

ROADMAP

Title of the initiative: **A new comprehensive framework for the protection of personal data in the EU (with: a) a Communication on the protection of personal data, and b) Legislative proposals)**

Type of initiative (CWP/Catalogue/Comitology): **CWP**

Lead DG/contact person/details: **JLS/D5**

Expected date of adoption of the initiative (month/year): **11/2010**

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Version No: **1**

Initial IA screening & planning of further work

A. Context and problem definition

(i) What is the political context of the initiative? (ii) How does this initiative relate to past and possible future initiatives, and to other EU policies?

(i) The protection of personal data is a fundamental right. The entry into force of the Lisbon Treaty made Article 8 of the EU Charter of Fundamental Rights binding at primary law level, and lays down the basic principles for the protection of personal data. As a consequence, it is the Union's obligation to secure a comprehensive strategy to protect this fundamental right within the EU and in its relations with third countries.

The newly introduced Article 16 TFEU now provides a single legal base for measures related to the protection of personal data, covering not only all EU institutions and bodies but also Member States in all activities which fall within the scope of EU law to be adopted under the ordinary legislative procedure (except for CFSP matters).

(ii) This builds on the existing EU policy to remove potential obstacles to the flows of personal data whilst giving effect to the fundamental right to personal data protection by ensuring a high level of protection within the EU, based in particular on the Data Protection Directive 95/46/EC.

(iii) The protection of fundamental rights is by its nature a horizontal issue, which has therefore an impact on almost all other EU policies.

What are the main problems identified?

- Globalisation and the development of information technologies have made it simpler and easier to collect and process personal data as well as facilitating the circulation and sharing through a variety of actors in different jurisdictions worldwide (e.g. via the internet, on-line social networking, e-commerce, on-line access to databases, on-line storage services for individuals, cloud computing, etc.). However, individuals should be able to claim protection even when their data are processed outside the EU. The current rules on the applicable data protection law need to be clarified where data controllers from a third country address data subjects in the EU, as e.g. in the case of on-line vendors and social network providers;
- The current rules do not provide clearly for 'privacy by design', and do not foresee certification schemes for "privacy-aware" technologies, products and services;

- The current obligation to notify individuals when a privacy breach is likely to affect their personal data and privacy applies only in the context of electronic communications, and not in general.
- The current data protection framework in the EU can best be described as heterogeneous due to the previous “pillar structure” which distinguished between Community legislation and legislation in the area of police cooperation and judicial cooperation in criminal matters.

Who is affected?

Everyone in the EU who processes personal data and about whom personal data are processed is affected.

(i) Is EU action justified on grounds of subsidiarity? (ii) Why can the objectives of the proposed action not be achieved sufficiently by Member States (necessity test)? (iii) As a result of this, can objectives be better achieved by action by the Community (test of EU Value Added)?

In order to remove the obstacles to flows of personal data, the level of protection of the rights and freedoms of individuals with regard to the processing of such data must be equivalent in all Member States; in line with the Europe 2020 programme, this objective is vital to the internal market in order to consolidate the mutual confidence indispensable for the single digital market, and so it is for the area of freedom, justice and security, and therefore cannot be achieved by the Member States alone, especially in view of the remaining divergences which currently exist between the relevant laws in the Member States and the need to coordinate the laws of the Member States. In order to ensure that the protection of personal data is regulated in a consistent manner, EU action to further approximate those laws and make them coherent is therefore needed; those objectives can be better achieved by action by the Union.

B. Objectives of EU initiative

What are the main policy objectives?

- Continue to guarantee a high level of protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States, in all areas of the Union’s activities, as well as the free movement of such data;
- Achieve the consistent and effective legal implementation and application of the fundamental right to protection of personal data in all areas of the Union’s activities;
- Ensure proper adaption to and application of the Treaty of Lisbon’s new legal bases for the protection of personal data in all areas of the Union’s activities, taking into account the abolition of the former distinction between “pillars”, with full involvement of the European Parliament and the European Court of Justice.
- Modernise the existing system for the protection of personal data in all areas of the Union’s activities to meet the challenges from globalisation, the use of new technologies, and the necessities of public authorities, in order to maintain the effective application of the data protection principles, and improve current data protection legislation;

- Improve the clarity and coherence of the EU legal framework for personal data protection.

Do the objectives imply developing EU policy in new areas or in areas of strategic importance?

No.

C. Options

(i) What are the policy options? (ii) What legislative or 'soft law' instruments could be considered? (iii) Would any legislative initiatives go beyond routine up-date of existing legislation?

(i) Likely options could be amending, extending, or rearranging the current data protection legal framework or adopting new legislative instruments in addition to those instruments already in existence or replacing the existing data protection legal framework entirely with a new data protection legal framework. The no-legislation/status quo option will be analysed but does not seem likely given the changed context (the Lisbon Treaty) and the new challenges to be addressed (see below under iii).

(ii) Article 16 TFEU allows for laying down rules relating to the protection of individuals with regard to the processing of personal data, by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, i.e. via a Regulation or Directive.

(iii) Yes, because the aim is not only to modernise the existing legislation but to take the opportunity offered by the Lisbon Treaty (new Article 16 TFEU) to develop a comprehensive and coherent legal framework. In addition, the new framework would address new challenges linked to globalisation and technological developments.

Does the action proposed in the options cut across several policy areas or impact on action taken/planned by other Commission departments?

The positioning of Article 16 TFEU as the legal basis for the protection of personal data in Title II “Provisions having general application” within the Treaty on the Functioning of the European Union makes clear that this single legal basis was designed to have a horizontal impact whilst giving effect to the fundamental right of personal data protection.

Explain how the options respect the proportionality principle

An EU legal framework on data protection is already in place and is being implemented by Member States. This allows for a high level of data protection throughout the EU and at the same time facilitates the free flow of information within the internal market. Given the cross-border nature of the new challenges (linked to globalisation and new technology developments) an action at EU level is necessary in order to properly address them.

D. Initial assessment of impacts

What are the significant impacts likely to result from each policy option (cf. list of impacts in the Impact Assessment Guidelines pages 32-37), even if these impacts would materialise only after subsequent Commission initiatives?

Under preparation. It is intended to proceed with a thorough evaluation of the existing data protection acquis, with the assistance of an external contractor, to better assess the problems and the needs to be addressed.

Could the options have impacts on the EU-Budget (above 5 Mio €) and/or should the IA also serve as the ex-ante evaluation, required by the Financial Regulation?

No.

Could the options have significant impacts on (i) simplification, (ii) administrative burden or on (iii) relations with third countries?

All options could have (positive) impacts on achieving more (i) simplification, (ii) less administrative burden and (iii) improve relations with third countries.

E. Planning of further impact assessment work

When will the impact assessment work start?

The impact assessment work is already underway.

(i) What information and data are already available? (ii) Will this impact assessment build on already existing impact assessment work or evaluations carried out? (iii) What further information needs to be gathered? (iv) How will this be done (e.g. internally or by an external contractor) and by when? (v) What type and level of analysis will be carried out (cf. principle of proportionate analysis)?

It is intended to proceed with a thorough evaluation of the existing data protection acquis, with the assistance of an external contractor, to better assess the problems and the needs to be addressed. The study will provide the necessary elements and analysis and serve as the basis for the Commission to draft a Communication and an impact assessment report for the future personal data protection legal framework in the EU.

The work will be based on information already available, in particular as a result of the 2009 Commission conference on data protection and the public consultation about the future legal framework for the fundamental right to protection of personal data in the EU which ended in December 2009.

Which stakeholders & experts have been/will be consulted, how and at what stage?

The general public, including relevant stakeholders were consulted in the public consultation in 2009. Other stakeholder meetings are planned throughout 2010.