## Explanatory Memorandum Rec (85) 20

*Introduction*

1. Since the beginning of the 1970s the Council of Europe has concerned itself with the protection of individuals vis-à-vis data processing and has thus acted as a forerunner in a sector which would later be the subject of important legislative developments.

2. After having set out in two resolutions fundamental principles for the protection of personal data in the private sector and in the public sector, this organisation undertook, as from 1976, the completion and the reinforcement of these principles by including them in a binding international agreement. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data was adopted by the Committee of Ministers of the Council of Europe on 17 September 1980 and opened to the signature of the member states on 28 January 1981. It entered into force on 1 October 1985.

3. After the elaboration of this Convention, the Committee of experts on data protection (CJ-PD), which has been given the task within the Council of Europe of examining these questions, reflected on the application and possible adaptation of the principles contained in the Convention to specific fields of activity. Accordingly, three recommendations addressed to the member states have been adopted by the Committee of Ministers, one concerning the regulations applicable to automated medical data banks (23 January 1981), one on the protection of personal data used for purposes of scientific research and statistics (23 September 1983) and finally one on the protection of personal data used for social security purposes (23 January 1986).

4. In this context, the committee of experts considered, as from 1981, that it would be useful to study the problems which might arise from the use of personal data in the direct marketing sector. The experts' study led them to the conclusion that the application in this field of the basic principles set forth in the Convention of 28 January 1981 would be promoted by the adoption of a legal instrument containing detailed regulations geared to the specific characteristics of the direct marketing sector. The experts made a point of emphasising from the outset that the adoption of such an instrument should not have the effect of imposing on the direct marketing sector (whose importance was emphasised) any restriction which would not be justified by the need to protect privacy in this sector.

5. To carry out this task, the committee of experts set up a working party composed of experts from Austria, Belgium, France, Italy, Portugal, Spain, Switzerland and the United Kingdom, which met on three occasions between November 1981 and May 1983 under the chairmanship of Dr. Waltraut Kotschy (Austria). Observers from the International Chamber of Commerce (ICC) and the International Organisation of Consumers' Unions (IOCU) were associated with the efforts of the working party which derived a great deal of benefit from their contributions, as they did from a paper submitted by a consultant expert, Mr John Braun. Having reviewed the current situation in the member states in the field of direct marketing and, in particular, the state of legislation and regulation in these states, the working party submitted to the committee of experts a preliminary draft recommendation which the committee approved before submitting it to the European Committee on Legal Co-operation (CDCJ) which approved it at its 43rd meeting from 20 to 24 May 1985.

6. Recommendation No. R (85) 20, on the protection of personal data used for the purposes of direct marketing, was adopted by the Committee of Ministers of the Council of Europe on 25

October 1985.

***Detailed comments***

*Preamble*

7. The preamble to the Recommendation gives a statement of its aims and sets out the recommended means by which the Recommendation can be implemented by member states, while throwing light on the relationship between the Recommendation and the Convention of 28 January 1981. In this context, the preamble clearly states that Recommendation No. R (85) 20 (as Recommendations Nos. R (81) 1, (83) 10 and (86) 1 have done in the fields of medical data banks, scientific research and statistics and social security respectively (see paragraph 3 above)) aims to promote application of the basic principles of the Convention in the direct marketing sector while taking account of the particular characteristics specific to that sector. According to the preamble, the need to protect the privacy of individuals in this sector by promoting the implementation of the Convention is based upon the observation that computers are being increasingly used in this area and that the use of personal data plays an essential role in the scheme of things.

This is why the Recommendation aims to make available to member states and, through their intermediary, to those directly concerned in such operations, guidelines designed to promote the development of rules applicable to the direct marketing sector. On the subject of rules, the preamble makes it clear that such rules can be seen either as legal rules or as a code of ethics, and that the Recommendation can accordingly be implemented either by the adoption of binding legal rules or, given the different legal systems existing in the member countries, by the promotion of rules of self-regulation (codes of conduct, codes of ethics, codes of practice, etc) drawn up within the profession in line with a number of existing examples.

In addition, it goes without saying that, as these guidelines are founded on the basic principles of the Convention and are designed to promote its implementation, they should be read in the light of this instrument and, accordingly, should be developed in accordance either with the principles set forth in the Convention or its provisions, even if these principles or provisions have not been expressly incorporated into the Recommendation. This is the case, for example, for the principle of finality or for the rules relating to the transborder flow of data.

*Operative part*

8. Given the information appearing in the preamble, member states are recommended to take account in their domestic law and practice of the guidelines set out in the appendix when they take action regarding the use of personal data in the direct marketing sector.

It is also clearly stated in the operative part that the essential corollary of the implementation of these guidelines is a simultaneous publicity and educational campaign both within the direct marketing sector and at consumer level, so that the interests concerned may be fully apprised of the provisions of the Recommendation and its contribution to data protection.

*Scope and definitions (Chapter 1)*

9. Although manually operated personal data lists are still relevant in the direct marketing sector, paragraph 1.1 of the Recommendation confines the scope to the automatic processing of personal data which is extensively used in this sector.

However, given the non-binding nature of this instrument and consistent with Article 11 of the Convention, there is nothing to prevent a member state from extending the scope of the Recommendation or indeed from granting the data subject a wider measure of protection.

10. The definition of "personal data" in paragraph 1.2 corresponds entirely to that appearing in Recommendation No. R (83) 10 on the protection of personal data used for scientific research and statistics.
The definition of "direct marketing" adopted for the purposes of the Recommendation is largely inspired by the definition favoured by the Direct Mail/Marketing Association of the United States but amended so as to take account of the concept of direct advertising. In referring to "any service ancillary thereto", it is made clear that such activities as "list broking" and "letter shops" are within the scope of the Recommendation. The provisions of the Recommendation are just as applicable to the direct marketing activities of private firms as they are to the activities of public organs and services of an industrial and commercial nature, insofar as they meet this definition.

11. The provisions of the Recommendation refer in several places to the expression "direct marketing list" which, for the purposes of the Recommendation, was taken by its drafters to mean any collection of names and addresses together with information restricted to an indication of likely customer or contributor interest used to communicate with data subjects. In the same way, when the Recommendation uses the expression "marketing file" this should, when the Recommendation is being implemented, be taken to refer to any collection of personal or other data, insofar as such data are collected and utilised to draw up direct marketing lists.

*The collection of data for direct marketing purposes (Chapter 2)*

12. Chapter 2 of the Recommendation indicates the conditions under which both natural and legal persons ("any persons") are entitled to gather personal data from different sources for direct marketing purposes.

13. Paragraph 2.1 establishes the right of a firm to compile marketing lists from information already in its possession which has been provided as a result of earlier contacts with actual or prospective customers or contributors. The term "previous relations" with actual or prospective customers or contributors includes previous business relations and relations between employers and employees. While an actual customer or contributor will have had direct relations with the firm, "prospective" customers or contributors covers those situations where the person concerned has not yet become a client or contributor but has by some voluntary act on his side established relations, for instance by making a request for information on products or services or by replying to an advertisement. This paragraph does not cover cases where a person has not replied to an approach made by a direct marketing firm. It seems natural to keep a list of persons who do not want to receive direct marketing information (non-response cases) so as to prevent such information being sent to them. Reference to "contributors" was made to emphasise the fact that the Recommendation covers not only the activities of mail order firms but also those of any other body using lists of names and addresses. such as charities, political parties, associations, etc.

14. The publicly available files and other publications referred to in paragraph 2.2 vary considerably in type from country to country, ranging from telephone directories to electoral rolls and registers of births, marriages and deaths as well as newspapers and magazines. This paragraph says that it will be the responsibility of domestic law to limit the collection of

personal data for direct marketing purposes when they appear in files open to the public or in other published material. Domestic law may, for example, restrict the extraction of certain categories of sensitive personal information from public sources if the intent is to use such information for the compilation of marketing lists to be used for direct marketing purposes.

15. One of the methods frequently used by marketing firms to expand their marketing lists is to ask persons with whom they have already had relations to give the names and addresses of other persons likely to be interested in their offers. Paragraph 2.3 indicates that this practice can be acceptable provided that it involves no infringement of privacy. This is why appropriate safeguards should accompany this collection procedure.
These safeguards may be determined either by the profession or by domestic law, as the case may be, in accordance with each member state's perception of what is appropriate in the circumstances.
The last sentence of paragraph 2.3 was included to take account of the fact that member states may adopt a much more restrictive approach in this area.

16. Other fairly widespread methods of collecting data include organising competitions or sweepstakes and conducting market research interviews without the person concerned knowing that his name will subsequently be entered in a list. Under paragraph 2.4, such a method is permissible only on condition that the person concerned is clearly informed that the data concerning him will be used for marketing purposes. The second sub-paragraph emphasises that the information obtained should in no event be the result of deceptive representations.

17. An enhanced protection for the data subject is contemplated in paragraph 2.5 in the event of a firm seeking to collect or use sensitive data for its direct marketing purposes. The sensitive data referred to in Article 6 of the data protection Convention may be collected and used only in accordance with the relevant safeguards provided by national law and, where appropriate, only with the express consent of the data subject. Article 6 of the Convention makes reference to the following categories of sensitive data: personal data revealing racial origin, political opinions, religious or other beliefs, health or sexual life, or criminal convictions. However, a member state may accord a broader interpretation to the notion of "sensitive data". It should also be borne in mind that data may be "implicitly sensitive". In the field of direct marketing, the fact that an individual's name and address appear in a marketing list of subscribers to certain political or religious journals may be just as sensitive as a straightforward statement of his political or religious beliefs alongside his name and address. It may be the case that collection and use of such data are prohibited under a particular national law. Alternatively, domestic law may provide adequate safeguards which may dispense with the requirement of obtaining the consent of the data subject. On the other hand, it may be thought appropriate to require the consent of the data subject in addition to those safeguards.

18. In many cases, sensitive data must necessarily be used for marketing purposes (the sale of articles used by disabled persons or certain ethnic groups, subscriptions to the newspapers of political parties or religious groups).

*The making available of lists to third parties (Chapter 3)*

19. While the primary purpose of compilation of the marketing list is to generate profit for its owner through sales to those appearing on it, an important secondary purpose lies in its utility in producing income through its exchange, rental or sale to third parties.

Paragraph 3.1 of the Recommendation expressly recognises this practice, while stipulating that the data subject should be informed at an appropriate time and by some appropriate means of the fact that his data may be made available to third parties for direct marketing purposes, and will then be able to raise an objection to such a transfer. Due account has been taken of the practical aspects of the situation since the Recommendation stipulates that the data subject can be informed - on the one hand - "directly or by other appropriate means" - and on the other - when the data are collected or at some later stage. Accordingly, the discussion of the means of imparting this information lets it be understood that it can, in practice, be provided in the most convenient way, such as by a statement to that effect in the sales catalogue, in a document required by law to be made available to the public, or in the first invoice sent to the data subject.
At the present time, it would seem unnecessary for the data subject to be informed every time his data are communicated to third parties for direct marketing purposes, for example in the case of professional agencies whose role is to distribute information to third parties.

20. It should be emphasised that paragraph 3.1 concerns the making available of lists which do not contain data of a sensitive nature or those not liable to infringe the privacy of the data subject. With regard to sensitive data, it should be recalled that paragraph 2.5 provides enhanced protection in the event of such data being collected and used, and that use is taken to include transfer to third parties.
Moreover, the second sub-paragraph of paragraph 3.1 takes account of the fact that marketing lists may provide information which, even if it does not relate to sensitive data as such, might infringe the privacy of the data subject if they were to be communicated to third parties. Buying habits relating to certain goods and services may be cited by way of example. In the event of a list providing any such information on the data subject, its transmission to a third party is conditional on the consent of the data subject being given.

21. List-usage agreements regulating transactions between, for example, the original compiler of the marketing list and a party to whom the list is sold, rented or exchanged for marketing purposes are recommended in paragraph 3.2. Each member state should determine whether such contracts should be written or oral. In addition to providing a mechanism for implementing codes of practice or self-regulatory rules, such contracts might allow proof of the abusive use of the list to be established. If the personal data on the list have been compiled in a manner contrary to domestic law or practice giving effect to the Recommendation by the original holder of the list or if the list is transferred by a subsequent holder for purposes other than direct marketing purposes, the data subject will be enabled to determine the party responsible.

22. Given the fact that marketing lists may be made available to third parties as a result of contracts of sale, rental and sub-rental agreements, etc, it is important to identify one party who may be said to have responsibility for the data contained in the list as it passes through the hands of several users. Paragraph 3.3 refers to the "controllers of marketing files" (see the definition of marketing files in paragraph 11 above).
In accordance with Article 8 of the Convention, domestic law or self-regulatory practice should determine the controllers of marketing files. These controllers should keep a record, which need not necessarily be a formal record, of all the users of the list so as to make possible the effective exercise by data subjects of the rights appearing in Chapter 4.

*The rights of the data subject (Chapter 4)*

23. Chapter 4 sets out the conditions under which a person should, where appropriate, be

entitled to exercise control over the collection and use of data concerning him. It results from the first sub-paragraph of paragraph 4.2 that each member state will be able to implement the provisions of paragraph 4.1 in accordance with the particular features of its legal system.

24. By virtue of paragraph 4.1.i, the data subject should be entitled to refuse to allow data concerning him to be included in a marketing list. In the case of data collected from files open to the public, or from other publications, reference should be made to paragraph 2.2 of the Recommendation. The second right, set out in paragraph 4.1.ii for the benefit of the data subject, is the right to refuse that data concerning him which are contained in marketing lists be transmitted to third parties. The provision concerning information mentioned in paragraph 3.1 is of obvious importance for the exercise of this second right.

25. Paragraph 4.1.iii recommends recognition of a right for data subjects to have data concerning them removed or erased from direct marketing lists.
By virtue of this provision, it is not necessary for the data subject to justify his desire to delete or erase information concerning him (name and address) which is contained in a direct marketing list.
It is thought that these rights constitute a legitimate counterweight to the right of a firm to collect personal data for direct marketing purposes. The concept of erasure does not appear in the Convention and is specific to the direct marketing sector where it constitutes an already well-established and widespread practice. It is aimed at allowing each individual, on request, to no longer receive publicity messages sent out by marketing firms either at all or only in regard to certain categories.
The right of removal or erasure which is provided for in this provision has been retained in recognition of the fact that marketing lists normally only contain the name and address of interested parties (for the definition of marketing list, see paragraph 11 above). The right of erasure or removal has not been provided for in the case of other information which is normally not found in marketing lists but in marketing files. In such cases, the data subject benefits anyway from the safeguards laid down in Article 8 of the Convention.

26. The second sub-paragraph of paragraph 4.1 allows the data subject to obtain and rectify data concerning him which are contained in a direct marketing list or marketing file. These rights have been taken over from Article 8 of the Convention and, as a consequence, must be exercised in conformity with the provisions of that article, that is to say that rectification is possible if the data have been processed in breach of the provisions of domestic law which give effect to the basic principles set out in Articles 5 and 6 of the Convention.

27. The possibility for the data subject to identify the controller of the file so as to be able to exercise his rights is important. The controller of the file can contribute, for example, to guaranteeing notification to users of a list of the desire of the data subject to have his name erased from this list. This may be brought about by recording on a special program the identifying features of the person who requests erasure as well as, as the case may be, the categories of lists in question. The controller of the file will do what is possible, taking account of the circumstances, so that users of the lists will amend them.
The "appropriate measures" which paragraph 4.2 refers to for the identification of the controller of the file could require publication of the name of the controller of the file in a public register, or that this name can be obtained directly on request or indirectly through the intermediary of a data protection authority.

*Presentation of marketing messages or material (Chapter 5)*

28. If the nature of the products or the messages received by a person can be easily discovered by third parties, an interference with privacy can result. Although this problem does not directly concern the field of data protection, it is important that domestic law and practice ensure that communication is carried out in such ways that the privacy of the addressees does not run the risk of being prejudiced.

*Data security (Chapter 6)*

29. Article 7 of the Convention emphasises the need to guarantee data security by taking appropriate security measures with respect to the data. It is for this reason that a chapter is included which is intended to implement this basic principle within the direct marketing sector.

*Measures concerning implementation of the Recommendation (Chapter 7)*

30. Paragraph 7.1 encourages the development of self-regulatory measures within direct marketing circles so as to facilitate the settlement of conflicts which arise in this sector between firms and individuals with regard to the use of personal data. In certain countries, boards have been created on which consumers are represented. It is thought that such an approach should be examined in all member states.

31. Paragraph 7.2 aims at ensuring that the two professions referred to therein come within the regulatory framework of the Recommendation. In certain countries, no regulation exists in regard to list brokers. Given the important contribution which these professions make to the direct marketing sector, it would appear desirable that they respect the provisions of the Recommendation. The appropriate measures mentioned in paragraph 7.2 could take the form of a licensing system.

32. The public should be informed of the safeguards which are laid down by the Recommendation in regard to the use of personal data in the direct marketing sector. This information, which is provided for in paragraph 7.3, could be disseminated by marketing firms, public authorities or other organs such as consumer organisations.