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Committee on Civil Liberties, Justice and Home Affairs

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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

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Dimitrios Droutsas

The necessity for a comprehensive approach

The current Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters[1] does not provide a comprehensive framework of data protection by law enforcement and judicial authorities in criminal matters, as it addresses only cross-border situations and does not address the issue of parallel existing provisions on data protection in different EU instruments.

The goal of the Parliament was to have a comprehensive single instrument on data protection addressing all the different issues and areas. Despite a different indication at the beginning of the drafting process the Commission did not propose a single instrument but instead two, whereby the criminal law area would be covered by the proposed Directive. The Directive as such, if adopted, would bring several improvements, such as the extension of its validity to purely internal situations. At the moment there is a whole patchwork of EU instruments addressing data protection in the area of police and judicial processing in criminal matters. The current "schizophrenic" situation where national law enforcement authorities have to adapt the level of data protection according to the situation they are dealing with (cross border situation, internal situation, Europol, Eurojust, Prüm) is not sustainable in a coherent legal environment, concerning also the fact that data protection is a fundamental human right (Article 8 of the EU Charter). Although the application of the Charter is limited to the implementation of EU law (Article 51 of the Charter), the Court of Justice has in the past understood in other areas the term broadly. At the same time Article 2 TEU does not have such a limitation (application of EU law) meaning that Member States have to respect fundamental rights. In that regard it would be in the long term legally questionable that two different notions of the same fundamental right would be used by the same national authorities in internal and cross-border situations.

It is clear that a regulation would have been preferable, as the level of harmonisation through a directive is always inferior, and could lead to irregular transposition without introducing a common horizontal practice in the Member States (as it happened with the Directive 95/46/EC). Besides the form, also the content of the Directive can not reach the same level of protection as the proposed Regulation. In that regard the EDPS stated, inter alia, that "*the widening of the scope of application only has added value if the Directive substantially increases the level of data protection in this area, which is not the case. Compared to the proposed Regulation, many provisions in the proposed Directive are weak, without any evident justification*".[2] The declared goal of the reform is not fully achieved and the lack of comprehensiveness has not been remedied.[3] The EDPS urged the legislators *"to ensure that both instruments contain the same essential provisions, and enter into force at the same date"*.[4] Also, the Article 29 Working Party in its opinion on the data protection reform[5] has

[1] OJ L 350, 30.12.2008, p. 60.
[2] EDPS opinion on the data protection reform package of January 2012, pt. 19.
[3] See in that regard Commission Communication of 4 November 2010 on "A comprehensive approach on personal data protection in the EU" (COM(2010)609, EP resolution of 6 July 2011, Council conclusions of the 3071st Justice and Home Affairs Council meeting of 24 and 25 February 2011., EDPS opinion of 14 January 2011, etc.
[4] EDPS opinion on the data protection reform package of January 2012, pt. 37.
[5] Opinion 01/2012 of the Article 29 WP on the data protection reform proposals of 23 March 2012.

repeatedly referred on the issue and expressed its concern about the Commission proposal. Thus, the Rapporteur, supported by the shadow rapporteurs, will insist on the package approach for both instruments and is willing to defend it, if necessary, including the coordination of the time-table of both proposals.

Avoidance of unrealistic and non-workable division of areas

The division of the two instruments poses justified questions on the practical applicability of them in situations of cooperation between law enforcement and private sector, or other public entities. Two different instruments (adopted at different times) with different sets of rules would, from a practical perspective, not reach the goal of legal certainty and equality before the law. Therefore, it is questionable if the Directive in the proposed form, although addressing also purely internal situations, would achieve a fully comprehensive approach.[1] Sometimes a domestic case can become a cross-border case and/or a case demanding cooperation with private entities. All the data collected is potential EU data being circulated in the Union. A good example, of spreading "contaminated" data is identified by the ECtHR *Marper* case, where a problem of DNA sample storage in one Member State becomes, due to the Prüm Decision, a problem in all Member States. This is shown also by the envisaged creation and role of supervisory authorities where the directive refers directly to the proposed Regulation, including the role of the European Data Protection Board.[2]

Furthermore the issue of EU institutions, bodies, offices and agencies falls outside the scope of the proposed Directive (Article 2), despite their increasing importance as regards data sharing in the judicial and law-enforcement sectors. At the same time the Commission, proposes to review the specific acts in the area of police and judicial cooperation, three years after the entry into force of this Directive, meaning in reality a time span of several years (1-2 years legislative work and 3 years for transposition, and after 3 years the Commission would start revising those acts). In practical terms this implies that a common level of standards throughout the EU will not exist for the next +/- 6 years and such a time span is unacceptable.

Issues to be addressed

Several specific issues have to be clarified referring, inter alia, to the following:

- Every single exception to the principle has to be duly justified, as data protection is fundamental right. It has to be equally protected in all circumstances, whereby Article 52 of the Charter allowing limitations fully applies. Such limitations must be an exception to the general rule, and cannot become the rule itself. Open blanket and broad exceptions can not be accepted;

- Clear definition of the data protection principles such as elements on data retention, transparency, keeping data up to date, adequate, relevant and not excessive: Moreover,

[1] In that regard Recital 12 of the proposed Directive makes the following abstract declaration*: "In order to ensure the same level of protection for individuals through legally enforceable rights throughout the Union and to prevent divergences hampering the exchange of personal data between competent authorities, the Directive should provide harmonised rules for the protection and the free movement of personal data in the areas of judicial co-operation in criminal matters and police co-operation."*

[2] See in that regard Recitals 52 and 59.

provisions requiring the data controller to demonstrate compliance are also missing;

- An evaluation mechanism is lacking regarding a proper evaluation of necessity and proportionality. This question is essential to evaluate if certain data processed are necessary at all and fulfil their goal. The necessity of such evaluations has been recently highlighted in the framework of the TFTP and PNR debates. Such an evaluation would furthermore prevent the establishment of a kind of "Orwellian" society where at the end all data will be processed and analysed. The collection of data must be necessary in order to justify a goal, taking into account that the goal can not be achieved by other means and the core of the private sphere of the individual is well preserved. Proportionality is also connected with the question on the re-use of data for a purpose other than it was initially legitimately processed to prevent an overall creation of profiles of the population;[1]

- A clear definition on profiling is missing. Any such definition should be in line with the Council of Europe Recommendation[2]. Profiling in law enforcement has to be provided by law, which lays down measures to safeguard data subjects' legitimate interests, particularly by allowing them to put forward their point of view. Any negative consequences have to be assessed through human intervention. At the same time profiling should not become a boxing area of purely innocent individuals without any justified personal trigger- it should not lead to the so called general *Rasterfahndung*;

- The proposed regime for transferring personal data to third countries is weak and does not provide all the necessary safeguards to ensure the protection of the rights of individuals whose data will be transferred. This system provides lower protection than the proposed Regulation. For example, the directive allows the transfer to a third country authority or an international organisation that is not competent for law enforcement purposes. Moreover, when the transfer is based on the assessment made by the data controller (Article 35(1)(b)), the Directive might allow massive and bulk transfer of personal data;

- The power of the DPAs to monitor and ensure compliance with data protection rules are not properly defined. Compared to the proposed Regulation the competences of the DPAs are less clear. It is not evident that the DPA could access the premises of the data controller, as provided under the Regulation. Also the sanctions and enforcement measures appear to be less precise.

Conclusions

The Rapporteur supports the idea to also include purely domestic processing, as this would fill a gap in the current EU law and would also provide a consistent and coherent mechanism as regards these situations. Thus, the proposed Directive needs to reach the level of protection required by the Treaties, the Framework decision 2008/977/JHA, Directive 95/46/EC and the

[1] Therefore Recital 19 calling for an extensive re-use has to be strictly understood in connection with Recital 20 calling for purpose limitation and proportionality.

[2] Recommendation CM/Rec(2010)13 of the Committee of Ministers to member states on the protection of individuals with regard to automatic processing of personal data in the context of profiling, 23 November 2010.

Council of Europe Recommendation No. R (87)15.

The Rapporteur thinks it is paramount that, in order to ensure coherence and legal certainty, the Directive and the Regulation are considered a package regarding the time table and the eventual adoption.

The Rapporteur will propose amendments for the purpose of raising the standards of protection to a level similar of the Regulation.