



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 May 2002

Restricted
CDL (2002) 67
English Only

Opinion no. 207/2002_lux

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS ON

**DRAFT LAW N° 4735 ON PROTECTION OF PERSONS IN
RESPECT OF PROCESSING OF PERSONAL DATA**

by

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1. With reference to a request made by authorities of Luxembourg I have been asked for comments on Luxembourg's

– Projet de loi n°4735 relatif à la protection des personnes à l'égard du traitement des données à caractère personnel

with regard to *general aspects of constitutional law*.

2. Together with the request a computer file was forwarded containing pages 1–53 of 108 of the « Projet de loi n°4735 ». However, the missing part of the text – containing the Exposé des motifs and the text of the Directive 95/46/CE relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données – were available on the Internet at www.chd.lu¹ together with the following additional documents:

– Projet de loi n°4735/01. Avis de la Chambre des Fonctionnaires et Employés publics, 22.5.2001,²

– Projet de loi n°4735/03. Avis de la Chambre de Travail, 14.11.2001,³

– Projet de loi n°4735/04. Avis de la Chambre des Employés Privés, 30.10.2001,⁴

– Projet de loi n°4735/05. Avis de la Chambre des Métiers, 22.11.2001,⁵ and

– Projet de loi n°4735/06. Avis du Conseil d'État, 29.1.2002.⁶

Further, at the Internet site www.gouvernement.lu, the official website of the Government of Luxembourg, the Government had published the press release

– « M. Juncker reçoit l'avis de la Commission consultative des droits de l'homme », 20.6.2001,⁷ with a link to the text of the document

– « Avis sur le Projet de loi 4735 relatif à la protection des personnes à l'égard du traitement des données à caractère personnel », 11.6.2001.⁸

These documents are the point of departure for my comments.

3. One – but not the only – purpose of the « Projet de loi n°4735 » is to transpose European Community Directive 95/46/EC into the law of Luxembourg, and one of the purposes of that directive is to give substance to and amplify the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS no 108).

4. Together these three documents – the Luxembourg « Projet de loi n°4735 », the European Communities' Directive 95/46/EC and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data – propose to establish new rules for Luxembourg in a field of law, where traditional fundamental rights sometimes

¹ Doc J-2000-O-0752, 675297.pdf.

² Doc J-2000-O-1100, 686642.pdf.

³ Doc J-2001-O-0079, 696233.pdf.

⁴ Doc J-2001-O-0102, 699076.pdf.

⁵ Doc J-2001-O-0124, 700515.pdf.

⁶ Doc J-2001-O-0262, 701806.pdf.

⁷ At <http://www.gouvernement.lu/gouv/fr/act/0106/20ccdh/20ccdh.html>.

⁸ At <http://www.gouvernement.lu/gouv/fr/act/0106/20ccdh/avis.rtf>.

overlap or even are in potential conflict with each other, where new fundamental rights are emerging and where also the basic freedoms of European Union law have to be taken into account. In this context two questions concerning constitutional law are obvious:

– Is the proposed legislation reasonable with regard to common European constitutional principles and compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms?

– Is the proposed legislation on data protection in harmony with the Constitution of Luxembourg?

5. It is well known that in national constitutional law of the Member states of the European Union the approaches to data protection differ greatly; Germany and Sweden are often quoted as examples for very different approaches.

The *German Constitution* does not explicitly grant the individual a fundamental right to data protection, but postal communication is protected and according to decisions of the Bundesverfassungsgericht every individual can claim “informationelle Selbstbestimmung” under the very broad provision in article 2 of the German Basic Law (Grundgesetz) on personal freedom, which is interpreted as limiting the freedom of expression in general and the freedom of the press in particular. This broad constitutional provision on the protection of personal freedom is supported by elaborate legislation in the field of administrative law – notably the Bundesdatenschutzgesetz, a federal act on data protection, which in 2001 was amended to achieve compliance with Directive 95/46/EC.

The constitutional approach of *Sweden* to data protection is different. The point of departure is not a fundamental right of the individual, but the freedom of the press. To strengthen this freedom and to encourage the free exchange of opinion and availability of comprehensive information, the Freedom of the Press Act (tryckfrihetsförordningen) of 1949, one of the constitutional laws of Sweden, provides that every Swedish citizen is entitled to have free access to official documents. This fundamental right, which is cherished by the Swedish press and a cornerstone of its investigative activities but granted to every Swedish citizen and not only to journalists, may be restricted only if restriction is necessary; any restriction has to be scrupulously specified in the provisions of a special act of law, the Secrecy Act (sekretesslagen) of 1980. Thus, in the field of public administration freedom of information – not a fundamental right to privacy or data protection – is the constitutional rule; the Swedish Constitution is silent on this point. Instead data protection is granted as an exception to the general rule by legislation in the field of administrative law but only insofar as it is permitted by the constitutional provisions, which always will prevail in case of conflict with provisions in ordinary legislation. In this constitutional context Directive 95/46/EC was transposed by means of the Swedish Act on Personal Data (personuppgiftslagen) of 1998, which expressly provides that its provisions cannot be applied if contrary to constitutional provisions.

The Constitution of *Luxembourg* is similarly silent when it comes to data protection in general. But postal communication is protected (as in Germany) and the freedom of the press of the press is guaranteed (as in both Germany and Sweden).

6. The examples of Germany and Sweden show that stronger data protection in general could be achieved not only by constitutional amendment but also either by creative interpretation of existing constitutional provisions or by ordinary legislation (or by combinations of these methods). They also show that there is considerable diversity in national solutions in the field of data protection on the constitutional level and its interaction with administrative law on the level of ordinary legislation. None of these solutions could claim to be setting a *constitutional* standard concerning data protection, which could give guidance on the European level to be followed by other countries. It is obvious that the development of the European corpus of constitutional law has not yet reached that stage. Therefore the way to stronger data

protection which is proposed in the Luxembourg « Projet de loi n°4735 » appears to be perfectly reasonable in the context of constitutional solutions elsewhere in Europe.

7. The situation is similar, when it comes to the European Convention on Human Rights. Article 8 protects quite broadly the right to respect for privacy. However, it is not entirely clear whether and when this provision may be interpreted as a means to achieve data protection for individuals in general. The European Court of Human Rights has not yet decided sufficiently many cases in which Article 8 is applied to solve data protection problems, and therefore the judgements of the Court do not yet provide easy and reliable guidance which could help to identify the level of data protection which necessarily has to be achieved in national legislation and where the line has to be drawn between the right to respect for privacy according to Article 8 on the one hand and other fundamental rights and freedoms guaranteed by the Convention on the other in order to avoid potential conflicts. Regarding this, the way to stronger data protection which is proposed in the Luxembourg « Projet de loi n°4735 » is convincing also in the context of European Convention on Human Rights.

8. Fresh inspiration for constitutional development in the field of data protection is emanating from the Charter of Fundamental Rights of the European Union, which declares in Article 8.1 that everyone has the right to the protection of personal data concerning him or her. The Charter, however, is not a binding document; its definitive legal status has still to be determined. It is legitimised by the Declaration of Nice, but cannot yet be interpreted as standard setting for the development of constitutional law within the Member States of the European Union.

9. The « Projet de loi n°4735 » has to be placed in this still not very structured and to some extent unstable context of development within the field of European constitutional law in general. The right balance between conflicting aspects of internal legislation has to be determined by the legislator of Luxembourg, who also has to determine the ways and means to do this and enjoys a considerable margin of appreciation when doing it. Both the Commission consultative des droits de l'homme and the Conseil d'État have mentioned situations, where provisions of the Constitution and ordinary laws of Luxembourg may come into conflict with provisions of the « Projet de loi n°4735 », and both give advice how to solve these potential conflicts. In my view, the Conseil d'État, in particular, in its very detailed « Avis sur le Projet » convincingly pleads for a number of changes in the draft and for supplementary legislation. To analyse them and to comment on them, however, is not part of my task.