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*Committee on Legal Affairs*

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## **NOTICE TO MEMBERS**

**(0047/2012)**

**Subject:** Reasoned opinion by the German Bundesrat 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 (COM(2012)0010) – C7-0024/2012 – 2012/0010(COD))

Under Article 6 of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality, any national parliament may, within eight weeks from the date of transmission of a draft legislative act, send the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.

Under Parliament's Rules of Procedure the Committee on Legal Affairs is responsible for compliance with the subsidiarity principle.

Please find attached, for information, a reasoned opinion by the German Bundesrat on the above-mentioned proposal.

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*United in diversity*

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## Reasoned opinion by the Bundesrat of the Federal Republic of Germany

At its 895th sitting on 30 March 2012 the Bundesrat adopted the following opinion pursuant to Article 12(b) of the EU Treaty:

1. The Bundesrat welcomes the proposed Directive's aim of simplifying police and judicial cooperation in criminal matters whilst respecting the fundamental right to the protection of personal data.
2. Raising an objection on grounds of subsidiarity, as provided for in Article 12(b) TEU, also encompasses the issue of the EU's competence (see the Bundesrat's opinions of 9 November 2007, Bundesrat document No 390/07 (Decision), point 5, 26 March 2010, Bundesrat document No 43/10 (Decision), point 2, and 16 December 2011, Bundesrat document No 646/11 (Decision)). The principle of subsidiarity is a principle concerning the exercise of competence. The subsidiarity principle is also infringed if the Union possesses no competence. An assessment of subsidiarity must therefore begin by considering the question of the legal basis.
3. Article 16(2) TFEU cannot provide a basis for the proposed directive 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 insofar as the scope of the Directive also extends to data processing in national proceedings. The Commission's proposal is thus not covered by the legal basis indicated (Article 16(2) TFEU) as it includes the purely national flow of information between police authorities. Under the principle of conferral, laid down in Article 5(2) TEU, the EU may act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Article 16(2) TFEU only permits the Member States to lay down rules relating to the protection of individuals with regard to the processing of personal data when carrying out activities which fall within the scope of Union law. There are, however, very narrow limits to how national criminal proceedings fall within the scope of Union law. The EU's limited power to adopt directives on criminal proceedings (Article 82(2) TFEU) thus also restricts its data protection powers in this field. This precludes harmonisation of purely national data processing in criminal proceedings. The processing of personal data is a key component

of criminal procedure. The proposal for a Directive thus leads to far-reaching encroachments into criminal procedural law that are not required in order to facilitate the mutual recognition of decisions or cooperation in criminal matters with a cross-border dimension. The proposal contains provisions, for example, imposing major obligations on the Member States on how to compile procedural documents (Articles 5 and 6), investigative measures using special categories of personal data (Article 8) and on access to documents and the provision of information (Articles 11 to 14).

The explanatory memorandum to the proposal for a Directive explains the inclusion of domestic data processing on the grounds that the competent authorities would not be able to easily distinguish between purely domestic data processing and the cross-border exchange of personal data or to foresee whether certain personal data may become the object of a cross-border exchange at a later stage. This argument cannot, however, be used to justify the need for the broad scope of the Directive. The competent authorities are perfectly capable of passing judgement on the cross-border transfer of data previously collected on the basis of the provisions of domestic criminal procedural law in accordance with the rules in force in that field. If any legal shortcomings arise in the course of data transmission within the context of police and judicial co-operation, these sector-specific rules could always be revised. The practical problems invoked by the Commission in making a legal distinction between domestic data processing and the cross-border exchange of personal data cannot, on the other hand, justify any extension of current powers. These comments apply *mutatis mutandis* to the processing of personal data by the police under the relevant law in that field.

4. With respect to police cooperation, the powers referred to in Article 16(2) TFEU (the scope of Union law) are determined, in accordance with Article 2(6) TFEU, by Article 87 TFEU. This only covers cooperation between the Member States' police and law enforcement authorities. Article 87(1) TFEU does not then confer any powers to regulate issues that exclusively concern the activities of these authorities within a Member State and thus do not relate to any form of cooperation between Member States. The regulatory power concerning the exchange of police information set out in Article 87(2)(a) TFEU has, by virtue of the reference to the purposes of Article 87(1), the same scope as defined in that paragraph for cooperation involving Member States' authorities. It therefore follows that in the field of data protection law too the movement of police information only falls within the regulatory scope of the Union when it concerns cooperation between Member State law enforcement authorities.

Furthermore, in accordance with Article 51 of the Charter of Fundamental Rights of the European Union, Article 8 of that Charter only applies to the activities of Member States

when they are implementing Union law, and Article 51(2) does not allow for the extension of powers by means of the Charter. In interpreting Article 8 of the Charter and Article 16(2) TFEU, whilst leaving aside the specific nature of the provisions governing the area of freedom, security and justice, the proposal for a Directive expands the scope of primary law in such a way as to give rise to the major constitutional tensions described in a German Federal Constitutional Court ruling of 30 June 2009 (Az.: 2 BvE 2/08 and others) between the principle of the conferral of powers and the constitutional responsibilities of the individual Member States with respect to integration and the impact this has on effectively ensuring law and order. The purely formulaic wording of Article 2(3)(a) of the proposal for a Directive is not appropriate for avoiding the extension of substantive powers that may be particularly detrimental to regional police authorities.

5. The Bundesrat considers also that the EU has no competence to regulate protective rights not linked to criminal acts. Here too there is a reasonable risk that the EU might supplement and substantively expand its data protection powers under Article 16 TFEU, with no corresponding clarifying exemptions, to the detriment of the Member States' powers to prevent threats not linked to criminal acts as described in the German Federal Constitutional Court ruling of 30 June 2009 (Az.: 2 BvE 2/08 and others). Here too, the formulaic wording of Article 2(3)(a) of the proposal is not appropriate for avoiding the transfer of powers laid down in the different provisions.
6. The proposal for a Directive is also contrary to the principle of subsidiarity in the stricter sense of the term, as enshrined in Article 5(3) TEU, in that it contains rules governing the collection and processing of data at purely national level. In this respect, there is no identifiable added value in the proposed uniform European provisions. On the contrary, the Member States are quite capable of regulating themselves the purely national processing of data (collection, storage and transfer) and this field is already sufficiently well regulated in German law by the existing data protection provisions.
7. The justification for the inclusion of the purely national movement of police information and the compatibility of this measure with the subsidiarity principle is also contrary to the provisions of Article 5 of Protocol No 2 to the Treaty of Lisbon, which the Commission is supposed to observe and to which it is bound under Article 51 TEU. The explanations given in point 3.2 of the explanatory memorandum merely state that it complies with the principle of subsidiarity, without presenting the quantitative and qualitative indicators required under Article 5 of the Protocol. Document SEC (2012) 73 accompanying the proposal only refers, on page 3, to some speculative hindrance to the smooth exchange of

personal data between relevant national authorities. This supposition is however, according to point d) on page 34 of the impact assessment document SEC (2012) 72, merely based on an opinion expressed in a non-public study by an advisory body on migration policy. The bases of this study carried out by a centre active in a different field are thus neither verifiable nor fully comprehensible and are, therefore, not fit for purpose. No other relevant data are provided.

8. The proposal for a Directive also touches on the provisions of Article 72 TFEU. Article 72 TFEU supplements Article 5(3) TEU with respect to the police. The compelling necessity criterion required for such measures under Article 72 TFEU is not mentioned either in the proposal for a Directive or in the accompanying documents. The proposed restrictions on the purely national movement of police information and the possibilities opened up by Article 27 of the proposal for a Directive to adopt binding regulations on criteria governing the use of domestic IT procedures and systems, and the reliability thereof for data protection purposes, thus affects the responsibilities and capabilities of the police guaranteed by Article 72 TFEU with regard to the strictly national maintenance of law and order and the safeguarding of internal security. If certain procedures and systems were declared illegal from a data protection standpoint, these could no longer be used and this would, in certain cases, hugely restrict the specific ability of police forces to carry out their tasks.
9. The obligation to amend existing bilateral or multilateral agreements in the field of police cooperation in Article 60 of the proposal for a Directive infringes the provisions of the Vienna Convention on the Law of Treaties and Member States' competences in the field of foreign policy. Article 351 TFEU only states that Member States shall take all appropriate steps to eliminate any incompatibilities established between agreements concluded and the EU Treaties. The inflexible wording of Article 60 of the proposal for a Directive is thus open to criticism. A 'sunset-clause' form of wording should be considered.
10. It is not obvious that the Member States are not capable of sufficiently ensuring data protection within their authorities by describing the tasks and activities of data protection officers. Nor is there any proof in the proposal for a Directive that the many provisions laid down in Articles 30 *et seq.* will ensure that official data are better protected than by some of the national rules already in force. This too violates the principle of subsidiarity.
- 11 The Bundesrat refers in addition to its opinion on the Communication from the Commission to the European Parliament, the Council, the Economic and Social

Committee and the Committee of the Regions on a comprehensive approach on personal data protection in the European Union, COM(2010) 609 final; Bundesrat document No 707/10 (Decision), point 8.