OPINION OF THE LEGAL SERVICE

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 (doc. 9400/92).
- Applicable national law (Article 4)

1. At its meeting of 21 and 22 April 1994 the Economic Questions (Data Protection) Working Party asked the Council Legal Service to give its opinion on the question whether the approach retained in Article 4, concerning the applicable national law, is compatible with Community law and in particular whether that approach can be applied to criminal penalties.\(^{1}\) The present opinion is given pursuant to that request.

2. Article 4, as it stands at the present stage of the discussions of the Working Party\(^{2}\), is headed "National law applicable" and provides that:

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

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

\(^{1}\) See doc. 6648/94 ECO 92. This request to the Legal Service, initially put forward by some delegations, was subsequently taken up as a request of the Working Party.

\(^{2}\) See doc. 6285/2/94 ECO 76, page 20.
(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.

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.”.

These provisions will essentially constitute an approximated body of provisions, but there will be divergencies amongst them to the extent that the Directive brings about only a partial approximation and leaves certain matters to be regulated on a non-approximated basis. The Legal Service understands Article 4 as being intended to avoid the potential difficulties caused by such divergencies, in an Internal Market in which it may be anticipated that there will be "a proliferation of processing operations at Community level,"(3) by ensuring that the law of only one Member State will apply to processing(4) at any given time. The law retained by the Directive is that of the Member State in which the controller(5) is established or to whose

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(3) Non-Paper from the Commission's Services, 18 April 1994, paragraph 2.
(4) For the purposes of this opinion, the word "processing" is used in the sense in which it is defined in Article 2(b) of the draft Directive, in the latest version of the text, as it appears in doc. 8285/94 ECO 164. The word covers a coherent set of processing operations, in which case it corresponds to the word 'traitement' in French (see the Non-Paper of the Commission's Services, referred to in note (3) above, at paragraph 8(i)).
(5) Under Article 2(d) of the latest version of the draft Directive the controller is "any natural or legal person, public authority, agency or other body which determines the purpose and means of the processing of personal data.". See doc. 8285/94 ECO 164.
law it is subject by virtue of public international law or, where it is not established in the Community, the Member State in which it makes use of means of transmission, save for the sole purpose of transit through the Community.

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