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The application of Commission Decision 2000/518/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data provided in Switzerland

TABLE OF CONTENTS

1.	Introduction	3
2.	Methodology	3
3.	Overall situation in Switzerland with regard to adequacy	4
3.1.	General findings	4
3.2.	The situation in the different Swiss cantons	5
3.3.	Discrimination.....	5
4.	The reform Process	5
5.	Conclusion.....	6

1. INTRODUCTION

Directive 95/46/EC¹ (hereinafter “the Directive”) provides for a special legal regime in case of transfer of personal data to third countries. Article 25(1) stipulates that such transfers may only take place if the third country in question ensures an adequate level of protection. Article 25(6) empowers the Commission to issue decisions in this respect².

On 26 July 2000 the Commission issued Decision 2000/518/EC (hereinafter “the Decision”) pursuant to Article 25(6) of the Directive stating that for all the activities falling within the scope of this Directive, Switzerland is considered as providing an adequate level of protection of personal data transferred from the Community³.

Article 4(1) of the Decision stipulates that “the Commission shall evaluate the functioning of this Decision on the basis of available information, three years after its notification to the Member States and report any pertinent findings to the Committee established under Article 31 of Directive 95/46/EC⁴, including any evidence that could affect the finding in Article 1 of this Decision that protection in Switzerland is adequate within the meaning of Article 25 of Directive 95/46/EC and any evidence that this Decision is being implemented in a discriminatory way.”

This Working Document of the Commission services aims at presenting pertinent findings with regard to the functioning of the Decision as well as any findings with respect to a discriminatory implementation thereof. This paper does not aim at reviewing the content of the Decision itself. In order to acquire an accurate picture of the functioning of the Decision, a study was carried out for the Commission analysing the state of play in Switzerland as far as the application of the Decision is concerned (hereinafter “the study”)⁵. The present paper is mainly based on this study.

2. METHODOLOGY

The group of Member States’ national data protection supervisors, the so-called Article 29 Working Party (hereinafter “the Working Party”) indicated in its Working Paper 12⁶ that “transfers of personal data to countries that have ratified Convention 108 could be presumed to be allowable under Article 25(1) of the directive”. Although Switzerland ratified this Council of Europe Convention, when analysing the Swiss situation the Commission did not limit itself to referring to this ratification and simply conclude that the situation in Switzerland could thus be regarded as adequate.

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

² Commonly referred to as adequacy decisions.

³ OJ L 215, 25.08.2000, p.1.

⁴ Committee set up under Article 31 of the Directive and composed of the representatives of the Member States. This Committee must deliver an opinion before the Commission may adopt an adequacy finding.

⁵ Analysis of the Adequacy of Protection of Personal Data Provided in Switzerland in View of Commission Decision 2000/518/EC (State of the situation 25 April 2004), CRID, Namur, April 2004 (hereafter referred to as the CRID study).

⁶ Working Document of the Working Party entitled “Transfers of personal data to third countries: Applying Articles 25 and 26 of the EC Data Protection Directive”. DG XV D/5025/98.

The Working Party itself suggested to assess the situation based on a number of core data protection principles and effective enforcement mechanisms whose compliance would allow qualifying a third country's data protection system as adequate.⁷

The *core data protection principles* identified by the Working Party are the purpose limitation principle, the data quality and proportionality principle, the transparency principle, the security principle, the rights of access, rectification and opposition and finally restrictions on onward transfers to other third countries. The Working Party also identified three additional issues to be looked into in case of specific types of data processing, namely sensitive data, direct marketing and automated individual decisions. In terms of *enforcement requirements*, the Working Party identified three core elements: a good level of compliance, support and help to individual data subjects as well as appropriate redress.

The above-mentioned criteria have been used as evaluation criteria in order to assess the functioning of the Decision. They have been further complemented by looking at the way the Swiss data protection legislation has been applied in practice since the Decision was taken. Thus, the Commission services considered not only the Swiss legislation as such, but also took account of actual implementation and daily practice including possible changes therein. Moreover, case law issued by the European Court of Justice since the adoption of the Decision regarding the Data protection Directive has been taken into account in addition to the above-mentioned evaluation criteria.

The methodology used is thus three-fold:⁸

- (1) Evaluation of the effective implementation of the Decision on the basis of a set of core data protection principles and enforcement mechanisms;
- (2) Assessment of the consequences of Switzerland adhering to Convention 108 of the Council of Europe; and
- (3) Review of case law of the European Court of Justice.

3. OVERALL SITUATION IN SWITZERLAND WITH REGARD TO ADEQUACY

3.1. General findings

On the basis of the information received during the period under examination, the Commission services consider that the implementation of the Decision in essence ensures the protection of individuals' privacy rights within the meaning of Article 25 of the Directive.

The Commission services have not identified any major problems, neither in terms of the implementation of the core data protection principles nor in respect of the enforcement mechanisms in place in Switzerland.

Member States' data protection authorities have not experienced difficulties in the context of data transfers to Switzerland during the period under examination.

⁷ Idem.

⁸ CRID study, paragraph 5.1, p. 38.

Finally, the Commission services are satisfied with the situation regarding international data transfers to third countries since, in case of transfer of data from Switzerland to non-Convention 108 countries, Article 6(1) of the Swiss Federal Act on Data Protection (hereinafter “SFADP”) requires the latter to provide protection equivalent to the one provided under Swiss law.

The SFADP also provides for appropriate institutional mechanisms, such as an independent supervisory authority with appropriate powers.

3.2. The situation in the different Swiss cantons

The study reveals that with regard to the situation in the different Swiss cantons, “significant quantitative as well as material changes have occurred” since the Decision was taken “addressing concerns with the cantonal situation which already has been voiced by the Working Group in its 1999 Opinion on Switzerland.”⁹ In particular, compared to the situation at the time of adoption of the Decision, currently 16 out of 26 cantonal constitutions contain an explicit data protection clause¹⁰. In two other cantons such a provision is being foreseen. It should be recalled that the cantons must adhere to the constitutional principles, such as Article 13 of the Federal Constitution on the protection of personal data.

As more and more cantons are incorporating data protection as an important principle into their constitution, it can be said that compared to the situation at the time of the Decision, the situation at cantonal level has improved. The Commission services would welcome a situation whereby all cantons would explicitly recognize this principle in their legislation.

3.3. Discrimination

The Decision also requested the Commission to look into the issue of a possible discriminative implementation of the Decision. Neither the study, nor other information collected by the Commission services has revealed any case of discriminatory implementation.

4. THE REFORM PROCESS

Efforts are under way in Switzerland to reform the SFADP. The reform has been triggered by two parliamentary motions¹¹ and the intention to ratify the Additional Protocol to the Council of Europe Convention 108. The first motion concerns a better level of data protection in case of on-line access to federal databanks. The second motion aims at improving the right of information and requests a duty to inform those concerned when collecting sensitive data, in particular in case of health data or personal profiles.

The draft law prepared by the Swiss Federal Council introduced a duty to inform the persons concerned in case of collection of sensitive data. In addition, the draft further specified the definition of consent (*i.e.* informed and free consent), introduced more specific forms of

⁹ CRID study, paragraph 5.2, No 210, p. 39. Opinion 5/99 of 7 June 1999 on the level of protection of personal data in Switzerland, WP 22.

¹⁰ CRID study, paragraph 5.2, No 212, p. 40.

¹¹ A parliamentary motion is a request to the Federal Council to present a draft law or to undertake an action which falls under its competence, CRID study, paragraph 4.1, No 155, p. 31.

information rights as well as the requirement of an adequate level of protection in case of transfers to other countries.

The draft law was rejected by the Legal Affairs Commission of the Swiss National Council¹² as it considered the draft went beyond the requirements of the two motions and the Additional Protocol¹³. The plenum of the Swiss National Council confirmed the decision taken by the Legal Affairs Commission and rejected the draft on 10 March 2004. The Law Commission of the Council of States¹⁴ recommended accepting the draft law for further deliberation.¹⁵

5. CONCLUSION

On the basis of the study and other information collected, the Commission services take the view that the Swiss data protection system continues to provide an adequate level of protection of personal data within the meaning of Article 25 of the Directive.

The reservation formulated in Article 3 of Decision 2000/518/EC¹⁶ which contains safeguards necessary in case of data transfers to countries outside the European Union is maintained.

¹² The National Council is the lower house of the Swiss Federal Parliament.

¹³ CRID study, paragraph 4.3, No 178, p. 34.

¹⁴ The Council of State is the upper house of the Swiss Federal Parliament. Together with the National Council it forms the Federal Parliament. Both houses have equal powers, including the right to introduce legislation.

¹⁵ CRID study, paragraph 4.5, No 181, p. 35.

¹⁶ Article 3 of the Decision allows the national data protection authorities of the EU Member States to suspend data flows to a recipient in Switzerland in a number of specified cases listed in this article.