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NOTE

from: Presidency
to: COREPER/Council

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Subject: Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data
- State of play

I. Introduction

The purpose of this Presidency note is to report to the Council on the progress achieved on the proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data. The proposed Directive together with the proposal for a General Data Protection Regulation form part of the data protection package put forward by the Commission on 27 January 2012. The proposal aims to ensure a consistent and high level of data protection in this field, enhancing mutual trust between police and judicial authorities of different Member States and facilitating the free flow of data and co-operation between police and judicial authorities. (The European Parliament is for the first time co-legislator with respect to the areas covered by this Directive.

The two legislative proposals are based on Article 16 TFEU of Lisbon Treaty. Article 16 (1) of the Treaty on the Functioning of the European Union (TFEU) establishes the principle that everyone has the right to the protection of personal data. Moreover, with Article 16 (2) TFEU, the Lisbon Treaty introduces a specific legal basis for the adoption of rules on the protection of personal data that also applies to a judicial co-operation in criminal matters and police co-operation. Article 16 TFEU requires the legislator to lay down rules relating to the protection of individuals with regard to the processing of personal data also in the areas of judicial co-operation in criminal matters and police co-operation, covering both cross-border and domestic processing of personal data. This will allow protecting the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data, ensuring at the same time the exchange of personal data for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. This will contribute to facilitating the co-operation in the fight against crime in Europe.

The proposal for a General Data Protection Regulation seeks to replace the 1995 Data Protection Directive.¹ The proposal for a Police and Judicial Authorities Directive is intended to replace Framework Decision 2008/977/JHA of November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (DPFD).² The Framework Decision 2008/977/JHA has a limited scope of application. It applies to cross-border data processing and not to processing activities by the police and judiciary authority at purely national level. This is liable to create difficulties for police and other competent authorities in the areas of judicial co-operation in criminal matters and police co-operation. They are not always able to easily distinguish between purely domestic and cross-border exchanges. The proposed Directive should meet the specific nature of these fields and lay down the rules relating to the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

The previous Presidencies (the Danish, the Cyprus, the Irish and the Lithuanian) have dealt with the two proposals as an overall legislative framework, while frontloading the work on the Regulation in order to also benefit the discussions on the Directive.

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 350, 30.12.2008, p. 60.

The first examination of the draft Directive was concluded during the Irish Presidency, which produced a compromise text of the Directive on 28 June 2013 based on comments, including written comments, from delegations as well as on comments made on the draft general Data Protection Regulation, which relate also to the provisions of this Directive.¹

The second examination of the draft Directive, was initiated under the Lithuanian Presidency and will be concluded under this Presidency.

Following these discussions the Presidency seeks to describe the main developments in respect of the proposed Directive.

II. Main developments

a. Need for and scope of the instrument

Several delegations have reservations on the need to replace the Framework Decision with a new instrument covering not only cross-border data processing operations but also domestic processing operations.

Some delegations also point to difficulties linked to the possible delineation between the proposed Regulation and Directive (Article 2). This is connected in particular with requests that the scope of the Directive covers the processing of personal data for the purpose of ensuring public order which are currently covered by Directive 95/46/EC even if the activities of public order are not undertaken for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

The current compromise provides that it applies to the processing of personal data by competent public authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences and for these purposes, the maintenance of public order, or the execution of criminal penalties (Article 1(1)).

¹ Council Documents 11624/13 And 11624/1/13 REV 1.

b. (Further) alignment with the General Data Protection Regulation

There is a large support for carrying over in the Directive some of the solutions found within the context of the General Data Protection Regulation as regards definitions of the Directive (Article 3), rights of the data subjects (Chapter III), obligations of controller and processor (Chapter IV – for example Articles 28 and 29 on communication of data breach to supervisory authority and data subject), international transfers (Chapter V – removal of negative adequacy) or independent supervisory authorities (Chapter VI).

c. Imposition of specific conditions

The Directive will allow Member States to provide for specific conditions beyond the minimum standards of this Directive. It means that Member States may provide for higher safeguards than those established in the Directive. A new Article 7a has been introduced in the compromise of the Presidency. A Member State may impose specific processing conditions for the transfer of data has also been introduced following the approach of Article 12 of the Framework Decision. On this basis, where Union or Member State law applicable to the transmitting competent public authority provides for specific conditions to the processing of personal data, the transmitting public authority will inform the recipient about these conditions and the requirement to respect them.

d. Removal of prescriptive requirements

There is also support for the removal of some provisions of the proposed Directive perceived as too prescriptive and/or difficult to reconcile with the requirements of law enforcement and criminal justice authorities.

The provisions on distinction between different categories of data subjects (Article 5) and degrees of accuracy and reliability (Article 6) have been removed.

As regards the data protection officer (Articles 30-32) the majority of delegations supports the solution of the Regulation, namely a voluntary DPO when required by Union or Member State law as opposed to a mandatory one as envisaged by the COM proposal.

e. Further adjustments

The Articles on lawfulness of processing and on processing for sensitive data (Articles 7 and 8) have been further clarified in the Presidency compromise. Some delegations further request the introduction of consent as ground for processing and to replace the rule of prohibition to process sensitive data (with listed exemptions) by an authorisation to process under specific conditions.

The provisions on the right of direct and indirect access of the individual to his/her personal data (Articles 12 and 14) together with those on rights of the data subject in criminal investigations and proceedings (Article 17) reflect to a large extent the current Framework Decision. The discussion has shown that these provisions are still being questioned by several delegations.

Chapter V on International transfers has also been revised, for example as regards the introduction of a requirement that in case where personal data are transmitted or made available from another Member State, that Member State must give its prior authorisation to the transfer pursuant to its national law. Exceptions are also foreseen for lifting this authorisation condition [Article 33(d) and Article 36a]. This approach follows the logic/philosophy of the Framework Decision.

Delegations have raised questions on other issues like the definition of "international organisations".

The issue of further processing of personal data by third country competent authorities for other purposes such as administrative purposes has also been raised during the discussions. Article 11 of the Framework Decision foresees further processing by a competent authority of a Member State of personal data received from another Member State for other judicial and administrative proceedings but does not allow for such further processing for data transferred to competent public authorities of third countries.

Finally, the current compromise maintains the obligation foreseen in Article 60 imposing on Member States to eliminate the incompatibilities resulting from bilateral agreements not compatible with Union law (including by renegotiating incompatible agreements) but no longer foresees a fixed period of time upon Member States to amend the agreements.

This Presidency will continue work on the text of the draft Directive, as part of the EU data Protection reform package, with a view to reconciling Member State positions in line with the Charter and the Treaties, which ensuring efficient law enforcement.
