



Council of the
European Union

Brussels, 20 September 2021
(OR. en)

11841/21

LIMITE

DATAPROTECT 217
JAI 985
DIGIT 121
MI 673
FREMP 229

NOTE

From:	Presidency
To:	Delegations
Subject:	Presidency draft of the Council position and findings on the application of the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to 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, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA - first examination

Delegations will find attached a first Presidency draft of the Council position and findings on the application of the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to 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, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. This document will be examined at the Working Party on Data Protection meeting of 23 September 2021.

Council position and findings on the application of the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to 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, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

1. INTRODUCTION

1. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to 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, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA¹ (hereinafter: 'the Directive') entered into application on 6 May 2018, replacing the Council Framework Decision 2008/977/JHA. The Directive is aiming to ensure a consistent and high level of protection of personal data of natural persons while facilitating the exchange of personal data between competent authorities of Member States for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security within the union and the transfer of such personal data to third countries and international organisations. The Directive is the first instrument that takes a comprehensive approach to data protection in the field of criminal law enforcement and represents a significant development compared with the earlier Framework Decision, which covered only transmission of data between Member States.

¹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to 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, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

2. According to Article 62 of the Directive, the Commission shall submit a report on the evaluation and review of the Directive to the European Parliament and to the Council. The first report is due by 6 May 2022, followed by reports every four years thereafter. The same Article provides that the Commission shall take into account the positions and findings of the European Parliament and the Council, and of other relevant bodies and sources when preparing the above-mentioned report. The Commission may also request information from Member States and supervisory authorities.
3. In the context of this evaluation and review, the Commission shall examine, in particular, the application and functioning of Chapter V on the transfer of personal data to third countries or international organisations with particular regard to decisions adopted pursuant to Article 36(3) of this Directive and Article 39.
4. To prepare the Council position and findings, delegations were requested to send written comments². On the basis of Member States' comments³, the Presidency prepared a draft text that was discussed at the Working Party on Data Protection in its meetings of 23 September, 14 October [enter WPDP meetings] 2021. The Council position and findings based on that preparatory work are outlined and summarised in this document.
5. The Council takes the view that its position and findings should not be limited to the topics specifically mentioned in Article 62 of the Directive. Therefore, the Council encourages the Commission to also evaluate and review, in its upcoming report, the application and functioning of the Directive beyond what is specifically mentioned in Article 62. Furthermore, the Commission should consider the experiences and input of relevant stakeholders, which will help to ensure that the evaluation is as comprehensive as possible.
6. While examining the application and functioning of Chapter V of the Directive, the Commission is invited to also take into account the findings of the German Presidency set out in the "Presidency report on the Exchange of police data with third countries – Experiences in the application of Article 37 of the Law Enforcement Directive" of December 2020⁴.

² 10885/21.

³ WK 10766/21

⁴ 13555/1/20 REV 1.

7. At the same time, the Council highlights that the Directive has only been in force since May 2018. Therefore, it is likely that most of the several issues identified by Member States will greatly benefit from more experience in the application of the Directive in the coming years. Further guidance especially by the European Data Protection Board ('EDPB') and a possibility to exchange information on national practices, interpretations and court decisions would also be useful for Member States.
8. The Council has made several observations on the application of the Directive. In this document, the Council outlines certain topics that have been considered particularly relevant by Member States. Those issues should also be reflected in the upcoming report of the Commission in an appropriate manner.

2. GENERAL REMARKS

9. The Council considers that, similar to the GDPR, the Directive has been successful in providing adequate protection of personal data in the scope of the Directive. The Council finds that the introduction of the Directive has had and continues to have a significant impact on awareness among police services and police authorities regarding the importance of data protection also in operational policing activities. It has led to further increasing the security of the data processing by competent authorities. The harmonised framework fosters trust and contributes to facilitating the exchange of operational information between competent authorities, within a Member State and between Member States and also provides good general principles and appropriate safeguards for the transfers of personal data to third countries.
10. The Council aims at ensuring a consistent and high level of protection of the personal data of natural persons and facilitating the exchange of personal data between competent authorities of Member States in order to ensure effective judicial cooperation in criminal matters and police cooperation.

11. However, it must be highlighted that the Directive has only been applied for a relatively short period. Therefore, it is expected that several issues could be addressed when more experience has been gained on the application of the Directive.
12. The Council acknowledges the important role of national supervisory authorities in the functioning and consistent application of the Directive and the GDPR. The Council also notes the significant increase in the activities of the supervisory authorities, linked to the exercise of their new tasks and powers also in the area of law enforcement, and the positive developments as regards the significantly increased allocation of resources to them in many Member States.
13. The Council encourages the Commission to include in its evaluation in particular the experience gained in the Member States with the application of the Directive by the competent judicial and law enforcement authorities.
14. The Council notes that in the area of international data transfers, only one adequacy decision has been adopted so far under the Directive, and that is for the United Kingdom⁵. In all other cases than the UK, the competent authorities have to resort to use “appropriate safeguards” or the derogations under article 38 of the Directive. At the same time, the Council notes the progress regarding the negotiations of important international agreements in the area of criminal law enforcement cooperation, such as the Second Additional Protocol to the Budapest Convention, a bilateral EU-US agreement on access to e-evidence as well as the Umbrella Agreement, which also covers and complements any MS transfer arrangement with the US. It would be worth examining and monitoring, for instance, how more information and guidelines should be provided to ensure that such alternative instruments set out in Chapter V of the Directive are applied effectively.

⁵ Commission Implementing Decision of 28.6.2021 pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom, (C(2021) 4801 final)

15. Furthermore, as it was the case for the GDPR evaluation⁶, the Council deems that controllers and processors need more clarification and guidance from the supervisory authorities and the EDPB. The Commission's upcoming evaluation report should also highlight the broad need for practical guidelines and other suitable means to meet this need.

3. **DATA SUBJECTS' RIGHTS**

16. According to the Council findings, while a number of national transpositions of the Directive build upon national laws which pre-existed the Directive, the Directive further fostered the overall level of protection for the citizens. The Directive raised data subject's awareness regarding their rights and made it easier for them to exercise those rights, as illustrated for instance by the increase in the number of data subjects' requests. Practical experience shows that data subjects make use mainly of the rights of access and erasure, in particular of identification data.
17. The Council would like to call for further clarification and guidance by the EDPB, of some of the provisions of the Directive related to data subject's rights. For example, whether data logs are part of the data subject's right of access and should therefore be made available to the data subject on request.

4. **INTERNATIONAL DATA TRANSFERS**

18. The Council finds that adequacy decisions are an essential tool for controllers to transfer personal data safely to third countries and international organizations. In this respect, the Council also considers it crucial that the adequacy decisions are based on compliance with all the criteria set for such decisions, including for onward transfers. Adequacy decisions must also be subject to ongoing monitoring and periodic review, as required by Union law, which is essential to ensure effective protection of the rights of the data subject.

⁶ *Council position and findings on the application of the General Data Protection Regulation.* See document 14994/2/19 REV 2, paragraph 12.

19. The Council encourages the Commission to take further steps towards the adoption of adequacy decisions pursuant to Art. 36(3) for third countries/international organisations that meet the criteria. Whereas the Commission has pointed out in the past that an examination of the data protection level in a third country or international organisation will only be conducted at the request of that third country/international organisation, the Commission should be encouraged to seek consultations on possible adequacy decisions pursuant to Art. 36(3) of the Directive with potentially eligible third countries/international organisations.
20. The Council recalls the Presidency report on the Exchange of police data with third countries – Experiences in the application of Article 37 of the Law Enforcement Directive” of December 2020. In this regard, the Council is of the view that a conclusive catalogue of criteria or precise procedures for determining whether appropriate safeguards are in place, are of particular importance when a Member State is negotiating a bilateral police cooperation treaty with a third country and 'appropriate safeguards' must also be included. The Council also recalls recent EDPB Recommendations 01/2021 on the adequacy referential under the Law Enforcement Directive clarifying set of criteria for such assessment.
21. To this end, the Council considers that further information and guidelines for interpretation are needed to ensure that the alternative instruments set out in Chapter V are applied effectively. The competent bodies in particular and the European Data Protection Board and supervisory authorities in the Member States in their function as advisers to the competent authorities have a key role to play in this context. The Council welcomes that the EDPB has included this issue in its strategy for 2021–23 and has announced that it will develop guidelines for promoting the use of transfer tools ensuring an essentially equivalent level of protection.

5. **RAISING AWARENESS AND INCREASING COMPETENCES ON DATA PROTECTION**

22. The introduction of the LED has had and continues to have a major impact on awareness among police services and police authorities regarding the importance of data protection also in operational policing activities.
23. The Council notes that the function of the Data Protection Officer had a positive impact on the competent authorities regarding their compliance with the data protection rules on one hand and raising awareness on the other. With respect to raising awareness, Member States have provided that trainings, which focus on topics related to protection of personal data are held often annually, both in administrative and operational service, and in addition, some Member States provide the possibility of online data protection lecture to every staff member in the executive and administrative service via e-learning platform.
24. The Council calls on Member States and the EU institutions with competences in this area such as the Commission, ENISA, Europol, EDPB or the EDPS for further investments on creating better capacity and develop a pool of experts specialised in privacy & data protection and technology, which will contribute to building law enforcement authorities' capacity to deal with relevant risks associated with the use of new technology.
25. The Council encourages the Commission and the Member States to invest more to consolidate expertise and knowledge and provision of human resources to help implementing the Directive in the daily operations of the competent authorities. In that, regards particular attention should be given to the meetings organised through EDEN (European data protection expert network) and to the topic of international transfers. The Council also welcomes the initiative of the Commission to set up and facilitate financially and logistically the Network for Data Protection Officers of law enforcement authorities, Justice and Home Affairs Agencies and the European Public Prosecutor's Office. The network is a permanent initiative, meeting at least twice a year, and aiming at exchange information and best practices on the application of the Law Enforcement Directive (EU) 2016/680 between the DPOs competent authorities exclusively.

6. **SECURITY OF PROCESSING**

26. The Directive helps to ensure security in the processing of personal data, including by improving the level of the security policies in the home affairs area, the security plans, modernisation of IT systems and the organizational measures, impact assessment of data protection, and system logging. Although this is still partly an ongoing process, the Council recognises the improvements that the application of the Directive has had on data security, in particular when it resulted in competent authorities reviewing their security policies, conducting the Data Protection Impact Assessments and provided for required logging capacities, modernizing their IT systems and or organisational methods..

7. **THE DEVELOPMENT OF NEW TECHNOLOGIES**

27. The Council underlines the importance of technologically neutral nature of the Directive which allows continued technological development.
28. The Council pays attention to the risk of fragmentation of legislation relating to the new initiatives such as in the area of artificial intelligence. The Council supports the objective to take data protection aspects and the Directive into account in relevant fields of EU policy and law making.

8. **FINDINGS REQUIRING FURTHER GUIDANCE**

29. The Council takes note that the application of the Directive could be further facilitated through additional discussions and guidance on some of its elements. The Council identified several points in that respect.

30. Member States advocated for further clarification of the scope and the meaning of the safeguarding against and prevention of threats to public security; clarifications as to the framework applicable to exchanging the data between the competent authorities and other authorities for border management. Furthermore, the Member States noted the need to clarify, particularly in the context of international transfers, the relationships between the provisions on subsequent processing that is Article 4(1)(b) of the Directive (which imposes a "compatibility test" for any processing other than one for which data was initially collected) and Article 4(2) (which imposes a further test of lawfulness and necessity) with Articles 8 and 9.
31. Another question that arises is the processing of the alerts for arrest distributed through Interpol, and sharing the information therein.
32. Further interpretation guidance is also needed as regards the notion of 'Specific processing conditions' under Article 9(3)(4)) and their meaning in practice. Member States could benefit from greater exchanges of practices on topic such as the practical difficulty arising from the requirement that personal data can only be transmitted to 'competent authorities of third countries'. What could prove complex for the competent authority of the Member State of origin to assess whether a service in another third country is a 'competent authority'.
-