COMMUNICATION FROM THE COMMISSION

First stage consultation of social partners on the protection of workers' personal data

1. AIM OF THIS DOCUMENT

The purpose of this document is to consult the social partners, in accordance with Article 138, paragraph 2 of the EC Treaty, on the possible direction of a Community action on the protection of workers' personal data.

2. BACKGROUND

General

In order to protect an individual with regard to the processing of his/her personal data, the Council adopted on 24th October 1995 the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

According to the Directive, the Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. The Directive is general and does not contain any sector specific provisions on the processing of data in the employment context, with one exception. According to the Directive, Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life. However, this prohibition shall not apply where 'the processing is necessary for the purposes of carrying out the obligations and specific rights of the controller in the field of employment law in so far as it is authorised by national law providing for adequate safeguards'.

In this context Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunication sector should also be taken into account, even though it is only marginally relevant for the relationship between employers and employees. There is a Commission proposal to replace this Directive which aims to adapt and update the existing provisions.

Employers collect personal data on job applicants and workers for a number of purposes, inter alia, to comply with law, to assist in selection for employment, training and promotion, to ensure personal safety, personal security, quality control, customer service and the protection of property.

Directive 95/46/EC fully applies to workers' personal data. However, it could be argued that, given the specific nature of the employment relationship and considering the general nature of the Directive, there may be a need for detailing out the application of the principles in the employment context.

Initiatives taken by the Commission in this area

The question of data protection in the employment area first arose in a Communication from 1997, 'The Social and Labour Market Dimension of the Information Society; People First – Next Steps', where the Commission committed itself to the adoption of a Communication on data protection in the employment area. Furthermore, experts from the Member States have been invited to several meetings on this subject and the Commission has made a survey of Member States' legislation in this field.

In its new Social Policy Agenda[1], the Commission undertakes to consult the social partners on the question of data protection in the employment context and the possibilities for future Community action. The European Social Agenda, endorsed by the European Council at the Nice Summit in December 2000, confirmed the need to consult the social partners on this issue.

At the request of DG EMPL, the Working Party on the Protection of Individuals with regard to the Processing of Personal Data has adopted an opinion[2] on the current application of Directive 95/46/EC to the protection of workers' personal data. Although it is too early to assess the level of compliance by employers with the terms of the Directive, the opinion recognises that there are circumstances in which personal data is processed in the employment context which raise specific problems for workers which the Directive does not adequately address.

National legislation

Most of the Member States have notified general legislation transposing Directive 95/46/EC. According to Article 33 of the Directive, the Commission is due to report on its implementation and, if necessary, make suitable proposals for amendments.

Some Member States have adopted, or are in the process of adopting, specific legislation aiming at protecting workers' personal data (Denmark, Finland). Supervisory Authorities in some other Member States (Belgium, France, The Netherlands and Greece) are in the process of adopting recommendations addressing different aspects of the use of personal data in the employer/employee relationship. The United Kingdom Information Commissioner is in the process of adopting a Code of Conduct. In Sweden and Germany, possible future legislative actions are being considered. Therefore, it is clear that the protection of workers' personal data is currently an important issue at national level.

International instruments

Both the International Labour Organisation and the Council of Europe have recognised that specific guidelines are required in relation to the employment relationship and data protection. There is an International Labour Organisation Code of Practice on protection of workers' personal data[3] and a Council of Europe Recommendation on the Protection of Personal Data used for Employment Purposes[4].

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[1] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions.
[2] Opinion 6/2001.
[3] Protection of workers' personal data. An ILO code of practice (1997).
[4] Recommendation No. R (89) 2 of the Committee of Ministers to Member States on the Protection of Personal Data used for Employment Purposes.

It should also be noted that Article 8 of the EU Charter of Fundamental Rights [5] refers to the protection of personal data. In addition, Articles 21, 26, and 31.1 have specific relevance to workers and the protection of their private data.

3. THE COMMUNITY ADDED VALUE

In accordance with Article 5 of the EC Treaty, the Community must only act if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Collecting and processing of personal data may entail some risks for workers. Member States regulate this in different ways, within the limits established by Directive 95/46/EC. A different treatment of workers' personal data within the EU may create barriers to the free movement of information and by extension to the free movements of workers within the internal market. A different treatment of workers' personal data may also hamper the free movements of workers by creating unequal conditions for their recruitment and the activity of recruitment services.

In the light of the various national laws and international standards that have established binding procedures for the processing of personal data and of the deliberately general nature of Directive 95/46/EC, there may be a need to develop or promote data protection measures - at European level - which specifically address the use of workers' personal data.

Furthermore, in a more and more globalised world economy, with a growing number of transnational mergers, take-overs and acquisitions, an increasing number of employees are working for companies or organisations that have establishments or subsidiaries in more than one country. Therefore, for both reasons of efficiency and ensuring a level playing field, a more consistent protection of workers' personal data throughout the EU may be necessary.

In accordance with its well established practice, the Commission is convinced that the social partners, at European level, are well placed to make a significant contribution on this question. In particular, the social partners could inform the Commission of their experience on possible obstacles to the free movement of workers or employment information within the internal market. The involvement of the social partners is based on a profound conviction that trust and respect between the employer and workers are an essential element in the effective business practices of the employer and creating a working environment in which both the worker and the employer can prosper.

4. ISSUES FOR ACTION AT EUROPEAN LEVEL

Consent

Directive 95/46/EC provides consent as one of the means for legitimising the processing of data. The question may be raised as to whether consent, in certain situations, is a suitable ground in view of the real nature of the employment relationship, in which the worker is subordinate and dependent. Furthermore, workers or prospective workers are often in a situation where they cannot give the 'freely, specific and informed' consent necessary under

[5] OJ No C 364, 18.12.2000, p. 1.

the provision of the Directive to make processing legitimate. For example, a worker or prospective worker is often in the position where it is not possible to refuse, withdraw or modify consent due to the employer's position of power, and the worker's fear of loss of promotion prospects or job offer.

Given the imbalance of power in the employment relationship it could be argued that consent alone is not an adequate safeguard, particularly in relation to the processing of sensitive data (data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership or health or sex life).

Medical data

Access to and processing of medical data requires particular attention in the employment context because of the sensitivity of the information processed and the risks posed to fundamental rights and freedom of individuals and, in particular, the risk of discrimination. It may be desirable to explore whether there is a need to specify, in the field of employment, the principles of necessity and proportionality contained in Article 6 of Directive 95/46/EC as well as other relevant principles, such as the retention period, accuracy of the data, etc.

Some Member States only allow employers to be informed of the outcome of medical examinations, i.e. whether the worker is fit to work or not. In these countries, the medical diagnosis and the rest of the medical file remain confidential and only the occupational health physician ("médecin du travail") can have access to it. This question is also dealt with by the ILO Code of Practice, which prescribes that data covered by medical confidentiality should only be stored by persons bound by medical secrecy and they should be kept separate to other data.

In the light of the foregoing, the Commission is considering whether action, at the European level, on the processing of medical data in the employment context, would be appropriate.

Drug testing and genetic testing

Testing of workers for drug and substance abuse is increasingly prevalent in some Member States. Much of the Member State legislation allows testing of a worker or a prospective worker's health to ensure that he or she is 'fit to work', which may include testing a worker for drug and substance abuse. It may be desirable to explore the need for specific rules applying to further processing of such data and also consider questions related to this matter such as what will happen (what are the remedies) if a worker, or a prospective worker, refuses to undergo these tests and what are the consequences if he or she gives inaccurate or incomplete answers on questions related to this matter.

Another issue, which has recently become a very live one, is that of genetic testing and the data, which result from such testing. Genetic data relates not only to analysis of the body but also details of family members' medical history.

A number of experts are calling for the prohibition or severe limitation of the use of data, which result from genetic testing in the workplace. Several Member States prohibit or restrict the use of data resulting from genetic testing (for example Austria, Portugal and The Netherlands). Other Member States do not appear to have legislated to restrict genetic testing in the workplace, thus employers and employees may be confused about the lawfulness of such tests, particularly in situations where the employer has operations in both a country which prohibits tests and one where there are no current guidelines.

Genetic features are included as a ground on which discrimination is prohibited in the EU Charter of Fundamental Rights[6]. The Council of Europe[7] states that genetic data should, in principle, not be used for purposes outside the detection, prevention or treatment of diseases, judicial procedure or a criminal investigation. Employment relations would fall outside of these purposes.

Although the Directive provides for a basic protection in Article 6 (data must be processed fairly, lawfully and in a proportionate way) and more specific protection in Articles 7 and 8, it may be argued that such drug and genetic testing in the employment context should be explicitly restricted, and that the use of data concerning drug misuse and genetic data obtained by the employer from a third party should be prohibited or restricted at Community level.

Monitoring and surveillance

The monitoring of workers' behaviour, correspondence (for example, e-mails, internet use), etc. is an issue that is currently the subject of some debate. According to the information available to the Commission, quite a number of Member States have some provisions restricting monitoring in the workplace. Some of these provisions are contained in employment law, others are part of criminal law, whilst trade unions and works councils in some of the Member States have developed their own codes of practice on employee monitoring.

In addition, location data is becoming widely used by employers in particular to monitor the whereabouts of their employees at any given time. The data may be obtained from a number of sources i.e. the vehicle the worker is driving or the equipment the worker is using, for example, GSM mobile phones. This data may then be used to monitor the worker's location, performance and habits etc.

The ILO Code of Practice does not prohibit monitoring of workers, but it does restrict it in two ways. First, the workers must be informed in advance. Second, employers must take account of the consequences on workers' privacy, etc. in choosing their methods of monitoring. Furthermore, the Code very much limits the use of secret monitoring to cases where it is necessary for health and safety reasons or for the protection of property.

Despite the applicability of Article 6 of the Directive (the requirement of necessity and proportionality), there might be a need for action in the field of employment.

5. TOPICS FOR CONSULTATION

In the light of the above the social partners are invited to answer the following questions:

> 1) Do the provisions laid down in Directive 95/46/EC and Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector, adequately address the protection of workers' personal data?

[6] Article 21.
[7] Recommendation No. R(97)5 of the Committee of Ministers to Member States on the protection of medical data.

2) Do current national rules, implementing Directive 95/46/EC and Directive 97/66/EC, deal with this issue to an extent satisfactory to both the worker and the employer?

3) Do you consider it advisable to take an initiative in this area? In particular, do you think that the absence of a specific body of provisions in this field has an adverse impact on the worker and/or the employer?

4) If so, should this initiative be taken at Community level?

5) If so, what form do you think Community action would have (directive, communication, recommendation, code of practice, guidelines, etc.)?

6) What should the main features of such a measure be?