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IMPLEMENTATION OF 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[1] OF 24 OCTOBER 1995

Preliminary Comments

1. UNICE welcomes the possibility offered by the European Commission[2] to comment on the implementation of Directive 95/46/EC (hereafter the Data Protection Directive) in view of the preparation by the Commission of its first report on this issue as required by Article 33 of the Data Protection Directive.

2. Adequate data protection is a necessary condition for consumer trust on the one hand and for the reliable free flow of information on the other hand. UNICE is fully aware of the importance of an adequate and uniform level of privacy protection throughout Europe.

3. European business experience in complying with Member State legislation implementing the Data Protection Directive demonstrates that there is a need for simplification and clarification of many of the European personal data protection rules.

4. Companies rely more and more on information technology and telecommunications networks for conducting their business. Since the Data Protection Directive was adopted in 1995, major changes have taken place in technology and the use, transfer and protection of data. For example, in 1996 it was estimated that 100 million personal computers (PCs) were in use[3] worldwide and in 2001 the estimated PC use reached 495 million[4]. Concerning networks through which personal data can be exchanged and in particularly the Internet, in 1995 it was estimated that there were worldwide 40 million users. In 2001, the estimated number of users reached 499 million[5]. A review of the Data Protection Directive would provide an opportunity to accommodate the ever-evolving information society and to reflect current business realities.

I. GENERAL COMMENTS

Diverging national implementation and applicable law

5. In 1995 the Data Protection Directive aimed to harmonise Member States legislation because the relevant national legislations were divergent and provided different levels of protection of personal data. This was rightly considered an obstacle to the free flow of personal data between Member

[1] OJEC L 281, 23.11.1995, pp. 31-50
[2] OJEC C 150, 22.6.2002, p. 6
[3] Information Society News, Information Society Project Office [ISPO], n° 1, April 1996
[4] Source: International Telecommunication Union [ITU] *in* Eurostat, Information Society Statistics, Theme 4 – 17/2002.
[5] *Id.*

States, thus impeding the establishment and functioning of an internal market within the meaning of Article 7a of the EC Treaty (now, after amendment, Article 14 EC)[6].

6. Although Recital 8 states that "*the level of protection* [of personal data] *must be equivalent in all Member States*", Recital 9 leaves Member States "*a margin of manoeuvre*" and recognises that "*within the limits of this margin of manoeuvre and in accordance with Community law, disparities could arise in the implementation of the Directive, and this could have an effect on the movement of data within a Member State as well as within the Community*".

7. Nearly four years after the deadline for implementation, disparities have appeared between Member States legislations that run contrary to the principle of harmonisation. These disparities maintain different levels of personal data protection and prove to be a hindrance to effective free movement of such data, which is essential to European companies, large and small, operating in the internal market.

8. For example, if a Belgian company processes customer data for itself and for its subsidiaries established in several other European countries, it would have to apply each country's national data protection laws which each provide different levels of protection. This is burdensome for companies and implies excessive compliance costs. A single company is prevented from adopting a unique personal data protection policy within the internal market of the European Union as a result of these significant differences. The Community is moving toward a single market in many different sectors (such as financial services), and there is no reason there should not also be a seamless internal market as far as data protection regulations are concerned. We expand further on these issues in Section II when we comment on issues relating to Applicable law.

9. UNICE believes that the legal report commissioned by the European Commission on the implementation of the Data Protection Directive will corroborate this assessment. We urge the Commission to take the necessary steps to limit the divergences between Member States implementation and ensure that the aim of free movement of personal data can be achieved. We also urge the Commission to make the legal report public.

Dialogue between industry and Article 29 Working Party / Article 31 Committee

10. The Data Protection Directive created an independent working party with advisory status (the so-called Article 29 Working Party) composed of representatives of the national data protection authorities (hereafter DPAs) and a committee (the Article 31 Committee) composed of representatives of the Member States to assist the Commission in the adoption of Community implementing measures (comitology procedure).

11. The opinions and recommendations of the Article 29 Working Party are delivered without any involvement of those who have a vital interest in the everyday application of and compliance with personal data protection rules: business and citizens.

12. We recommend that both the Article 29 Working Party and Article 31 Committee consult with interested parties on issues concerning the application of personal data protection rules. This would provide the authorities with additional and complementary expertise from data controllers and data subjects. Such dialogue would also allow for timely and concerted responses to new issues arising from the continuous evolution of technology and the implications on the protection of personal data.

13. In addition to providing for dialogue, further transparency is needed in the workings of the Article 29 Working Party in particular. Publishing the work program and agendas of their meetings and providing for on-line discussion forums would be a step in this direction. For any consultation to be effective a reasonable period must be provided for comments to be provided. Furthermore, since decisions are taken by a "simple majority" of votes actually cast, it would be advisable to allow for publishing dissenting opinions of the members of the Article 29 Working Party who disagree with the decision. Further transparency is especially important given that national courts seem to be giving the pronouncements of the Working Party a quasi-legislative character that they were never intended to have.[7] This would also be in line with the move toward greater transparency in the

[6] Citation done in accordance with the "Note on the citation of articles of the Treaties in the publications of the Court of Justice and the Court of First Instance" issued by the European Court of Justice, available on http://curia.eu.int/en/jurisp/renum.htm

[7] See Campbell v. Mirror Group Newspapers (QB, March 27, 2002), in which an English court interpreted the 1998 UK Data Protection Act in reference to an opinion of the Article 29 Working Party, stating 'to give a proper interpretation to the domestic Act I must look to the directive and the ancillary Recommendation of the working party'.

European institutions. As a result we believe that the terms of reference of the Working Party should also be clearly defined

Consistency with other European legislation

14. Numerous pieces of legislation tend to deal with data protection and their interaction leads to entanglement and interference. The Data Protection Directive, the recently adopted Electronic Communications Directive, the E-commerce Directive, the Electronic Signatures Directive, and the Distance Selling Directive all deal with data protection issues. Each of these Directives may come into play in a single business transaction or each one may be applicable in separate but almost identical business operations that leads to inconsistencies (e.g.: opt-in solution for commercial communication as opposed to opt-out in the e-commerce Directive [Art. 7]). Sector-specific legislation is burdensome when a single Data Protection Directive should cover all data protection issues in a consistent manner.

II. SPECIFIC COMMENTS

Applicable law (Article 4)

15. According to Article 4, it is possible that several Member States laws may be applicable to the same processing. This is confirmed by the Article 29 Working Party in a recent working document[8] where it highlights that a data controller (e.g. a company which compiles customer data) established in several Member States must comply with the obligations laid down in each of those Member States. The controller then faces the parallel application of the respective national laws to the respective establishments. If each establishment sends the compiled customer data to a single data controller in order to create a single customer database for its European operations, several laws will apply to the personal data contained in the database. This burdensome and complex situation for companies operating in the internal market is contrary to the free flow of personal data that the Directive should seek to reach.

16. Problems are also caused by the fact that differences in the implementation of Article 4 have made it very difficult for businesses active in several Member States to apply the rules on applicable law in a consistent manner. For instance, Member States seem to have different interpretations of what constitutes an "establishment" and can deem companies to be "established" within their borders for activities that do not rise to the level of the definition of "establishment" in Article 2 of the Data Protection Directive.

17. The Article 29 Working Party itself states that *"(…) the fact that the law of another Member State alone is applicable, has very limited impact, given that both laws are harmonised by the Directive [95/46/EC] and thus equivalent".* If indeed Member States data protection laws are to be considered equivalent, it should be possible for companies involved in processing personal data in different Member States to comply with the laws of one Member State through, for example, a single registration for data protection purposes, which could be done either at the Community level, or at Member State level with mutual recognition among the Member States. This would be consistent with the so-called "*country of origin principle*".

Corporate data

18. Experience shows there is a necessity to distinguish between personal data and professional or corporate data. As currently defined and interpreted, "personal data" (Article 2a) covers the data of individuals in their personal capacity as well as in their work capacity.

19. Name, job title and workplace e-mail addresses etc. in the work place may all be presently considered personal data. Often, however, this data is held only for the purpose of ensuring that the mail, e-mail or telephone call reaches the correct person in the company or organisation because of a relation with the organisation via the individual in his work capacity and the position he holds with the company.

[8] Article 29 – Data Protection Working Party, "Working document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites", 30 May 2002, 5035/01/EN/Final, WP 56, p.6. Available on http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/index.htm

20. The exceptional expansion of new technologies in the work place and the use and volume of e-mail exchanged calls for urgent clarification in this area. The use of business information which would not compromise the legitimate expectations of individuals regarding their right to privacy should be allowed under the Data Protection Directive, without the need to either seek consent or provide notifications to individual contacts within companies.

Notification (Article 18 and 19)

21. The Data Protection Directive requires Member States to provide for data controllers to notify the relevant DPAs before carrying out the processing of personal data (as mentioned above, in the case of a company established in several Member States, several notifications could be required each requiring different types of information).

22. At the same time, the Directive allows for simplification and/or exemption from notification under certain conditions.

23. This situation has led to severe divergences in the Member States. UNICE believes that the requirement for prior notification is without added value for data subjects because processing has to be lawful in any case (Article 6(1)a). Notification incurs unnecessary administrative costs for companies which is an additional barrier and can act as a disincentive for SMEs to carry out cross-border activities in the internal market. This lack of added value in the protection of the right to privacy through compulsory notification also creates unnecessary burdens on DPAs who receive the notifications.

24. UNICE recommends that the requirement for prior notification be abrogated. If abrogation is not possible, at the very least, a single notification to one DPA, or appointment of a company data protection officer, should be sufficient for all the processing that the data controller carries out in the EU. As mentioned above, on the basis that harmonised laws are deemed to be *"equivalent"*, notification to one DPA should be mutually recognised by the other European DPAs.

Data Subject right of access (Article 12)

25. It is not clear from the Data Protection Directive what volume of data must be produced upon request of a data subject. A data subject exercising his right of access could imply that the company must search personal data currently active but also personal data which has been archived or which may be stored in back-up files. Such a search can often be extremely time consuming and costly for a company, involving a disproportionate effort. There is major concern among companies that certain data subjects may exercise their right of access in an abusive manner, lacking good faith and with the sole intention of disrupting legitimate company operations. It should be able to limit to a certain geographic or organisational range the information to be delivered when a data subject exercises his/ her right of access. If the data subject asks for his/her data within a multinational company it should be clear that the company does not have to search for data of the individual in the whole group worldwide. Either the individual has to limit his request or the company should also have the right to limit it to a geographic range in good faith

26. UNICE recommends that companies be obligated to respond only to data subject access requests done in good faith insofar as they do not involve disproportionate effort on behalf of the data controller. Clarification and uniform interpretation as to what is considered "disproportionate effort" may also be needed.

Consent (Article 7 a)

27. "Unambiguous consent" is considered as one of the possible criteria for making data processing legitimate and has been interpreted differently by Member States. In the UK for example, the Data Protection Tribunal has held that notifying customers of new data processing followed by the continued use by the customer of the facility is enough to constitute consent, recognising that implied consent can be given.

28. UNICE is of the opinion that "unambiguous" is superfluous and that implied consent as described above is a workable solution to be encouraged as best practice among DPAs.

29. There are also differences in the Member States in the definition of "consent". For instance, the German Federal Data Protection Act does not allow data subjects to consent to data processing electronically, but requires a written signature on paper, which makes no sense in the Internet age. At the same time, the German Teleservices Data Protection Act *does* allow the use of electronic consent for processing, but only in the context of "teleservices". If such differences exist even in a single Member State, it can be seen what problems exist for companies offering goods and services across the Community.

Sensitive Data (Article 8)

30. There are significant differences in Member States' definition of special categories of data or "sensitive data" (i.e. data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and data concerning health or sex life).

31. For example, in Portugal, data related to "private life" is considered sensitive data and therefore requires "*explicit consent* " (Article 8(2)a) (i.e. written consent). In France, personal data concerning the newspapers a person reads is considered sensitive data because it could reveal his political opinions. Data concerning peoples' dietary habits, collected to prepare for a meeting, comes under the definition of sensitive data because it could reveal religious beliefs.

32. UNICE recommends that exemptions from the requirements applicable to sensitive data be included when such data is only incidentally sensitive. In addition it would be advisable to reach a European-wide agreement concerning a list of sensitive data, thus avoiding diverging national interpretation.

International Data Transfers (Article 25 and 26)

33. Articles 25 and 26, which deal with international transfers of personal data, should be redrafted, as they are not in tune with the reality of intra-company transfers and the internal structure of many multinational companies, where divisions exist on functional rather than geographical lines.

34. Art.26 (2) should specifically mention company codes of conduct/data privacy policies as suitable instruments to provide adequate safeguards once data are transferred outside the European Economic Area (EEA). It should be for the data controller to determine the adequacy of the Policies / Code and there is no need for such codes/policies to be submitted for the individual approval of each Member State, as is presently the case. The Directive should be enabling rather than prescriptive in its approach, and data should be able to be transferred from the entire Community once it has been demonstrated that the legal requirements of a single Member State have been satisfied. In addition, there is lack of consistency between Member States in relation to contractual terms. Some countries require companies to obtain a license for data export even when the Commission's model contract[9] is being used and is unamended (e.g., The Netherlands); this violates the single market principle and should not be permitted.

35. Derogations in Art 26(1) should clearly legitimise international transfers of personal data in cases where the transfer includes data in everyday business operations of a multinational company, such as internal directories, and passing on names of internal and external business contacts, where there is no real risk to the rights of the data subject.

36. The condition for legitimate processing in Art 7(f) of the Directive ("…*necessary for the purposes of the legitimate interests pursued by the data controller, except where such interests are overridden by the fundamental rights and freedoms of the data subject*…") should be included as a derogation in Art 26(1). To ensure correct application, this should be made subject to the right of the data subject to object to legitimate processing in Art.14 of the Directive.

37. Where other countries have passed data protection legislation, the guiding principle should be adequacy and not equivalence.

[9] Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC, OJEC L 181, 4.7.2001, p.19 and Commission Decision of 27 December 2001 on standard contractual clauses for the transfer of personal data to processors established in third countries, under Directive 95/46/EC, OJEC L 6, 10.01.2002, p. 52.

Protection of Workers Personal Data

38. On 28 August 2001, the European Commission launched the first stage consultation with social partners (UNICE, ETUC and CEEP) on the protection of workers' personal data in accordance with Article 138 (2) of the Treaty establishing the European Community.

39. Please find at annex UNICE's position on this first stage consultation dated 30 October 2001 where UNICE states that it is opposed to any new legislative initiative of the Commission regarding the protection of workers' personal data.

40. UNICE believes that the Data Protection Directive, which already applies to workers, is sufficient to ensure high quality protection of workers' personal data throughout Europe and defines efficient instruments to cope with cross-border transfer of data (taking into account the above comments)

41. UNICE has been informed that the second phase of the consultation will take place in the autumn of 2002 and will provide further comments on this issue in that context.

42. Nevertheless, UNICE would like to strongly recommend that the European Commission services involved in the review of the Data Protection Directive 95/46/EC (Directorate General Internal Market) and those responsible for the consultation of social partners regarding the protection of workers personal data (Directorate General Employment and Social Affairs) cooperate closely on both of these issues in order to ensure coherence and consistency in this field.

Conclusion

43. UNICE welcomes the Commission's efforts to increase transparency in the review of the Data Protection Directive (e.g. broad consultation followed by a Data Protection Conference – 30 September, 1 October 2002 – Brussels). We encourage the Commission to pursue these efforts by making public the outcome of the consultations with Member States, DPAs, data controllers, data subjects and in making available reports commissioned by it. We also urge the Commission to make public the timetable of the next steps regarding the review of the Data Protection Directive.

44. As demonstrated above, UNICE believes that urgent reform is needed in certain key areas. UNICE is prepared to contribute further to the simplification and clarification of the Data Protection Directive and is available to provide more detailed proposals and suggestions as the debate evolves.

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Annex

30 October 2001

UNICE position on Commission's first stage consultation on the protection of workers' personal data

I./ INTRODUCTION

1. On 28 August 2001, the European Commission launched a first stage consultation of social partners on the protection of workers' personal data. The purpose of this exercise 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. In the field of data protection, the general Directive 95/46/EC[10] already fully applies to workers' personal data. However, the Commission argues 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.

3. In parallel, a proposal for a new Directive was adopted by the Commission[11], which aims to adapt and update the existing provisions of Directive 97/66/EC[12]. However, this directive, dealing with the security and confidentiality of communications, is only marginally relevant for the relationship between employers and employees.

4. The Commission identifies several issues for which action at European level could be needed:
   - consent, as a means for legitimising the processing of data;
   - access to and processing of medical data;
   - drugs testing and genetic testing;
   - monitoring and surveillance of workers' behaviour, correspondence etc.

5. UNICE believes the submission and processing of workers' personal data is an important issue that deserves full attention. Minimum standards put in place in EU member states are important to remove the obstacles to flows of personal data as well as to ensure the protection of these data.

6. However, UNICE fails to see the need for or the added value of a new action on the protection of workers' personal data at Community level. In particular, European employers do not believe there is a need for detailing out the application of the general principles of Directive 95/46 in the employment context.

II./ General comments

<u>On the need for a specific application of the general principles of Directive 95/46 in the employment context</u>:

7. Firstly, UNICE believes that, as a general principle, regulation should only be used if there is no alternative. This principle applies also at European level. The need for and extent of regulation should be assessed on the basis of the proportionality and subsidiarity principles. This precise and thorough assessment is a prerequisite to any proposal for Community action.

8. The document of the Commission on the protection of workers' personal data does not refer to any assessment of the situation in member states. Therefore, no specific problems or current lack of regulation could be highlighted. It is not sufficient that the Commission refers to the protection of

[10] Council Directive 95/46/EC adopted on 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
[11] Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM (2000) 385 final) adopted on 12 August 2000;
[12] European Parliament and Council Directive 97/66/EC adopted on 15 December 1997 on the processing of personal data and the protection of privacy in the telecommunication sector;

workers' personal data as “a clearly important issue at national level” to justify further action in this field.

9. Secondly, as the Commission rightly points out, some member states have adopted legislation transposing Directive 95/46 and some are still in the process of adopting it. As a consequence, the report from the Commission to the Council and the European Parliament on the implementation of the Directive 95/46, foreseen in its article 33, has not yet been issued. It is therefore premature to identify any problem in the implementation of the Directive that could plead for specific action in the employment field.

10. Furthermore, it should be borne in mind that a predictable framework of regulation is not only crucial for individuals and companies, but it is also a prerequisite for member states to allow for efficient enforcement of Community law.

11. Thirdly, for years, business has been calling for a timely and thorough evaluation, including an economic impact assessment, of the likely effect of an administrative measure on business. European employers are concerned that the Commission focuses only of workers’ needs and does not take any notice either of benefits for workers from employers’ processing of personal data, or of the supplementary burden that new regulation could put on companies.

12. UNICE hopes the Commission would agree that workers also benefit from employers’ processing of personal data. For example, without up-to-date sickness records, companies would have no record of absence so that, on the one hand, workers could not receive sickness benefit and, on the other hand, management might not become aware of health and safety issues affecting the workforce. Interests on the employers’ side and workers’ need for protection must be taken into consideration in a balanced way. Employers notably use personal data to fulfil legal obligations stemming from health and safety frameworks. This benefits the worker concerned as well as his colleagues.

13. European employers therefore believe that Directive 95/46, which already fully applies to workers, is sufficient to ensure a high quality protection of workers' personal data throughout Europe. The document of the Commission is not backed up by any assessment either of the situation in member states, or of the implementation of Directive 95/46. The Commission fails to bring forward evidence that a Community action is needed for specific application of the general principles of Directive 95/46 in the employment context.

<u>On the need for an initiative at Community level:</u>

14. UNICE believes the arguments of the Commission referring to cross-border mobility of data and workers and global economy to be too weak to justify an action at Community level.

15. Firstly, European employers do not consider that a different treatment of workers’ personal data within the EU creates barriers to the free movement of information and by extension to the free movement of workers within the internal market. Indeed, article 4 of the Directive 95/46 deals with the issue of cross-border transfer of data in a satisfactory way.

16. Secondly, European employers question the Commission’s assertion that different treatment of workers’ personal data in the different member states would create unequal conditions for recruitment of workers and hence hamper the free movement of workers in Europe. In any case, no evidence is put forward by the Commission to back this view.

17. Thirdly, it is European employers’ view that the current high Community standards of protection for workers stemming from Directive 95/46 are sufficient to cover all employees, including those who work in companies active in different member states.

18. Therefore, UNICE does not share the analysis of the Commission on a need for further legislative action at Community level and is concerned that a further initiative at this level would interfere with the obligations or rights stemming from national labour law and collective agreements.

19. The issue of data protection is closely linked to other issues such as health and safety at work (e.g. medical data), workers’ involvement (e.g. membership of trade unions), anti-discrimination (e.g. data revealing racial or ethnic origin, political opinion) depending on the type of data, which is processed. These issues are dealt with in different ways from country to country and, potentially, from sector to sector across Europe. What is considered “appropriate and proportionate” varies in different circumstances, sectors and countries.

20. It is therefore important to allow for national diversity, for different methods of work according to types and sizes of companies and for different expectations across sectors and countries. UNICE believes that a Community-level "one size fits all" approach over and above existing EU rules is unlikely to meet these requirements.

21. Furthermore, a new Community initiative in the form of legislation would not, by its very nature, be flexible enough in its implementation and could not be amended quickly enough to keep up with rapid change in the world of work.

22. On the contrary, instruments like self-regulation, voluntary agreements, codes of practice, guidelines, etc., have proved to be effective mechanisms providing rapid assessment, decisions, and implementation, while ensuring a high level of protection for workers. Social partners at national level would be in a better position to address problems as and when identified.

23. However, UNICE recognises that there is a real need for information and transparency about existing national regulations concerning data protection in EU member states. Furthermore, UNICE calls on the Commission to encourage exchange of information and best practice between national data protection authorities in the framework of the Article 29 Committee[13]. European employers would for example suggest that the Committee addresses the issue of the cost-effectiveness of practices, having particular regard to the situation of SMEs. This work could then be used to spread information and raise awareness on this issue in member states.

III./ Specific comments

24. UNICE does not share the analysis of the Commission on the five issues listed in its document.

25. As regards consent as a means for legitimising the processing of data, European employers are concerned that the Commission appears to assume that workers or prospective workers are likely to be pressured and ill-informed when giving consent. It should be emphasised that other means are foreseen in Directive 95/46 for legitimising processing of data. Indeed, in article 6 and 9 of the Directive, conditions are listed for the processing of data in order to ensure a high quality protection to the individual. Furthermore, European and national legislations provide adequate protection to avoid discrimination while processing workers' personal data.

26. The issue of medical data is sufficiently dealt with in several European directives, ensuring for example that medical data on individuals is exchanged on the basis of medical secrecy between the employer and the individual concerned and that medical assessment on recruitment is related to the need to adapt the workplace to the individual for health and safety purposes. The processing of medical data, per se, is of limited value in improving health and safety standards unless it is linked with workplace monitoring. The issue of medical monitoring is specified in various directives dealing with ionising radiation, chemicals, physical and biological agents. The retention times for information are specified, as are the objectives and, often, the methods of medical surveillance.

27. The issues of drugs testing and genetic testing are separate, but are both closely linked to health and safety matters and should be dealt with as such. UNICE regrets that the Commission does not seem to take into consideration the real need to ensure safety at work and the need to fulfil existing legal obligations in this field, which both justify testing. UNICE feels that it is important to consider the problem of drugs testing not only from the point of view of the worker being tested, but also from the point of view of his/her colleagues and other individuals, who could be harmed if the worker were unfit for duty and were for example to cause an accident.

28. Concerning genetic testing, flexible rules should be developed because of the necessity to follow rapid scientific changes in this field. Given these rapid changes, the potential application of these tests to employment relations is an issue that will be more efficiently dealt with at national level.

29. European employers believe that there are no cross-border aspects concerning data processing following drugs testing and genetic testing that cannot be covered by existing rules. A new initiative at Community level is therefore not needed.

[13] The working party on the protection of individuals with regard to the processing of personal data, composed of representatives of the supervisory authorities of the member states, was set up by Article 29 of Directive 95/46/EC;

30. Finally, UNICE believes that article 6 of the Directive 95/46 makes it possible to deal with the issue of monitoring and surveillance of workers' behaviour, correspondence, etc., in a satisfactory way. It should be borne in mind that an employer might need to monitor employees at work for several reasons to minimise the risks for workers, customers, visitors and the company itself. For example, an employer may collect location data to avoid accidents or he may use surveillance mechanisms to prevent harassment of colleagues or outsiders (sexual, bullying, racial, religious, etc), to prevent the introduction of pornography into the workplace or to prevent defamation, particularly of customers, competitors and suppliers. National and international (e.g. ILO code of practice) safeguards already exist which ensure that workers' rights (e.g. right to privacy) and employers' interests are taken into consideration in a balanced way.

31. European employers would also like to recall that, contrary to what the Commission seems to indicate through its examples, monitoring is not the same thing as access to data for general good management. A certain amount of access to files is part of the normal management processes of firms. For example, it is generally accepted as best practice for someone, such as a secretary, to have access to colleagues' paper and electronic files and diaries. In this way that person can answer client queries in the employee's absence on holiday, on training courses, in meetings, etc., but can also answer queries from the employee him / herself when out of the office.

32. Thus, in the view of European business, the Commission provides no evidence of a need for action at European level on the five issues listed. The general principles of Directive 95/46 ensure high quality protection to workers and regulate cross-border transfer of data in a satisfactory way. In this framework, specific solutions could be found at a more decentralised level to match needs as and when identified.

IV./ Conclusion

33. To sum up, European employers are opposed to a new legislative initiative of the Commission regarding workers' personal data protection. They believe that Directive 95/46, which already fully applies to workers, is sufficient to ensure high quality protection of workers' personal data throughout Europe and defines efficient instruments to cope with cross-border transfer of data (Question 1).

34. The document of the Commission is not backed up by any assessment either of the situation in member states, or of the implementation of Directive 95/46. As a consequence, the Commission fails to bring forward evidence that a Community action is needed for specific application of the general principles of Directive 95/46 in the employment context (Questions 2 and 3).

35. UNICE is also concerned that a further initiative at this level would interfere with the obligations or rights stemming from national labour law and collective agreements. A new European legislative initiative would lead to more legal uncertainty and would have a negative impact on the implementation of national legislation.

36. Furthermore, UNICE calls on the Commission, on the one hand, to prepare a report to the Council and the European Parliament on the implementation in member states of the Directive 95/46 and on the other hand to give more emphasis and public awareness to the work done in the framework of the Article 29 Committee (Questions 4, 5 and 6).

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