TEXT ON NON-DISCRIMINATION ADOPTED BY THE ARTICLE 31 COMMITTEE ON 31ST OF MAY 2000

Non-discriminatory and even-handed implementation of Articles 25 and 26 of the Directive and decisions taken on the basis of these provisions

The Committee is mindful of the interest which third countries are showing in the implementation of Articles 25 and 26 of the Directive and in particular in the effects of findings of "adequacy" under Article 25(6). It recognises that some third countries have raised concerns that enforcement actions in the EU may be more severe vis-à-vis third country entities than they are vis-à-vis EU data controllers and that there may also be discrimination between the entities from different third countries.

The Committee is confident that these concerns will prove to be unfounded. It recalls the standard text in the recitals of the Commission's decisions under Article 25(6)\(^1\) and the views of the Article 29 working party on this issue, as expressed at the wp's meeting on 3 February.

For its part, the Committee regards it as necessary to be even-handed in implementing the provisions of the Directive that deal with third countries. The Committee express its commitment to the principle of non-discrimination and recall that the general principle of equality, of which the prohibition of discrimination on grounds of nationality is a specific enunciation, is one of the fundamental principles of Community law. This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified\(^2\). The Committee also recalls obligations emanating from other international instruments, in particular the European Convention of Human Rights. Article 14 of the ECHR requires that the rights and freedoms set forth in the Convention (which include the right to respect for privacy - Article 8) be secured without discrimination on any ground, including inter alia national origin.

The Committee also regards it as important to be able to judge different situations on their merits and not to regard the equal treatment principle as imposing a single model on third countries. Such an interpretation of the principle would fly in the face of the deliberately flexible wording of Article 25 (which requires "adequate" protection in third countries and
which allows circumstances to be judged on a case by case basis) and of
the need to take into account different countries' varied approaches to
achieving effective data protection. This approach means that adequacy
findings may sometimes be made despite certain weaknesses in a
particular system, provided of course that such a system can be assessed
as adequate overall, for example because of compensating strengths in
other areas. The principle of equal treatment does not mean that
allowances made to take account of the particular traditions of one
country, as described above, are automatically applicable to or acceptable
in the cases of other third countries. It does mean that assessments of
adequacy should be made broadly by reference to the same standard.

The Committee will respect the principle of equality of treatment in any
opinions it may be called upon to issue involving data transfers to third
countries which are the subject of Commission draft measures for
adequacy findings under Article 25(6) or which are already the subject of
Article 25(6) decisions (notably under Article 2 paragraph 5 of such
decisions) and welcomes the Commission's intention to be particularly
vigilant in this regard (see Article 3 of the draft Article 25(6) decision). The
Committee wishes to be informed of any instances of allegedly arbitrary
and/or unjustified discriminatory actions and to have the opportunity to
discuss and contribute to resolving them, including consideration of the
views of the third country concerned.

As befits an instrument aiming to protect fundamental rights, the
Directive's enforcement should, in the Committee's view, be impartial both
as between different third countries and as between third countries' and
EU entities. The Committee notes in this context that complaints handling
is a major part of the enforcement of data protection rules, including the
Directive. Member States as well as the third countries which benefit from
an Article 25.6 decision are subject to an obligation to respond to
complaints in an appropriate manner and in respect of the applicable law
or rules. Fulfilling this obligation cannot be held to be incompatible with an
undertaking to enforce Articles 25 and 26 in an even-handed manner. It is
also useful to recall in this regard that under Community law non-
compliance with the law by one entity cannot be accepted as legitimate
defence for non-compliance by another entity(3).

http://www.export.gov/safeharbor/nondiscrimArt31May00.htm

10/30/2006
"Given the different approaches to data protection in third countries, the adequacy assessment has to be carried out' and any decision based on Article 25 paragraph 6 has to be enforced' in a way that does not arbitrarily or unjustifiably discriminate against or between third countries where like conditions prevail nor constitute a disguised barrier to trade taking into account the Community's present international commitments"

ECJ judgement of 8 October 1980 in case 810/79, Peter Überschär v Bundesversicherungsanstalt für Angestellte

Cases 52/75, 78/76, 232/78, 325/82 and 38/89