of the processing,

(c) the recipients or categories of recipients, and

(d) the categories of data concerned.

2. Paragraph 1 shall not apply where the provision of information to the data subject proves impossible or involves a disproportionate effort. In these cases Member States shall provide appropriate safeguards.

(27) 4382/94, pp. 3 and 4.
Article 13
Right of Access (28)

Member States shall guarantee for every data subject the right to apply without constraint to the controller so as to:

1) obtain at reasonable intervals and without excessive delay or expense:

   – information as to whether or not data relating to him are processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;

   – communication to him in an intelligible form of the data undergoing processing and of any available information (29) as to their source;

   – knowledge of the logic involved in any automatic data processing operations with which he is confronted particularly in the case of the automated decisions of Article 16, paragraph 1;

2) obtain the rectification, erasure or blocking of data, the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

3) have third parties to whom the data have been disclosed notified of any rectification, erasure or blocking carried out in compliance with paragraph 3, if it does not prove possible or involve a disproportionate effort.

(28) 4522/94, p. 2; see new recital (20a)
(29) The availability of information will be subjected in judicial control dealt with on the basis of general law principles on fraud in transactions.
Article 14
Exemptions and restrictions to the right of access (30)

Member States may adopt legislative measures to restrict the scope of the obligations and rights provided for in Articles 6(1), 11, 12(1), 13 and 21 when such a restriction constitutes a necessary measure to safeguard:

(a) national security;
(b) defence;
(c) public security;
(d) the investigation, detection and prosecution of criminal offenses;
(e) an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters;
(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority;
(g) the protection of the interests of the data subject;
(h) the protection of an equivalent right or freedom of another person.

Member States shall restrict the scope of the obligations and rights provided for in the Articles of this Directive referred to in the previous subparagraph here they are obliged to do so by a provision of Community law.

2. Member States may limit the right of access of the data subject when the data are kept only temporarily in personal form and intended to be processed only for the purpose of creating statistics, particularly for purposes of scientific research, of such a type that the data subjects can no longer be reasonably identified.

(30) 4522/94, p. 3.
SECTION VI

THE DATA SUBJECT'S RIGHT TO OBJECT

Article 15 (31)

Member States shall grant the data subject the right to:

(a) object at any time on legitimate grounds to the processing of data relating to him, except where otherwise provided by national legislation. Where there is a justified objection, the controller shall cease the processing;

(b) obtain on request and free of charge, the blocking of personal data which the controller anticipates being processed for the purposes of marketing by mail or, if this right is not exercised, to be informed before personal data are disclosed to third parties or used on their behalf for the purposes of marketing by mail, and to be expressly offered the right given above before such disclosures or uses.

The controller must ensure that the opportunity to have data erased without cost has been expressly offered to a data subject before personal data are disclosed to third parties or used on their behalf for the purposes of marketing by mail.

Article 16

Automated individual decisions

1. Member States shall grant the right to every person not to be subjected to a decision adversely affecting him which is based solely on automatic processing defining [a personality profile.]

2. Subject to the other Articles of this Directive, Member States shall provide that a person may be subjected to a decision of the kind referred to in paragraph 1 if that decision:

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(31) 4078/94, p. 13.
(a) is taken in the course of the entering into or performance of a contract, provided any request by the data subject has been satisfied, or that there are suitable measures to safeguard his legitimate interests, which must include arrangements allowing him to defend his point of view; or

(b) is authorized by law which also lays down measures to safeguard the data subject's legitimate interests.

SECTION VII

SECURITY OF PROCESSING

Article 17 (32)

Article 17bis

SECTION VIII

Article 18

Obligation to notify the supervisory authority (33)

1. Member States shall provide that the controller or his representative, if any, must notify the supervisory authority referred to in Article 30 before carrying out any wholly or partly automatic processing operation or set of such operations intended to serve a single purpose or several related purposes.

(32) 6032/94, p....
(33) 5244/94; see recitals 22 and 22a.
2. Member States shall provide for the taking of measures to simplify or exempt from the obligation to notify in the case of categories of processing operation which are not likely to affect adversely the rights and freedoms of data subjects, taking into account the data which are to be processed, in particular those data referred to in Article 8(1).

To this end Member States may:

– specify, for each category of processing operation to which an exemption or simplification applies, the purposes of the processing, the data or categories of data undergoing processing, the category or categories of data subject, the recipients or categories of recipient to whom the data are to be disclosed and the length of time the data are to be stored; and/or

– make the exemption conditional on the appointment by controllers, in compliance with the national law that governs them, of a data protection official, responsible in particular for ensuring in an independent manner the internal application of the national provisions taken pursuant to this directive, and for holding the register of processing operations undertaken within the organization including the items of information listed in paragraph 1 of Article 19.

3. Member States may provide for an exemption from the obligation to notify or a simplification of the notification in the case of processing operations referred to in Article 8(2)(b).

4. Member States may stipulate that certain or all non-automatic processing operations involving personal data shall be notified, or provide for these processing operations to be subject to a simplified notification.
Article 19
Examination of notified processing operations (34)

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.

(34) 5575/94, p. 4.
Article 20
Manual processing operations  

Article 21
Publicizing of processing operations

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.

\(\text{Article deleted.}\)

\(5575/94,\ p.\ 5.\)
CHAPTER III

JUDICIAL REMEDIES, LIABILITY AND PENALTIES

Article 22
Judicial remedies (37)

Without prejudice to any administrative remedy for which provision may be made, inter alia before the supervisory authority referred to in Article 30, Member States shall provide for the right of every person to a judicial remedy for any breach of the rights guaranteed him by the national provisions adopted pursuant to this Directive.

Article 23
Liability (38)

1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.

2. Member States may provide that the controller may be exempted, in whole or in part, from his liability for damage resulting from the loss or destruction of data or from unauthorized access if he proves that he has taken suitable steps to satisfy the requirements of Articles 17 and 24.

[Article 24
Processing on behalf of the controller] (39)

(37) 5594/93, p. 9.
(38) 5594/93, p. 10.
(39) Article deleted.
Article 25
Penalties

Each Member State shall provide for the imposition of dissuasive penalties on any person who does not comply with the national provisions adopted pursuant to this Directive.

CHAPTER IV
TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

Article 26
Principles (40)

[......]

Article 27
Derogation (41)

[......]

CHAPTER V
CODES OF CONDUCT

Article 28
National codes (42)

1. Member States may provide that codes of conduct drawn up by trade associations may make additional provisions for the special features of particular sectors, [subject to] the national measures taken under this Directive.

(40) 6153/94, Annex; see new recital No 17a.
(42) 6477/93, p. 2–3.
2. The draft codes shall be reviewed by the national supervisory authority, which shall ascertain whether or not they are justified and the representatives of the organizations which prepared them. The authority shall seek the views of data subjects or their representatives.

3. Member States shall ensure (1) the publication in an appropriate manner of codes which have been the subject of a favourable opinion on the part of the supervisory authority.

4. Any extension or amendment of the codes shall be subject to identical procedures.

Article 29
Community codes (43)

1. Member States and the Commission shall encourage the trade associations concerned to participate in drawing up Community codes of conduct intended to contribute to the proper application of this Directive in the light of the specific characteristics of each sector.

2. The Commission may, for the purposes of information, publish codes of conduct in the Official Journal of the European Communities, together with the opinion of the Working Party provided for in Article 31 on the content of the codes and the representativeness at Community level of the organizations which prepared them. The Working Party shall seek the views of data subjects or their representatives.

CHAPTER VI
SUPERVISORY AUTHORITY AND WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

Article 30
Supervisory authority (44)

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

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(43) 6477/93, p. 5.
(44) 6153/94, Annex
These authorities shall act with complete independence in exercising the functions entrusted to them.

1a. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

2. Each authority shall in particular be endowed with:

- 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, for example, that of delivering opinions in accordance with Article 19(3), before processing operations are carried out and ensuring appropriate publication of such opinions, that of ordering the blocking, erasure or destruction of data, or of imposing a temporary or definitive ban on processing, that of warning or admonishing the controller or that of referring the matter to national parliaments or other political institutions;

- the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.
3. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. 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.

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

5. Member States shall provide that their supervisory authorities 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.

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 in this other Member State.

6. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of confidence with regard to confidential information to which they have access.
Article 31
Working Party on the Protection of Individuals with regard to the Processing of Personal Data (45)

[...........]

Article 32
Tasks of the Working Party (1)

[...........]

CHAPTER VII

RULE-MAKING POWERS OF THE COMMISSION

Article 33
Exercise of rule-making powers (46)

[...........]

Article 34
Advisory Committee (2)

(45) 6153/94, Annex.
(46) 6032/94.
FINAL PROVISIONS

Article 35
[...........] (47)

Article 36

The Commission shall report to the Council and the European Parliament at regular intervals on the implementation of this Directive, attaching to its report, if necessary, suitable proposals for amendments. The report shall be made public.

Article 37

This Directive is addressed to the Member States. (48)

Done at Brussels,

For the Council

The President

(47) 6032/94.
(48)