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'I' ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)
No. Cion doc.:	9375/1/23 REV 1
No. prev. doc.:	11077/2/23 REV 2
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data – Mandate for negotiations with the European Parliament

I. INTRODUCTION

1. On 11 May 2023, the Commission submitted to the Council and the European Parliament a proposal for a Regulation of the European Parliament and of the Council amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the protection of personal data¹. The revised version, correcting the mistake in the subsidiarity part of the explanatory memorandum, was submitted by the Commission on 17 July 2023². The aim of the proposal is to align the Customs Information System (CIS) with EU data protection rules.
2. The draft Regulation is based on Article 16(2) of the Treaty on the Functioning of the European Union (TFEU) and is subject to the ordinary legislative procedure.

¹ 9375/23

² 9375/1/23 REV 1

3. In accordance with Article 6a of Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU), Ireland is bound by Decision 2009/917 JHA and is therefore taking part in the adoption of this Regulation.
4. In accordance with Article 1, 2 and 2a of Protocol No 22 on the Position of Denmark, annexed to the TEU and TFEU, Denmark is bound by Decision 2009/917/JHA and is therefore taking part in the adoption of this Regulation.

II. WORK IN OTHER INSTITUTIONS

5. In the European Parliament, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) has the lead responsibility. Ms Cornelia Ernst (GUE/NGL) was appointed rapporteur. The draft report was presented to LIBE on 25 October 2023³.
6. The European Data Protection Supervisor delivered its opinion on 4 July 2023⁴.

III. WORK IN THE COUNCIL'S PREPARATORY BODIES

7. The Law Enforcement Working Party – Customs (LEWP-C) discussed the proposal at its meetings on 12 June, 10 July, 19 September and 10 October 2023.
8. The main changes made to the Commission proposal include the application of the Regulation to Denmark, the addition of a definition of personal data and the national supervisory authority, the deletion of the reference to "controller" and "processor", which will be clarified at later stage in contractual arrangement(s), the removal of access to the CIS by international or regional organisations, the clarification of conditions for the further processing of personal data from the CIS and the introduction of a transitional period of 18 months for the review and, where necessary, the update or deletion of data to bring them into line with the new scope of the Regulation.

³ https://www.europarl.europa.eu/doceo/document/LIBE-PR-753732_EN.pdf

⁴ https://edps.europa.eu/system/files/2023-07/23-07-04_opinion_regulation_council_decision_alignment_data_protection_rules_en.pdf

9. Subsequently the proposal was submitted for legal-linguistic revision. As no delegation expressed any substantial comments on the compromise text by 25 October, the LEWP-C agreed on the text in the annex to this note.
10. Additions to the Commission proposal are marked with **bold underlined**, while deletions from it are marked with ~~striketrough~~.

IV. CONCLUSIONS

11. The Permanent Representatives Committee is therefore invited to confirm agreement on the text of the mandate for negotiations with the European Parliament, as set out in the Annex to this note, to enable the Presidency to conduct those negotiations.
12. In accordance with the approach to legislative transparency endorsed by Coreper on 14 July 2023, and in full compliance with Regulation (EC) 1049/2001 and the Council's Rules of Procedure, the text of the mandate thus agreed will be made public, unless the Permanent Representatives Committee objects.
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2023/0143 (COD)

Proposal for a

**REGULATION (EU) 2023/... OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

of...

**amending Council Decision 2009/917/JHA, as regards its alignment with Union rules on the
protection of personal data**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Directive (EU) 2016/680 of the European Parliament and of the Council⁵ provides for harmonised rules for the protection and the free movement of personal data processed for the purposes of the prevention, investigation, detection or prosecution of criminal offences or execution of criminal penalties, including the safeguarding against, and the prevention of, threats to public security. That Directive requires the Commission to review relevant other acts of Union law in order to assess the need to align them with that Directive and to make,

⁵ 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 (OJ L 119, 4.5.2016, p. 89).

where necessary, the proposals to amend those acts **in order** to ensure a consistent approach to the protection of personal data falling within the scope of that Directive.

- (2) Council Decision 2009/917/JHA⁶ on the use of information technology for customs purposes establishes the Customs Information System (CIS), **the purpose of which is** to assist in preventing, investigating and prosecuting serious contraventions of national laws by making information available more rapidly and **thereby to** increase the effectiveness of the customs administrations **of the Member States**. ~~In order to ensure a consistent approach to the protection of personal data in the Union, that Decision should be amended to align it with Directive (EU) 2016/680. In particular, the personal data protection rules should respect the principle of purpose specification, be limited to specified categories of data subjects and categories of personal data, respect data security requirements, include additional protection for special categories of personal data and respect the conditions for subsequent processing. Moreover, provision should be made for the coordinated supervision model as introduced by Article 62 of Regulation (EU) 2018/1725.~~ **The CIS consists of a central database facility which stores personal data, such as names and forenames, addresses, numbers of identity papers related to commodities, means of transport, businesses or persons, and detained, seized or confiscated items and cash. The central database is managed by the Commission, which does not have access to the personal data stored in it. The central database is accessible by the designated authorities of the Member States, which may enter and consult the information stored in it. Europol and Eurojust have, within their mandate and for the fulfilment of their tasks, the right to access the data entered in the central database by the designated authorities of the Member States and to search those data.**

⁶ Council Decision 2009/917/JHA **of 30 November 2009** on the use of information technology for customs purposes (OJ L 323, 10.12.2009, p. 20).

- (2a) In order to ensure a consistent approach to the protection of personal data in the Union, Decision 2009/917/JHA should be amended in order to align it with Directive (EU) 2016/680. In particular, the personal data protection rules from that Decision should respect the principle of purpose limitation, be limited to specified categories of data subjects and categories of personal data, respect data security requirements, include additional protection for special categories of personal data and respect the conditions for subsequent processing. Moreover, provision should be made for the coordinated supervision by the European Data Protection Supervisor and the national supervisory authorities as set out in Regulation (EU) 2018/1725 of the European Parliament and of the Council⁷.
- (3) In particular, in order to ensure a clear and consistent approach ensuring adequate protection of personal data, the term ‘serious contraventions’ should be replaced by ‘criminal offences’ as referred to in Directive (EU) 2016/680, bearing in mind that the fact that a ~~given~~ **particular** conduct is prohibited under the criminal law of a Member State in itself implies a certain degree of seriousness of the contravention. Moreover, the ~~objective~~ **purpose** of the CIS should remain limited to assisting in ~~connection to~~ the prevention, investigation, detection or prosecution of ~~the~~ criminal offences under national laws as defined in ~~Council~~ Decision 2009/917/JHA, that is, national laws in respect of which the national customs administrations of the Member States are competent and ~~that are~~ therefore particularly relevant in the context of customs. Therefore, whereas the qualification as a criminal offence is a necessary requirement, not all criminal offences under national laws are ~~should be considered to be covered~~ by Decision 2009/917/JHA. For instance By way of example, the ~~covered~~ criminal offences of ~~include~~ illicit drugs trafficking, illicit weapons trafficking and money laundering are covered by Decision 2009/917/JHA. Furthermore, ~~other than the~~ replacement ~~introduction~~ of the term ‘serious contraventions’ with the term ‘criminal offences’, ~~this amendment~~ should not be understood as affecting the specific requirement set out in ~~that Council~~ Decision 2009/917/JHA regarding the establishment and sending by each Member State of a list of criminal offences under their national laws that

⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

meet certain conditions, ~~those requirements relating only to the particular~~ **for the** purposes of the customs files identification database.

- (4) ~~It is necessary to clarify the respective roles of the Commission and of the Member States with regard to the personal data. The Commission is considered the processor acting on behalf of the national authorities designated by each Member State, which are considered the controllers of the personal data, as well as the supervisory authorities responsible for monitoring the application of the legislation applicable to each of them.~~

When processing personal data under Decision 2009/917/JHA, without prejudice to specific rules contained in that Decision, Member States are subject to their national provisions adopted pursuant to Directive (EU) 2016/680; the Commission is subject to the rules laid down in Regulation (EU) 2018/1725; Europol is subject to the rules laid down in Regulation (EU) 2016/794 of the European Parliament and of the Council ⁸; and Eurojust is subject to the rules laid down in Regulation (EU) 2018/1727 of the European Parliament and of the Council ⁹. Those acts govern inter alia the obligations and responsibilities of controllers, joint controllers, processors and their relationship. National supervisory authorities responsible for monitoring and ensuring the application of Directive (EU) 2016/680 in each Member State shall be competent for monitoring and ensuring the application by the competent authorities of each Member State of the provisions relating to the protection of personal data in Decision 2009/917/JHA. The European Data Protection Supervisor should be responsible for monitoring and ensuring the application by the Commission, Europol, and Eurojust of the provisions relating to the protection of personal data in Decision 2009/917/JHA.

⁸ **Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p. 53).**

⁹ **Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138).**

- (5) **In order** ~~To~~ to ensure the optimal preservation of the data, while reducing the administrative burden for the competent authorities, **and in line with Council Regulation (EU) 515/1997¹⁰**, the procedure governing the retention of personal data in the CIS should be simplified by removing the obligation to review data annually and by setting a maximum retention period of five years which can be increased, subject to justification, by an additional period of two years. That retention period is necessary and proportionate in view of the typical length of criminal proceedings and the need for the data for the conduct of joint customs operations and of investigations.
- (5a) The processing of personal data under Decision 2009/917/JHA involves the processing, exchange and subsequent use of relevant information for the purposes set out in Article 87 of the Treaty on the Functioning of the European Union (TFEU). In the interests of consistency and the effective protection of personal data, the processing of personal data under Decision 2009/917/JHA should comply with Union and national law 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, including the safeguarding against and the prevention of threats to public security. It should be possible for personal data contained in information lawfully entered in the CIS to be processed for purposes other than those for which the CIS was set up, such as subsequent criminal or related administrative or civil procedures or parliamentary scrutiny, only in accordance with the applicable Union and national law and only if such processing is necessary and proportionate to its purpose.**
- (6) In accordance with Article 6a of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union (TEU) and to the TFEU, Ireland is bound by ~~Council~~ Decision 2009/917/JHA and is therefore taking part in the adoption of this Regulation.

¹⁰ **Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ L 82, 22.3.1997, p. 1).**

- (7) In accordance with Articles 1, 2 and 2a of Protocol No 22 on the Position of Denmark annexed to the ~~TEU~~reaty on European Union and the ~~TFEU~~reaty on the Functioning of the European Union, Denmark is ~~not taking part in the adoption of this Regulation and is not bound by it or subject to its application~~ **bound by Decision 2009/917/JHA and is therefore taking part in the adoption of this Regulation.**
- (8) The European Data Protection Supervisor was consulted in accordance with Article 42~~(1)~~ of Regulation (EU) 2018/1725 and delivered an opinion on **4 July 2023**.
- (9) ~~Council~~Decision 2009/917/JHA should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Council Decision 2009/917/JHA is amended as follows:

- (1) ~~Paragraph 2 of~~ in Article 1, **paragraph 2** is replaced by the following:
- ‘2. The ~~objective~~**purpose** of the Customs Information System, **in accordance with this Decision, shall be** to assist the competent authorities ~~of~~in the Member States with the prevention, investigation, detection or prosecution of criminal offences under national laws, by making information available more rapidly, thereby increasing the effectiveness of the cooperation and control procedures of the customs administrations of the Member States.’;
- (2) ~~Point 2 of~~ Article 2 **is amended as follows:** ~~is hereby deleted~~

(a) point (2) is replaced by the following:

‘2. “personal data” means personal data as defined in Article 3, point (1), of Directive (EU) 2016/680 of the European Parliament and of the Council*.

*** 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 (OJ L 119, 4.5.2016, p. 89).’;**

(b) the following point is added:

‘6. “national supervisory authority” means a supervisory authority as defined in Article 3 point (15) of Directive (EU) 2016/680’.

(2a) in Article 3(1), the introductory words are replaced by the following:

‘(1) The Customs Information System shall consist of a central database facility, accessible through terminals in each Member State. It shall comprise exclusively data necessary to achieve its purpose as stated in Article 1(2), including personal data, in the following categories:’;

(3) — After the first sentence of paragraph 2 of Article 3, a new sentence is added as follows:

~~‘In relation to the processing of personal data in the Customs Information System, the Commission shall be considered the processor, within the meaning of point (12) of Article 3 of Regulation (EU) 2018/1725, acting on behalf of the national authorities designated by each Member State, which shall be considered the controllers of the personal data.’~~

(3a) Article 4 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘1. Member States shall determine the items to be entered into the Customs Information System relating to each of the categories referred to in Article 3(1), to the extent that this is necessary to achieve the purpose of that system. No items of personal data shall be entered in any event within the category set out in Article 3(1), point (e).’;

(b)(4) — Paragraph 5 of Article 4 — ~~paragraph 5~~ is replaced by the following:

‘5. In no case shall the special categories of personal data referred to in Article 10 of Directive (EU) 2016/680 be entered into the Customs Information System.’;

(5) Paragraph 2 of in Article 5, **paragraph 2** is replaced by the following:

‘2. For the purpose of the actions referred to in paragraph 1, personal data in any of the categories referred to in Article 3(1) may be entered into the Customs Information System only if there are reasonable grounds, in particular on the basis of prior illegal activities, to suggest that the person concerned has committed, is in the act of committing or will commit criminal offences under national laws.’;

(5a) in Article 7, paragraph 1 is replaced by the following:

‘1. Direct access to data entered into the Customs Information System shall be reserved to the national authorities designated by each Member State. Those national authorities shall be customs administrations, but may also include other authorities competent, according to the laws, regulations and procedures of the Member State in question, to act in order to achieve the purpose stated in Article 1(2).’;

(6) ~~Paragraph 3 of in Article 7, **paragraph 3** is replaced by the following:~~**deleted.**

~~‘3. Notwithstanding paragraphs 1 and 2, the Council may exceptionally, by a unanimous decision and after consultation of the European Data Protection Board, permit access to the Customs Information System by international or regional organisations, provided that both of the following conditions are met:~~

~~(a) — the access complies with the general principles for transfers of personal data set out in Article 35 or, where applicable, Article 39 of Directive (EU) 2016/680;~~

~~(b) — the access is based either on an adequacy decision adopted under Article 36 of that Directive or is subject to appropriate safeguards under Article 37 thereof.’~~

(7) Paragraph 1 of Article 8 **is amended as follows:**

(a) paragraphs 1 and 2 are replaced by the following:

‘1. The national authorities designated by each Member State in accordance with Article 7(1) Member States, Europol and Eurojust may process personal data obtained from the Customs Information System only in order to achieve the aimpurpose stated in Article 1(2), or for other purposes in accordance with Union or national law applicable to the protection of personal data with the prior authorisation of, and subject to compliance with any conditions imposed by, the designated national authorities of the Member State which entered the personal data in that systemin accordance with the applicable rules of Union law on the processing of personal data.

Member States, Europol and Eurojust may process non-personal data obtained from the Customs Information System in order to achieve the aim**purpose** stated in Article 1(2) or for other purposes, including administrative ones, in compliance with any conditions imposed by the **designated national authorities of the** Member State which entered the non-personal data in that system.

2. Without prejudice to paragraphs 1 and 4 of this Article and Articles 11 and 12, data obtained from the Customs Information System shall only be used by national authorities in each Member State designated by the Member State in question, which are competent, in accordance with the laws, regulations and procedures of that Member State, to act in order to achieve the purpose stated in Article 1(2).’;

(8)(b) ~~p~~Paragraph 4 of Article 8 is replaced by the following:

‘4. Personal data obtained from the Customs Information System may, with the prior authorisation of, and subject to compliance with any conditions imposed by, the **designated national authorities of the** Member State which entered that data into that system, be:

- (a) transmitted to, and further processed by, national authorities other than those designated under paragraph 2, in accordance with **Union or national law applicable to the protection of personal data** ~~the applicable rules of Union law on the processing of personal data;~~ or
- (b) transferred to, and further processed by, the competent authorities of third countries and international or regional organisations, in accordance with **Union or national law applicable to the protection of personal data** ~~adopted pursuant to Chapter V of Directive (EU) 2016/680 and, where relevant, with Chapter V of Regulation (EU) 2018/1725.~~

Non-personal data obtained from the Customs Information System may be transferred to, and further processed by national authorities other than those designated under paragraph 2, third countries, and international or regional organisations, in compliance with any conditions imposed by the **designated national authorities of the** Member State which entered the non-personal data in that system.’;

(8a) in Article 13, paragraph 5 is replaced by the following:

‘5. Subject to this Decision, where in any Member State a court, or other competent authority within that Member State, makes a final decision as to amendment, supplementation, rectification or erasure of data in the Customs Information System, the Member States undertake mutually to enforce such a decision. In the event of conflict between such decisions of courts or of other competent authorities in different Member States, including of the national supervisory authorities, concerning rectification or erasure, the Member State which entered the data in question shall erase them from that system.’;

(9) Article 14 is replaced by the following:

‘Article 14

Personal data entered into the Customs Information System shall be kept only for the time necessary to achieve the ~~aim~~**purpose** stated in Article 1(2) and may not be retained for more than five years. However, exceptionally, ~~those~~**at** data may be ~~retained~~**kept** for an additional period of ~~at most~~**up to** two years, where and insofar as a strict need to do so in order to achieve that ~~aim~~**purpose** is established in an individual case.’;

(9a) Paragraph 2 of Article 15 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. The purpose of the customs files identification database shall be to enable the national authorities responsible for carrying out customs investigations designated pursuant to Article 7, when opening a file on or investigating one or more persons or businesses, and for Europol and Eurojust, to identify the competent authorities of other Member States which are investigating or have investigated those persons or businesses, in order, through information on the existence of investigation files, to achieve the purpose referred to in Article 1(2).’;

(10)(b) ~~p~~Paragraph 3 of Article 15 is replaced by the following:

‘3. For the purposes of the customs files identification database, each Member State shall send the other Member States, Europol, Eurojust and the Committee referred to in Article 27 a list of criminal offences under its national laws.

This list shall comprise only criminal offences that are punishable:

- (a) by deprivation of liberty or a detention order for a maximum period of not less than 12 months; or
- (b) by a fine of at least EUR 15 000.’;

(11) Article 20 is replaced by the following ~~deleted~~:

~~‘Directive (EU) 2016/680 shall apply to the processing of personal data under this Decision.’~~

(12) Articles 22, 23, 24 and 25 are hereby deleted;

(13) Article 26 is replaced by the following:

~~‘Coordinated supervision among national supervisory authorities and the European Data Protection Supervisor shall be ensured in accordance with Article 62 of Regulation (EU) 2018/1725.’~~

‘Article 26

Coordinated supervision among national supervisory authorities and the European Data Protection Supervisor shall be ensured in accordance with Article 62 of Regulation (EU) 2018/1725.’;

(13c) in Article 27, paragraph 2, point (a) is replaced by the following:

‘(a) for the implementation and correct application of this Decision, without prejudice to the powers of the national supervisory authorities and of the European Data Protection Supervisor’;

(14) In paragraph 2 of in Article 28, paragraph 2, the following points are added:

- ‘(i) to ensure that installed systems may, in the case of interruption, be restored;**
- (j) to ensure that the functions of the system perform, that the appearance of faults in the functions is reported and that stored personal data cannot be corrupted by means of a malfunctioning of the system.’;**

(14a) in Article 28, paragraph 3 is replaced by the following:

‘3. The Committee referred to in Article 27 shall monitor queries of the Customs Information System for the purpose of checking that searches made were admissible and were made by authorised users. At least 1 % of all searches made shall be checked. A record of such searches and checks shall be maintained in the system and shall be used only for the abovementioned purpose by that Committee, the national supervisory authorities and the European Data Protection Supervisor. It shall be erased after six months.’;

(14b) Article 29 is replaced by the following:

‘Article 29

The competent customs administration referred to in Article 10(1) shall be responsible for the security measures set out in Article 28, in relation to the terminals located in the territory of the Member State concerned, the review functions set out in Articles 14 and 19, and otherwise for the proper implementation of this Decision so far as is necessary under the laws, regulations and procedures of that Member State.’;

(15) ~~in Paragraph 1 of Article 30, paragraph 1 is hereby deleted.~~

Article 2

By....[18 months after the date of entry into force of this Regulation], without prejudice to the application of this Regulation, the personal data entered into the Customs Information System before....[the date of entry into force of this Regulation] shall be reviewed by the Member States which entered those data and, where necessary, updated or deleted in order to ensure that their processing complies with Decision 2009/917/JHA as amended by Article 1(1) of this Regulation.”.

Article ~~23~~

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the European Parliament
The President

For the Council
The President