EUROPEAN DATA PROTECTION SUPERVISOR

Comments of the European Data Protection Supervisor on the recent developments with respect to the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

On 5 October 2007, the MDG discussed the proposal for the last time. Subsequently, the Presidency submitted five crucial 'political' questions to Coreper, for its meeting on 11 October. A 'general approach' on the DPFD-text must be reached at the JHA-Council meeting on 9 November 2007.

The EDPS notes that already in the JHA-Council of September essential decisions were taken on two fundamental issues: the limitation of the scope to data that are exchanged between Member States, as well as the specific rules for the transmission of data to third countries.

He also notes that on other points the margins are small. Therefore, this letter is limited to a few important, but more technical points that should not be overlooked at the stage of finalisation of the Council Framework Decision.

1. The Framework Decision should take into account that all Member States are bound by **Council of Europe Convention 108**. For reasons of legal certainty it should be ensured that the text of the Framework Decision reflects the minimal protection by the Convention. For instance, when it comes to processing of special categories of data, a stringent regime is needed. The text of Article 7 is acceptable in this context, but should by no means be weakened.

2. In the first opinion (points 61-65) as well as in the third opinion of the EDPS (points 20-25) the issue of **purpose limitation** and **incompatible use** was extensively discussed. According to the EDPS, the Framework Decision should allow incompatible use, under strict conditions set out in Article 9 of Convention 108, simply because the practice in the area of police and justice cooperation needs this possibility. Article 3(2), subsequently relied upon in Article 12, does not allow this possibility, which suggests that the principle of 'compatible use' is interpreted too widely and not in line with Convention 108. The present legislative technique in which Article 12 (d) allows - without precision and substantive limitations - further processing for any other purpose, either with the prior consent of the transmitting Member State or the consent of the data subject, is not satisfactory. The solution to this problem should therefore involve both Articles 3 and 12.

3. **Right of access**. Article 17 is incomplete, since access should include also the *purposes* for which data are processed, communication in an *intelligible form*, and *knowledge of the logic* involved in any automatic processing of data (at least in the case of automated decisions).

4. **Logging and documentation**. Even within the context of a scope of application limited to exchanges of data between Member States, Article 11, in order to be

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effective for the purposes of verification of the lawfulness of data processing, should lay down appropriate mechanisms for logging or documenting not only all transmissions of data, but also *all accesses* to data. Indeed, effective supervision on personal data transferred to other Member States cannot rely only on transmission logs.

5. **Declaration on a joint supervisory authority**. It would be needed to take into account the recent choices that have been made in the framework of SIS II, that foresees a system of supervision in which cooperation between national supervisory authorities and the EDPS (as competent authority at European level) plays a central role (see Articles 60-62 of Council Decision 2007/533/JHA of 12 June 2007). This new system should be allowed the time to prove its value.

6. **Working Party.** Besides the long term perspective of a joint supervisory authority, a forum of national and European supervisory authorities, analogous to the Article 29 Working Party, is currently needed with a view to ensuring a harmonized application of the framework decision and to providing advice on legislative proposals within the third pillar. This is even more important at the moment of first applying a new legal instrument which leaves broad margins of manoeuvre to Member States. Such a Working Party could prove also particularly helpful in contributing to a harmonised assessment of the adequate level of protection provided in transfers to third countries, since current provisions unfortunately do not establish common EU mechanisms to assess adequacy and might thus lead to great divergences in national approaches. Mechanisms for cooperation and coordination between national supervisory authorities are essential when personal data are exchanged between Member States.

7. **Advisory role of national data protection authorities**. It is necessary that the advisory role of the data protection authorities, mentioned in Article 25.1, is given concrete effect by providing, analogously to Article 28.2 of Directive 95/46, that these authorities shall be consulted with regard to administrative measures and regulations relating to the protection of personal data in police and judicial cooperation.

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