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NOTE

From: Presidency
To: Permanent Representatives Committee

Subject: 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 [First reading]
= State of play

INTRODUCTION

1. On 27 January 2012, the Commission submitted a 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. This proposal is part of the so-called data protection package. The other proposal in the package is the General Data Protection Regulation (GDPR).

2. The proposal aims to ensure a consistent and high level of data protection in the field of police cooperation and judicial cooperation in criminal matters, 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.

3. The draft Directive is intended to replace Framework Decision 2008/977/JHA which was adopted on 27 November 2008. It had to be implemented by 27 November 2010 and the Member States had to inform the Commission by 27 November 2013 on the implementation. Some delegations find it premature to replace the Framework Decision 2008/977/JHA with a new instrument only a couple of years after the adoption of the Framework Decision. 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.

4. The purpose of this Presidency note is to inform the Council of the main issues under discussion in the proposal for the Directive in object.

STATE OF PLAY

5. The proposed Directive has been discussed in the Working Party on information exchange and data protection (DAPIX) under every Presidency since the first semester 2012. DAPIX, has examined the proposal in its entirety twice. The JHA Council has been regularly informed of the work carried out on this file. Last time was in October 2014. Under the Italian Presidency, DAPIX discussed the proposal at its meetings on 29 September, 27 October and 24 November 2014.

6. The European Parliament adopted its report on 12 March 2014¹.

7. The main issue under discussion is the subject matter and objectives in Article 1(1) and how to delimit this in relation to the GDPR. Linked to this is the question to which bodies the Directive should be applicable.

¹ 7427/1/14 and 7428/14.

8. The subject matter and objectives in Article 1(1) as proposed by the Commission read as follows: '...the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.' Some Member States criticized this drafting mainly because they wanted all activities of the police to be covered by one single instrument.

9. In view of the DAPIX meeting on 24 November 2014, the Presidency had put forward three options for discussion on subject matter and objectives. The first option consists in maintaining the text from the EL Presidency, that is '...the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences and for these purposes safeguarding of public security or the execution of criminal penalties'.

10. The second option is the Presidency's suggestion to delete 'and for these purposes' from the EL text, and thus disconnect the safeguarding of public security from the criminal offences, *i.e.* that the safeguarding of public security should be covered by the Directive even if it is not for the purposes of prevention, investigation, detection, prosecution of criminal offences. In addition to that change the Presidency added a new recital (11a) to clarify what is meant with public security, notably that national security and intelligence services remain outside the scope of the Directive. The new recital also makes clear that when covering public security without it being linked to a criminal offence, the Directive may include activities that go beyond the scope of Chapter 4 or 5 of Title V TFEU.

11. The third option for discussion of the scope is a German suggestion, with the following wording: '... the processing of personal data by competent (...) authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties as well as by the police or other law-enforcement services for the purposes of maintaining law and order and the safeguarding of internal security.'

The words 'maintenance of law and order and the safeguarding of internal security' are taken from Article 72 TFEU.

12. At the DAPIX meeting on 24 November 2014, a majority of delegations preferred the DE text. Some of them, however, stating that they would prefer to replace the term of *internal security* by *public security*. One delegation mentioned areas like food safety, police activities in the context of demonstrations or the activities of the border police as areas that could fall within the concept of public security.

13. The Commission opposed the deletion of the words 'for these purposes' because they found it important that the areas that are currently covered by Framework Decision 2008 - which the Directive is intended to replace - should remain covered by the Directive. The Commission further cautioned against extending the scope of the draft Directive to areas that are today covered by Directive 1995 and would therefore be replaced by the GDPR as this could lower the level of protection. Also, the Commission objected to the deletion of 'for these purposes' on the ground that the delimitation of the subject matter between the two instruments under negotiation would become very difficult and risked creating grey zones.

14. When DAPIX discussed Chapters I and II on 29 September 2014, the Presidency had submitted a new **definition of competent authority**, in Article 3(14) that included 'any body/entity entrusted by national law to perform public duties or exercise public powers for the purposes of prevention, investigation, detection, prosecution of criminal offences [and for these purposes] safeguarding of public security or the execution of criminal penalties'. While generally accepting this definition some Member States raised concerns that this would extend the scope to cover every single entity standing under a legal obligation to provide certain information to the police. In the draft text of the Directive submitted to DAPIX on 24 November 2014, the Presidency had reworded recital 11 in reply to these concerns. This recital aims to clarify that for example financial institutions would not be covered even if they retain personal data for the purpose of investigation, detection and prosecution which they have processed and provide it to national authorities. While the Commission services could accept the new text in the recital, delegations did not commit to the new text.

NEXT STEPS

15. The Presidency is of the view that it is necessary to find a way forward on the issue of subject matter and objectives. Work on this issue will continue under the Latvian Presidency. The Council will be kept informed about these efforts in a timely manner.
