



## Analysis

### The Directive on data protection and law enforcement: A Missed Opportunity?

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#### Introduction and Background

The first involvement of the EU in data protection issues was the data protection Directive of 1995 (the '1995 Directive'), which did not apply to matters within the scope of the EU's 'third pillar', ie (from 1999) policing and criminal law matters. Much later, after three years of difficult negotiations, the Council adopted a third pillar 'Framework Decision' on data protection in the policing and criminal law context in 2008. Member States had two years in which to implement this measure in their national law.

The entry into force of the Treaty of Lisbon in December 2009 repealed the previous 'third pillar', but third pillar measures adopted before that date remain in force until they are amended or repealed. This Treaty also put in place a new legal basis to adopt EU data protection legislation - Article 16 of the Treaty on the Functioning of the European Union (TFEU), which allows the Council and the European Parliament (EP) to adopt EU legislation on data protection issues generally, with the exception of certain issues related to foreign policy.

In January 2012, the Commission proposed a comprehensive overview of these two key measures. The 1995 data protection Directive would be replaced by a Regulation, which would remove much of the discretion left to Member States by the current Directive. On the other hand, the Framework Decision would be replaced by a Directive, which would be binding but which would leave to Member States the choice of form and

methods to implement it. The two new measures would still leave in force a number of other more specific measures concerning data protection, such as: sectoral legislation concerning telecoms and data privacy, including the controversial 'data retention' Directive; more detailed rules governing data protection as regards EU databases and EU systems for information exchange between national authorities; and rules on data protection in the EU's own institutions and other bodies.

It should be noted that unlike other EU measures concerning police and criminal law, there is no general opt-out from this proposal for the UK, Ireland and Denmark. The relevant protocols to the EU Treaties provide instead that for these three Member States, the legislation adopted on the basis of Article 16 TFEU will not apply to the extent that those Member States have not opted in to the EU legislation which establishes EU databases and EU systems for information exchange between national authorities in this field. But otherwise the proposed legislation would apply to these Member States without any possible opt-out. Furthermore, for the time being the qualification set out in the Protocols is irrelevant, since those three Member States are fully bound to apply the current legislation concerning EU databases and EU systems for information exchange between national authorities. This proviso could, however, be relevant to some extent in future, if those Member States opt out of future such measures or if the UK exercises the option to remove itself from participation in all pre-Lisbon policing and criminal law measures in June 2014.

### **Comparing the Proposed Directive to the Framework Decision**

First of all, the institutional framework of the proposed Directive is clearly different from the Framework Decision. According to the previous Treaty rules, Framework Decisions cannot confer 'direct effect', ie they cannot be invoked in national courts by individuals. This is particularly problematic in that the very subject-matter of the Framework Decision concerns individual rights. On the other hand, Directives can be directly effective against State bodies - and this proposed Directive would only impose obligations upon State bodies, not the private sector, so the restrictions upon applying Directives against private parties will not be relevant.

Next, the proposed Directive will be adopted by qualified majority voting in the Council (ie Member States' ministers), while the Framework Decision had to be adopted unanimously. Also, the proposed Directive will be decided by the ordinary legislative procedure, ie co-decision with the EP, whereas the EP was only consulted as regards the Framework Decision. Given the EP's keen interest in data protection issues, this is likely to lead to a higher level of data protection in the final Directive - although the EP has an unfortunate record of either spectacularly reneging on its principles (ie the data retention directive) or making huge tactical blunders (ie its litigation strategy as regards the first EU/USA PNR treaty) in this field. In some cases, with friends like the EP, data protection hardly needs any enemies.

The third institutional change is the role of the EU's Court of Justice. At present, Member States have an option as to whether to permit their national courts to send questions to the EU's Court of Justice about pre-Lisbon third pillar measures. About two-thirds of them permit this to happen, but the others do not. Also, the EU's 'infringement procedure', which in practice consists of the Commission suing Member States which have not implemented EU rules correctly or at all before the EU's Court of Justice, does not apply to pre-Lisbon third pillar measures. However, these particular restrictions will expire anyway on 1 December 2014 - and the Directive is unlikely to be applicable before that date anyway (the Commission has proposed to set a deadline of two years for Member States to implement the Directive after its adoption, and the Directive is unlikely to be officially adopted before 1 December 2012).

As to the substance of the proposed Directive, the first significant change is its scope. The Framework Decision only applies where personal data are exchanged between Member States; purely domestic data processing is not covered. Equally, the rules in the Framework Decision on external relations (ie the transmission of personal data outside the EU) only apply where the data in question have been transmitted between Member States first. Such limitations were never applicable as regards the 1995 Directive, because the Court of Justice ruled that it would be too difficult in practice to distinguish between data which were processed purely domestically and data which were transferred between Member States, and too complex to apply different rules to the two sets of cases.

However, this distinction would be removed in the proposed Directive. This can only be welcomed, for the reasons given by the Court of Justice to justify its interpretation of the 1995 Directive on this point. For instance, police might decide to gather information (via means such as interception of telecommunications, informants or undercover operations) upon a group of persons suspected of planning terrorist acts or of being involved in organised crime. It may only become evident after some weeks or months that there is a cross-border element to the investigation. For instance, the suspected terrorists may be planning to commit acts on the territory of another Member State, or obtaining funding and materials from another Member State; or the suspected organised crime gang may be planning to smuggle drugs to or from another Member State. Or the cross-border connection may come to light when another Member State's authorities request the first Member State for information for use in criminal proceedings, or for the surrender of a person under investigation in the first Member State pursuant to a European Arrest Warrant. This distinction will also be removed as regards third States - which must be welcomed for the same reasons. Obviously (for instance) illegal drugs and explosives are being moved into the EU from outside, and vice versa, but the existence of such links will not be evident from the outset. Alternatively, it is possible that the cross-border elements to an investigation disappear over time (for instance, it may turn out that while a group of suspected terrorists has links to more than one State, all of the criminal acts which it ultimately allegedly commits are confined to the territory of one State). Applying two different

sets of rules, with the dividing line between them uncertain and subject to change, could lead to complications and extra costs for law enforcement bodies, and to individuals' uncertainty about their rights.

Another point changed implicitly by the proposed Directive as compared to the Framework Decision is the limitation of the measure to setting minimum standards only. The case law of the Court of Justice on the 1995 Directive already made clear that in principle it fully harmonised national law (subject to the discretion which the Directive left on specific issues to Member States), and this would be strengthened greatly by the proposed Regulation. However, the Framework Decision contained an express reservation allowing Member States to set higher standards, which would be abolished by the proposed Directive. It might be questioned whether abolition of this power to set higher standards is really appropriate in the context of policing and criminal law. Furthermore, the proposed Directive will also contain a 'free movement' clause, preventing differences in national law between Member States from constituting a ground for refusal to transfer data between them.

The definitions in the Directive would differ in some respects from the Framework Decision, for instance elaborating on the definition of 'data subject' and changing the concept of 'blocking' data.

As to the grounds for processing data, the principle of lawfulness would be added, as would some other key principles (see Articles 4(d) to (f) of the proposal), most notably the principle of accuracy. There would be important new rules on distinctions between categories of persons, different degrees of accuracy and on the detailed application of the principle of lawfulness. The rules on sensitive data would be expanded, *inter alia* to add a reference to genetic data. Also, the rules on automatic decision-making, now referred to as 'profiling', would be amended to include a new rule (Article 9(2) of the proposal).

The rights of the data subject would be amended, for instance to add new rules on the modalities for exercising the data subject's rights (Article 10), and to revise the rules on the right of information and the right of access. The rules on the obligation of data controllers (Articles 18-26) are mostly new, and there are important new rules on the appointment of data protection officers and on the notification of breaches.

The rules on external relations would be overhauled, so that adequacy decisions are in the hands of the Commission, rather than Member States, and the regime more closely resembles the external relations regime in the 1995 Directive. The rules on supervisory authorities would elaborate greatly on Article 25 of the Framework Decision. As for remedies, there would be new provisions on the right to lodge complaints with, or challenge decisions of, supervisory authorities.

Finally, as regards the relationship with other measures, under the proposed Directive, Member States could retain pre-existing international treaties,

but would have to amend them within five years (Article 60). In contrast, the Framework Decision (Article 26) permitted Member States (or the EU) to retain pre-existing international treaties without any such restraint. And as for other EU measures, the proposed Directive provides that any relevant rules in prior EU acts remain effective (Article 59; see also point 72 in the preamble), although there is a commitment to review such measures within three years (Article 61(2)).

## Assessment

The improved institutional framework, the widened scope and the enhanced rights for data subjects and other improvements in the Directive as compared to the Framework Decision can only be welcomed. However, the European Data Protection Supervisor has pointed to a number of improvements that could be made in the text, in particular as regards: the delay before other EU rules in this area are revised; the lack of clarity regarding the derogation from the purpose limitation rules; the addition of a category of non-suspects; the need for clarification of the extra safeguards as regards sensitive data; the limits on powers of supervisory authorities; the absence of rules on transfers to and from the private sector, and of specific rules relating to children; and the restrictions on the rules relating to cross-border cooperation of supervisory authorities, as compared to the proposed Regulation.

On the whole, while the proposed Directive is a significant improvement upon the existing Framework Decision, there is still a need for a number of changes to the text before it can play a full role contributing to effective data protection in the context of policing and criminal law.

## Sources

Commission proposal for a Directive:

[http://ec.europa.eu/home-affairs/doc\\_centre/police/docs/com\\_2012\\_10\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/police/docs/com_2012_10_en.pdf)

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Opinion of the European Data Protection Supervisor:

[http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07\\_EDPS\\_Reform\\_package\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2012/12-03-07_EDPS_Reform_package_EN.pdf)

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