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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 the consolidated text of the recitals revised by the Commission following the meeting on 14 and 15 November 1994.
DRAFT EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

on the protection of individuals
with regard to the processing of personal data
and on the free movement of such data

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

Having regard to the Opinion of the Economic and Social Committee (2),

(1) Whereas the objectives of the Community, as laid down in the Treaty, as amended by the Treaty on European Union, include establishing an ever closer union among the people 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 people, 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 man; whereas they must, whatever the nationality or residence of natural persons 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 7a 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;

(5) Whereas the economic and social integration resulting from the establishment and functioning of the internal market within the meaning of Article 7a 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 cooperation and the coordinated 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 coordinate 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 7a 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 for manoeuvre is left to the Member States which may in the context of implementation also be exercised by the industrial and social partners; whereas Member States may therefore specify in their national law the general conditions governing the lawfulness of data processing; whereas in doing so the Member States shall strive to improve the protection currently provided by their legislation; whereas, within the limits of this margin for manoeuvre and in accordance with Community law, disparities could arise in the implementation of the Directive and this could have an effect on the movement of data within a Member State as well as in the Community;

(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 as those set out in national laws; whereas processing carried out by a natural person in the course of a purely personal or household activity, for example correspondence or the maintenance of lists of addresses, must be excluded;

(11a) Whereas the laws on the protection of legal persons regarding the processing of data relating to them are not affected by this Directive;

(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 under the responsibility of a controller who is established in a Member State should be governed by the law of that State;

(12a) Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through the means of a stable set-up; whereas the legal form of such an establishment, whether a simple branch or a subsidiary with a legal personality, is not the determinate factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of a subsidiary, he must ensure in order to avoid any circumvention that each of the establishments fulfil the obligations imposed by the national law applicable to its activities;

(12b) 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 these cases, 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;

(12c) Whereas this Directive is without prejudice to the rules of territoriality applicable in criminal matters;

(13) Whereas Member States shall 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, in particular, Article 5 in conjunction with Articles 7 and 8, allows Member States, in addition to general rules, to provide for special processing conditions for specific sectors and for the various categories of data covered by Article 8;

(14) Whereas the principles of protection must be reflected, on the one hand, in the obligations imposed on persons, public authorities, enterprises, agencies or other
bodies responsible for processing, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, 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 request corrections and even to object to processing in certain circumstances;

(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 any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable;

(14b) Whereas the protection of individuals, must apply as much to automatic processing of data as to non-automatic processing; whereas the scope of this protection must not in effect depend on the techniques used, otherwise this would create serious risk of circumvention; whereas, nonetheless as regards manual processing, only files should be covered by the scope of the protection; whereas a file is defined by several conditions which must be fulfilled cumulatively; whereas in particular the content of a file must be structured according to specific criteria relating to individuals allowing easy access to the personal data; whereas consequently files or a set of files, as well as their cover pages, which are not structured according to specific criteria do not fall within the scope of the protection;

(15) Whereas any processing of personal data must be lawful and fair to the individual concerned; whereas, in particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed; whereas such purposes must be explicit and legitimate and must be determined at the time of collection of the data; whereas the purposes of processing further to the collection shall not be incompatible with the purposes as they were originally specified;

(15a) Whereas the further processing of personal data for historical, statistical or scientific purposes is not generally to be considered incompatible with the purposes for which the data have previously been collected provided that Member States furnish suitable guarantees; whereas these guarantees must in particular rule out the use of data for taking measures or decisions regarding any particular individual;

(16) Whereas, in order to be lawful, the processing of personal data must in addition be carried out with the consent of the data subject or be necessary with a view to the conclusion or performance of a contract binding on the data subject, or be required by law, by the performance of a task in the public interest or in the exercise of official authority, or by the interest of a natural or legal person provided that the interests or the rights and freedoms of the data subject are not overriding; 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 used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies; whereas Member States may similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any 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 equally be regarded as lawful where it is carried out in order to protect an interest which is essential for the data subject's life;

(16b) Whereas it is for national legislation 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 another national or legal person governed by public law or by private law or such as a professional association;

(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 explicit consent; whereas, however, derogation from this prohibition must be explicitly provided for in prospect of specific needs, in particular where the processing of these data is carried out for certain health-related purposes by individuals subject to a legal obligation of professional secrecy or for legitimate activities by certain associations or foundations the purpose of which is to permit the exercise of fundamental freedoms;

(17a) Whereas Member States must also be authorized, when justified by grounds of important public interest, to derogate from the prohibition on processing sensitive categories of data in areas such as public health and social protection, scientific research and public statistics; whereas it is incumbent on them, however, to provide specific and suitable safeguards so as to protect the fundamental rights and the privacy of individuals;

(17b) Whereas, moreover, the processing of personal data by official authorities for achieving aims, laid down in constitutional law or international public law, of officially recognized religious associations is carried out on important grounds of public interest;

(18) Whereas the processing of personal data for purposes of journalism or for purposes of literary or artistic expression should qualify for exemption from the requirements of certain provisions of this Directive insofar as 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, where data are collected from him, must be given accurate and full information bearing in mind the circumstances of the collection;

(19a) Whereas certain processing operations involve data which the controller has not collected directly from the data subject; whereas, furthermore, data can be legitimately disclosed to a third party, even if the disclosure was not anticipated at the time the data were collected from the data subject; whereas, in all these cases, the data subject should be informed when the data are recorded or at the latest when the data are first disclosed to a third party; whereas, however, it is not necessary to impose this obligation if the data subject already knows the information or if the recording or disclosure are expressly provided for by law or if the provision of information proves impossible or involves disproportionate efforts, which could be the case where processing is for historical, statistical or scientific purposes; whereas, in this regard, the number of data subjects, the age of the data, and any compensatory measures taken may be taken into consideration;

(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 in particular the accuracy of the data and the lawfulness of the processing;

(20a) Whereas Member States may, in the interest of the data subject or so as to protect the rights and freedoms of others, restrict rights of access and information; whereas they may, for example, specify that access to medical data may be obtained only through a health professional;

(20b) Whereas restrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States insofar as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union, as well as criminal investigations and prosecutions and action in respect of breaches of ethics in the regulated professions;

(20c) Whereas Member States may also be lead, by virtue of the provisions of Community law, to derogate from the provisions of this Directive concerning the right of access, the obligation to inform individuals and the quality of data, in order to safeguard certain purposes among those referred to above;

(20d) Whereas in cases of processing lawfully pursued on grounds of public interest, official authority or the legitimate interests of a natural or legal person, any data subject should nevertheless be entitled, on legitimate and compelling grounds relating to his particular situation, to object to the processing of any data relating to himself; whereas Member States nevertheless have the possibility of laying down national
provisions to the contrary;

(21) Whereas the protection of the rights and freedoms of data subjects with regard to the processing of personal data requires that appropriate technical and organizational measures be taken, both at the time of the design of the processing system 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;

(22a) Whereas, in order to avoid unsuitable administrative formalities, exemptions from the obligation to notify and simplification of the notification required may be provided for by Member States in cases where processing is unlikely to adversely affect the rights and freedoms of data subjects, provided that it is in accordance with a measure taken by a Member State specifying its limits; whereas in an equivalent way exemption or simplification can similarly be provided for by Member States where a person appointed by the controller ensures that the rights and freedoms of data subjects are unlikely to be adversely affected; whereas such an official, whether an employee of the controller or not, must be in a position to exercise his functions in complete independence;

(22b) Whereas exemption or simplification could be provided for in cases of processing operations whose sole purpose is the keeping of a register intended, according to national law, to provide information to the public and open to consultation by the public or by any person demonstrating a legitimate interest;

(22c) 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;

(23) Whereas, in this context, ex post facto verification by the competent authorities must in general be considered a sufficient measure;

(23a) Whereas, however, certain processing operations are likely to pose specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes, such as the purpose of excluding individuals from a right, benefit or a contract, or by virtue of the specific use of new technologies; whereas it is for Member States, if they so wish, to specify such risks in their legislation;

(23b) Whereas with regard to all the processing undertaken in society, the amount posing such specific risks should be very limited; whereas Member States must provide that the supervisory authority, or the data protection official in cooperation with the authority, check such processing prior to it being carried out; whereas following this prior check, the supervisory authority may, according to its national law, give an opinion or an authorization regarding the processing;
whereas such checking may equally take place in the course of the preparation of a legislative measure adopted by the national parliament or on the basis of such an initiative, defining the nature of the processing and specifying suitable safeguards;

(24) Whereas, if the controller 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 controller, who may be exempted from liability if he proves that he is not responsible for the damage, in particular in cases where he reports an error on the part of the data subject or in a case of force majeure; whereas sanctions 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;

(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;

(26a) Whereas provision should be made for exemptions from this prohibition in certain circumstances where the data subject has given his consent, where the transfer if necessary in relation to a contract or a legal claim, where protection of an important public interest so requires, for example in cases of international transfers of data between tax or customs administrations or between services competent for social security matters, or where the transfer is made from a register established by law and intended for consultation by the public or persons having a legitimate interest; whereas in this case such a transfer should not involve the entirety of the data or entire categories of the data contained in the register and, when the register is intended for consultation by persons having a legitimate interest, it should be made only at the request of the same persons or if the latter are the recipients;

(26b) Whereas particular measures may be taken to compensate for 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;

(26c) 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;
Whereas Member States and the Commission, in their respective spheres of competence, must encourage the trade associations and other representative organizations concerned to draw up codes of conduct so as to facilitate the application of this Directive, taking account of the specific characteristics of the processing carried out in certain sectors, and respecting the national provisions adopted for its implementation;

Whereas the establishment in Member States of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data;

Whereas such authorities must have the necessary means to perform their duties, including powers of investigation and intervention, particularly in cases of complaints from individuals, and powers to engage in legal proceedings; whereas such authorities must help to ensure transparency of processing in the Member States within whose jurisdiction they fall;

Whereas the authorities in the different Member States will need to assist one another in performing their duties so as to ensure that the rules of protection are properly respected throughout the European Union;

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;

Whereas the adoption of additional measures for applying the principles set out in this Directive calls for the conferment of powers of implementation on the Commission and the establishment of an [ ... ] in accordance with the procedures laid down in Council Decision 87/373/EEC (3);

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;

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; whereas, in order to facilitate cost-efficient implementation, a further period expiring ten years after the date on which this Directive is adopted will be allowed to Member States to ensure the conformity of existing manual files with certain of the

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(3) OJ No L 197, 18.7.1987, p. 33.
Directive's provisions; whereas data contained in such files actively processed during this extended transition period should nevertheless be brought into conformity with these provisions at the time of such further active processing;

(33a) Whereas it is not necessary for the data subject to give his consent again so as to allow the controller to continue to process, after the national provisions taken pursuant to this Directive enter into force, any sensitive data necessary for the performance of a contract concluded on the basis of free and informed consent before the entry into force of these provisions;

(34) Whereas this Directive does not stand in the way of a Member State's regulating marketing 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;

(35) Whereas the Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive,

HAVE ADOPTED THIS DIRECTIVE: