

COMMISSION OF THE EUROPEAN COMMUNITIES

EC(95) 303 final - COD 287

Brussels, 24.02.1995

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 189 B (2) of the EC Treaty

Council common position of 20 February 1995 on the proposal for a
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

1. BACKGROUND

On 27 July 1990 the Commission presented to the Council a proposal for a Directive on the protection of individuals with regard to the processing of personal data (COM(90)314 final - SYN 287). By letter dated 5 October 1990 the Council transmitted the proposal to Parliament and the Economic and Social Committee.

Parliament delivered its opinion (first reading) on 11 March 1992.

The Economic and Social Committee delivered its opinion on 24 April 1991.

In the light of Parliament's opinion, the Commission presented to the Council on 15 October 1992, pursuant to Article 149(3) of the EEC Treaty, an amended proposal for a Directive (COM(92)422 final - SYN 287).

The Council adopted its common position on 20 February 1995.

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 on "Growth, Competitiveness and Employment" as well as the report of the Bangemann group on "Europe and the global information society" underscored the need for the Directive as a regulatory measure within the clear, stable legal framework which 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 proposal has been restructured to reflect the two major amendments suggested by Parliament and which affect the general approach: one concerns the dropping of the formal distinction between the rules applying in the public sector and those applying in the private sector, and the other the procedures involving the supervisory authority. In keeping with Parliament's wishes, The proposal takes a broad-brush approach by encompassing manual data, textual data, and sound and image data.

3. COMMENTARY ON THE COMMON POSITION

3.1 General remarks

The Council has confirmed the approach set out in the amended Commission proposal incorporating those of Parliament's amendments which had been accepted by the Commission on first reading. It has thus recognized the need to protect individuals and to ensure the free movement of personal data on the basis of a high, equivalent level of protection.

3.2 Treatment of Parliament's amendments (first reading)

The amendments accepted by the Commission and incorporated in the amended proposal have been reproduced in the common position. These are essentially as follows:

** General approach*

The formal distinction between requirements concerning the public sector and those concerning the private sector has been dropped; the approach is now homogeneous (amendments Nos 27 to 29, 39 to 41, 118 and 119).

The proposal takes up Parliament's idea of not making protection dependent solely on the creation of personal data files, but of developing a wider approach covering all uses of data. The basic concept of "data processing" has accordingly been employed.

The principle that data-processing systems are designed to serve man has been embodied in the second recital (amendment No 9).

** Definitions - Article 2*

The definition of personal data has been made clearer (amendment No 12).

The data-collection stage and the various forms of data communication have been included in the definition of processing (amendments Nos 10, 15, 16 and 34).

Definitions of "third party" and "processor" have been included (amendments Nos 18 and 134).

** Principles relating to data quality - Article 6*

The principle that the purpose must be specified before data are collected has been included in Article 6(1)(b) (amendment No 59).

A derogation from the principle that data must not be stored for longer than is necessary for the purposes for which they are processed has been introduced for the benefit of data kept for historical, statistical or scientific use (amendment No 60).

** Special categories of processing - Article 8*

The processing of personal data by a foundation, association or any other non-profit-seeking body with a political, religious, trade-union, etc. aim qualifies for specific exemption where it relates to sensitive data caught by the blanket prohibition on the processing of such data (amendments Nos 64 and 149).

As to the processing of data relating to offences, criminal convictions, etc., Parliament's call for greater flexibility is catered for by the current wording (amendment No 65).

It is for Member States to determine the conditions under which a national identification number or any other generally applicable identifier may be processed (amendment No 65).

* *Rights of the data subject - Articles 10, 11, 12, 14, 15 and 22*

The data subject's rights have been enhanced and defined more closely along the following lines in particular:

- the right to be informed is extended to include the origin of data and the logic involved in certain types of automatic processing (amendments Nos 48 and 46);
- the right of access must be exercisable without constraint (amendment No 132);
- the right to object may be exercised at any time, and in particular with regard to processing for purposes of direct marketing (amendments Nos 145 and 30);
- the remedies to be provided by Member States are extended to cover all the rights guaranteed by the Directive (amendment No 52);
- the criterion of unlawful processing giving rise to liability on the part of the controller is introduced (amendment No 73);
- it should be noted in this connection that Parliament's call for sanctions to be imposed on controllers in the public sector as well is reflected in the fifty-fifth recital (amendment No 77).

* *Notification of processing operations and prior checking - Articles 18, 19 and 20*

In order to reduce red tape and increase efficiency, the notification procedure has been made more selective: Member States may grant exemption from the obligation to notify or provide for a simplified form of notification where the processing is not likely to affect adversely the rights and freedoms of data subjects or where it is carried out by a foundation, association or other body with a political, religious, trade-union, etc. aim (amendments Nos 39 and 149). A whole series of processing operations (including those referred to by Parliament in its amendment No 23) will in practice qualify for such treatment.

The principle that a check should be carried out by the supervisory authority before the start of any processing operations likely to present specific risks for the rights and freedoms of data subjects has been incorporated; examples of such processing operations, indicated by Parliament, are given by way of illustration in the recitals (amendments Nos 40, 41, 118 and 119).

This approach should enable Member States to adapt the procedures so as to take account of the inevitable national differences stemming from the many practices employed and the varying degrees of development of data processing.

Provision is made for consultation by the public of the register of notified processing operations kept by the supervisory authority (amendments Nos 37 and 39).

* *Codes of conduct - Article 27*

The encouragement given to the drawing-up of codes of conduct at both national and European level has been confirmed with a view to applying the Directive's principles in a manner that is tailored to the specific features of the various sectors; the supervisory authorities, the Working Party and data subjects or their representatives may be involved in the drawing-up of such codes (amendments Nos 72 and 91).

* *Supervisory authority - Article 28*

Each Member State must appoint a supervisory authority - or several supervisory authorities in the case of Member States with a federal structure - to monitor the application of the provisions adopted pursuant to the Directive (amendment No 84). The supervisory authority's powers may include that of ordering the blocking, erasure or destruction of data and that of imposing a ban on processing (amendment No 86). Supervisory authorities must publish a periodic report (amendment No 87).

* *The Working Party - Article 29*

The following tasks proposed by Parliament have been incorporated in the proposal:

- the giving of an opinion on the application of national measures adopted under the Directive;
- the giving of an opinion on the level of protection in the Community and in third countries and on measures to be taken to safeguard the rights and freedoms of individuals;
- the possibility of giving opinions on its own initiative.

The Commission, for its part, must draw up and publish a report informing the Working Party of the action it has taken in response to its opinions, and the report must be forwarded to Parliament and the Council (amendments No 90, 91 and 92).

* *Final provisions - Article 34*

The report which the Commission is to send to Parliament and the Council at regular intervals must be published (amendment No 95).

3.3 Amendments introduced in the Council common position

* *Definitions - Article 2*

A definition of "recipient", which will be useful when it comes to applying the provisions on transparency of processing, has been introduced.

* *Data held in manual filing systems - Articles 2 and 33*

With a view to facilitating the Directive's implementation in those Member States which do not yet have any laws governing manual data, a 12-year transition period is envisaged for applying some of the Directive's provisions. Specifications have been added to the recitals such as the principle that such data should be brought into line as and when they are used.

* *National law applicable - Article 4*

The Council has confirmed the classic criterion proposed by the Commission in relation to the internal market, namely the place where the controller is established. It has introduced useful clarifications, firstly in Article 17 regarding the security obligations incumbent on processors and

secondly in Article 28 regarding the powers of supervisory authorities over processing operations carried out in their territory.

* *Processing of special categories of data - Article 8*

Exceptions to the prohibition on the processing of data revealing racial or ethnic origin, political opinions or religious or philosophical beliefs or of data concerning health or sex life have been added in order to cover justified needs, essentially in the medical and employment fields, subject to suitable safeguards.

Derogations for reasons of important public interest and derogations from the rules governing the processing of data relating to offences, criminal convictions or security measures must be notified to the Commission.

* *Freedom of expression - Article 9*

The Council has endorsed the Commission's approach of including processing for journalistic purposes in the scope of the Directive. In addition to such processing, processing carried out for the purpose of artistic or literary expression is rightly covered by special exemption arrangements aimed at reconciling freedom of expression and the right to privacy.

* *Processing for historical, statistical or scientific use including research*

While preserving the Directive's general character, the Council has added to the derogation introduced for the maximum period for storing data for historical, statistical or scientific purposes (Article 6(1)(e)) a number of useful clarifications, notably in Article 6(1)(b) on the compatibility of processing for such purposes with the processing of data collected for other, specified purposes, or again in Article 11 on the provision of information to individuals. The scope of the optional derogation from the right of access to data processed for such purposes has been extended (Article 13(2)). The thirty-fourth recital expressly mentions scientific research and statistics as being fields in which an important public interest might justify derogations from the ban on processing sensitive data on the basis of Article 8(4).

* *Transparency of processing - Articles 10, 11 and 21*

The obligations relating to the provision of information to data subjects on the processing of data concerning them have been made more flexible to allow for the

multiplicity of circumstances in which such processing may be carried out (Articles 10 and 11). The obligation on Member States to guarantee any person the right to know of the existence of a processing operation, which was provided for in the old Article 10, has been incorporated in Article 21 in the form of an obligation to ensure that processing operations are publicized.

* *Exemptions and restrictions - Article 13*

The exemptions or restrictions provided for in the articles relating to the information and transparency-of-processing requirements (old Articles 11, 12 and 21, or the new Articles 10, 11 and 21) have been grouped together in a new Article 13 together with the derogations from the right of access.

The scope of the exemptions and restrictions, for the benefit of the interests referred to in the article, has been extended also to the purpose principle laid down in Article 6.

A statement has been added to the effect that the exemptions and restrictions must be laid down by a legislative measure.

The compensatory measure in the form of checks carried out by the supervisory authority at the request of the interested party in the event of his right of access being restricted has been included in Article 28.

* *Security of processing - Articles 16 and 17*

The provisions on confidentiality have been included in a separate article (Article 16); those on the security obligations incumbent both on the controller and on his processor (Article 17) have been the subject of drafting simplifications. Provision has been made for taking into account the cost of the measures to be taken, while the risk criterion used to assess the adequacy of the measures taken has been retained.

* *Notification and prior checking - Articles 18, 19 and 20*

The rules on notification and checking ensure equivalence between two types of procedure which have proved their worth in the Member States.

As regards notification, in addition to the possibility of exemption or simplification for categories of processing operations which are unlikely to affect adversely the rights and freedoms of data subjects (Commission proposal), the possibility of exemption or simplification has been provided for in cases where the controller appoints a data protection official responsible for ensuring in an independent manner the internal application of national provisions, thereby ensuring that the rights and freedoms of data subjects are unlikely to be adversely affected by processing operations.

As to the prior checking of processing operations likely to present specific risks for the rights and freedoms of data subjects, this may be carried out either by the supervisory authority (Commission proposal) or by the data protection official in cooperation with that authority. Depending on their national law, the supervisory authorities may either deliver an opinion or issue an authorization following the prior check (fifty-fourth recital).

* *Third countries - Articles 25 and 26*

The Council has reaffirmed the overall approach proposed by the Commission, namely the principle of an adequate level of protection in third countries to which data are transferred and the obligation on Member States to make sure that such a level of protection exists. It has defined more precisely both the factors to be taken into account in assessing the level of protection and the derogations to be provided for.

* *Supervisory authority - Article 28*

Systematic consultation of the supervisory authorities when administrative measures or regulations are being drawn up at national level has been introduced. The supervisory authorities' powers of intervention have been specified in an indicative manner and include that of referring matters to national parliaments. This approach leaves Member States the degree of flexibility that is needed to integrate these bodies into their national legal systems. The provision on cooperation between Member States' supervisory authorities has been clarified.

* *Committee - Article 31*

The Council has limited the implementing powers to the transfer of data to third countries and, for the committee assisting the Commission in this area, it has selected Procedure III, Variant (a) provided for in Article 2 of Decision 87/373/EEC of 13 July 1987.

* *Final provisions - Articles 32 and 33*

Besides laying down the above-mentioned transitional measures on bringing manual filing systems into conformity with the Directive, it has been deemed necessary to increase to three years from the date of adoption of the Directive the period allowed for its transposal into national law.

To take account of technological developments and in the light of the state of progress in the information society, the Commission is to examine in its periodic report the application of the Directive to the processing of sound and image data relating to individuals.

3.4 Commission position on the amendments made by the Council

As pointed out in the above commentary, many of the amendments resulting from the Council's deliberations are useful clarifications or simplifications. The flexibility introduced, while guaranteeing an equivalent level of protection in Member States, should not lead to a reduction in the level of protection. On the contrary, the Directive's implementation will permit effective, non-bureaucratic application of the general principles laid down in the light of the enormous variety of processing operations involving personal data.

As far as implementing powers are concerned, the Commission can accept the solution adopted in the common position, but would have preferred the powers to be more extensive.

It would also stress that, since this is a legislative measure subject to the co-decision procedure, the *modus vivendi* agreed between the European Parliament, the Council and the Commission is applicable.

The Commission can therefore endorse the amendments stemming from the Council's work.

4. CONCLUSIONS

The Commission considers that the common position incorporates and supplements in a suitable manner the amendments accepted on first reading. The Council has added to the amended proposal both a degree of flexibility enabling account to be taken of the specific nature of certain processing operations and a measure of clarity where this was needed.