Strasbourg, 23 July 2002
Opinion no. 207/2002

CDL- AD(2002)19
Or. French.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

OPINION
ON THE DRAFT LAW OF LUXEMBOURG ON THE PROTECTION OF PERSONS IN RESPECT OF THE PROCESSING OF PERSONAL DATA

Comments by

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Endorsed by the Venice Commission
at its 51st plenary session
(Venice, 5 and 6 July 2002)

Introduction

1. On 4 March 2002 the Prime Minister of Luxembourg, Mr Jean-Claude Juncker, asked the Venice Commission to examine Luxembourg's draft law on the protection of persons in respect of the processing of personal data.

2. The Commission then set up a working group, comprising Mr Hans-Heinrich Vogel and Mr Stefano Rodotà, who submitted their comments on 10 and 20 May 2002 (see CDL(2002)67 and 68 respectively).

3. At its 51st plenary session (5 and 6 July 2002) the Commission endorsed Mr Vogel's and Mr Rodotà's comments (see below).

A. Comments by Mr H.-H. Vogel

4. 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.*

5. 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 caracère personnel et à la libre circulation de ces données – were available on the Internet at www.chd.lu[1] 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

[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.

- « 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.

6. 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).

7. 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 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?

8. 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.

9. 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.

10. 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

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

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.

11. 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).

12. 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.

13. 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.

14. 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.

15. 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.

B. Comments by Mr S. Rodotà

16. In the comments below I have sought to highlight the main points to emerge from a comparative analysis of the Luxembourg draft law on the protection of persons in respect of the processing of personal data (hereinafter called the Draft Law) submitted to us for an appraisal and the text of European Directive 95/46/EC (hereinafter called the Directive) and the data protection guidelines that have emerged recently.

17. It should first be pointed out that the actual layout of the Draft Law is unusual. While I do not wish to pass judgment, for or against the layout, I must point out that many concepts that are grouped together both in the Directive and in most other European laws on the subject (for example, Italian Law No.675/1996) have been dealt with in the Draft Law on the basis of an unprecedented approach and layout.

18. For the sake of simplicity, the most important features of the Draft Law are set out here in an order that takes account of content and not necessarily of the numerical order of the articles.

Parties covered by the Draft Law

19. The Draft Law provides for the following parties:

- the data subject;
- the controller;
- the processor.

20. These parties are provided for in accordance with the Directive. The Draft Law also provides for another party in Article 12.2a, the officer responsible in an independent capacity: this is someone who is appointed by the controller and is responsible in practice for data protection and for ensuring that professional rules and security measures are observed (cf Article 18.2 of the Directive). This new party is subsequently described, in Article 40, as a professional specialising in the protection of data processing rights safeguarded by law (a sort of company ombudsman). It is not clear, however, how these various provisions tie in with one another. Is the data protection officer independent or a member of the company staff?

Scope

21. The Draft Law applies to all processing, by automatic means or otherwise, of data which form or are intended to form part of a filing system (Article 3.1). While processing for personal reasons or personal use is excluded (Article 3.3), the material scope covers processing operations concerning public security, defence and activities of the state connected with criminal law and the economic well being of the state (Article 3.5). These provisions are in keeping with the Directive.

Data quality

22. Article 4 reaffirms the principles of the Directive.

Lawfulness of processing

23. Here too, the provisions of the Draft Law (Article 5) are in keeping with the Directive.

Processing of special categories of data

24. The provisions of Article 6 of the Draft Law correspond to those in the Directive, including the exceptions. By providing for hypothetical consent to the processing of the data, however, the provision concerning "inferred consent" (Article 6.2e) seems to be taking the Directive too far. Moreover, paragraph 3 does not really seem consistent with paragraph 2. Attention should be drawn to the provision on the processing of genetic data and the need, provided for in Article 7.2, for authorisation from the National Commission responsible for the processing of sensitive health service data.

Processing of judicial data

25. The arrangements set out in Article 8 of the Draft Law seem to be in keeping with the Directive.

Processing in the context of freedom of expression

26. The article specifically concerning special arrangements for managing data in this context (Article 9) is in keeping with the approach in the Directive.

Processing for surveillance purposes

27. The alternative to consent provided for in the Draft Law (Article 10.1) seems to be in keeping with the approach adopted by French legislation and by the National Commissions in Belgium, Spain and Italy. It would, however, be worth inserting a provision concerning the time for which personal data obtained in this way must be stored in order to dispel any misgivings about the interpretation of this particularly sensitive provision.

Surveillance in the workplace

28. With regard to the issue of the surveillance of people in the workplace, it is debatable whether it is advisable to lay down rules (such as are set out in Article 11 of the Draft Law),

particularly in view of the work currently being carried out by the Subgroup on Surveillance and Monitoring in the Workplace set up within the working party provided for in Article 29, which should shortly lead to guidelines consistent both with the Directive and with European legislation on worker protection.

Notification of the National Commission

29. Article 12 seems to comply with Article 18.2 of the Directive; indeed, it is more restrictive.

Authorisation from the Commission

30. As far as the purpose is concerned, the provisions of Article 14 are in keeping with the general criteria in the Directive. It would, however, be worth adding a provision allowing the Commission to issue general authorisation independently for each category of processing.

Authorisation by means of regulations

31. Processing necessary for security and the prevention and punishment of criminal offences falls within the competence of the Grand Duchy of Luxembourg (Article 17).

Combination

32. Combination of personal data is possible only where provided for by law or authorised by the Commission, the aim being to ensure that the controller has a legitimate interest in combining the data. It must not lead to discrimination (Article 16). This provision seems to have been drafted in order to implement Article 15 of the Directive, taking account of "automated individual decisions", which are moreover governed by Article 31 of the Draft Law.

Transfer of data to third countries

33. The principles set out in Article 18 of the Draft Law are taken from Article 25 of the Directive. Similarly, the exceptions provided for in Article 19 follow the provisions of Article 26 of the Directive.

Confidentiality and security of data

34. Articles 21 and 22 likewise parallel Articles 16 and 17 of the Directive.

Information

35. Article 26 is in keeping with Articles 10 and 11 of the Directive and the exceptions provided for in Article 27 seem consistent with, although more extensive than, Article 13 of the Directive.

Right of access

36. Article 28 allows the legal representatives of the data subject to have access to the relevant data, provided they can prove a legitimate interest. This broadens the scope of

Article 12 of the Directive. This right of access is also recognised in the case of newspaper databases. The exceptions are similar to those provided for in Article 13 of the Directive.

Objection

37. The provisions in Article 30 match those in the Directive (cf Article 14).

Automated individual decisions

38. The provision faithfully reproduces Article 15 of the Directive.

Prior checking

39. Prior checking by the National Commission is provided for only in respect of the categories of data referred to in Article 14.1. This provision does not seem to give the Commission the discretion to intervene independently, as is possible, for example, under the Italian law passed in 2001.