



COMMISSION OF THE EUROPEAN COMMUNITIE

Brussels, 18.07.1995
COM(95) 375 final-COD28

OPINION OF THE COMMISSION

pursuant to Article 189 b (2) (d) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the

proposal for a
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**

AMENDING THE PROPOSAL OF THE COMMISSION

pursuant to Article 189 a (2) of the EC Treaty

1. **BACKGROUND**

- (a) On 27 July 1990 the Commission presented to the Council a proposal for a Directive (COM(90) 314 final - SYN 287).¹
- (b) On 24 April 1991 the Economic and Social Committee delivered its opinion.²
- (c) On 11 March 1992 Parliament delivered its opinion (first reading) and adopted a resolution endorsing the Commission proposal, subject to a large number of amendments.³
- (d) On 15 October 1992 the Commission adopted an amended proposal for a Directive pursuant to Article 149(3) of the EEC Treaty (COM(92) 422 final - SYN 287).⁴
- (e) On 20 February 1995 the Council adopted a common position.⁵
- (f) On 24 February 1995 the Commission transmitted to Parliament its opinion on this common position (SEC(95) 303 final - COD 287).
- (g) On 15 June 1995 Parliament approved (second reading) seven amendments to the common position.

2. **PURPOSE OF THE COMMISSION PROPOSAL**

The proposal for a Directive seeks to facilitate the free movement of data within the Community by affording individuals a high level of protection with regard to the processing of personal data. Harmonization of the relevant national laws has proved necessary because of the wide divergences between them and of data-exchange requirements imposed by completion of the internal market.

The White Paper "Growth, competitiveness, employment" and the Bangemann group's report "Europe and the global information society" underscored the need for the Directive as a regulatory measure within the clear, stable legal framework that is essential if the information society is to develop along lines acceptable to the citizens of Europe.

The proposal for a Directive lays down common ground rules for the protection of individual rights with regard to the processing of personal data.

The high-level protection is afforded through the obligations imposed on data controllers (for example, public authorities, enterprises and associations) and through the rights conferred on the individuals whose data are processed.

The obligations on controllers relate, for example, to the quality of the data - the processing of which must meet a specific and legitimate purpose - to security requirements and to the notification of such processing to an independent supervisory authority to be set up by the Member States.

¹ OJ No C 277, 5.11.1990, p. 3.

² OJ No C 159, 17.6.1991, p. 38.

³ OJ No C 94, 13.4.1992, p. 76; OJ Annex, Debates of the European Parliament, No 3/416, p. 133.

⁴ OJ No C 311, 27.11.1992, p. 30.

⁵ OJ No C 93, 13.4.1995, p. 1.

The right to be informed under certain circumstances about the processing of data relating to them, the right of access to such data and the right to ask for them to be corrected if they are inaccurate and even to object to their processing are the main rights conferred on individuals by the proposal.

3. COMMISSION OPINION ON PARLIAMENT'S AMENDMENTS

1. The seven amendments put forward by Parliament are acceptable to the Commission.
2. Five of them, which relate to the substance of the proposal, make useful clarifications to the text.

Amendment No 1 incorporates into the 41st recital a specific reference to business confidentiality as grounds for possibly limiting an individual's right to know the logic involved in the automatic processing of data concerning him.

Amendment No 3 provides in Article 2(d) for the possibility that for a single processing operation a number of parties may jointly determine the purpose and means of the processing to be carried out.

It follows from this that, in such a case, each of the co-controllers must be considered as being constrained by the obligations imposed by the directive so as to protect the natural persons about whom the data are processed.

Amendment No 4 is intended to make it clear in Article 3(2) that the processing of personal data carried out for the "economic well-being of the State" is excluded from the scope of the Directive where that operation relates to questions of State security.

In order to do this, amendment No 4 adopts the wording used in the 13th recital of the common position.

Amendment No 5 incorporates into Article 9 a clarification to the effect that Member States will have to provide for exemptions or derogations "only" if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

Amendment No 6 is designed to clarify the point that transfers which are "legally required" on important public interest grounds escape application of the normal rule that the third country of destination must ensure an adequate level of protection to enable such transfers to take place.

Although it is not specified in certain language versions of the text, it seems evident that such a transfer could only be considered as legally required where a legal act of a public authority applies, notably a law passed by the national parliament. On the contrary a simple contractual agreement could not serve as a basis for such a transfer.

3. The remaining two amendments concern the Commission's implementing powers.

Amendment No 2 introduces a reference to the "modus vivendi" agreed between Parliament, the Council and the Commission on 20 December 1994.

Amendment No 7 is designed to replace the IIIa regulatory committee with a IIb management committee.

A management committee is fully consistent with the nature of the powers conferred on the committee by the Council common position. Those powers are limited to transfers to third countries: they cover the appraisal, based on the criteria set out in Article 25(2), of whether or not there is an adequate level of protection in third countries (Article 25(3) and (6)) and the adoption of appropriate measures to authorize transfers to third countries not having an adequate level of protection (Article 26(3) and (4)).

It should also be pointed out that there is no major difference between the IIIa committee and the IIb committee in terms of powers available to the Commission. The difference between the two procedures is essentially formal: in one case (IIIa), the Council decides on the basis of a Commission proposal, while in the other (IIb) it amends a decision which has already been taken by the Commission but whose effects are suspended. However, the IIb procedure is quicker since it obviates the need for a new procedure within the Commission: the Commission's decision simply takes effect once the period allowed the Council has expired.

The Commission very much hopes that the Council will also be convinced by this procedural efficiency aspect of the matter, which is important for the decisions to be taken.

Amended proposal for a

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**

**(presented by the Commission pursuant to
Article 189a(2) of the EC Treaty)**

Recital 41

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; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of automated decisions referred to in Article 15(1); whereas this right must not adversely affect intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;

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; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of automated decisions referred to in Article 15(1); whereas this right must not adversely affect business confidentiality or intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;

Recital 66a (new)

Whereas an agreement on a "modus vivendi" between the European Parliament, the Council and the Commission concerning the implementing measures for acts adopted in accordance with the procedure laid down in Article 189B of the EC Treaty was reached on 20 December 1994.

Common position of the Council

Amended Commission proposal

Article 2(d)

d) "controller" shall mean the natural or legal person, public authority, agency or any other body which determines the purposes and means of the processing of personal data. Where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by a national or Community law;

d) "controller" shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data. Where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by a national or Community law;

Common position of the Council

Amended Commission proposal

Article 3(2), first indent

- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State) and the activities of the State in areas of criminal law;

- in the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation is bound up with questions of State security) and the activities of the State in areas of criminal law;

Article 9

Member States shall provide for exemptions or derogations 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 expression which prove necessary to reconcile the right to privacy with the rules governing freedom of expression.

Member States shall provide for exemptions or derogations 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 expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

Common position of the Council

Amended Commission proposal

Article 26 (1) (4)

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| 4) the transfer is necessary on important public interest grounds, or for the establishment, exercise or defence of legal claims, or | 4) the transfer is necessary <u>or legally required</u> on important public interest grounds, or for the establishment, exercise or defence of legal claims, or |
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Common position of the Council

Amended Commission proposal

Article 31(2), third, fourth and fifth subparagraphs

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

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

If within three months of the referral to it the Council has not acted, the proposed measures shall be adopted by the Commission

The Commission shall adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event:

The Commission shall defer application of the measures which it has decided for a period of three months from the date of such communication.

The Council, acting by a qualified majority, may take a different decision within the time limit referred to in the previous subparagraph.

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