



## Statewatch analysis The Revised Data Protection Framework Decision

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### Summary

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A new text of the proposed EU Framework Decision on data protection, drafted by the German Council Presidency, has now been circulated to Member States.

Taken as a whole, this revised proposal falls even further below the very low standards which had been reached in internal Council discussions on this proposal. In particular, it:

- removes basic protections that apply to domestic data processing (regarding, for example, the accuracy of data);
- weakens protections relating to transfers of data between Member States;
- leaves wholly unregulated the transfer of data outside the EU, whether made under bilateral agreements with Member States or the EU (ie, with the USA), or made in the absence of bilateral agreements
- leaves wholly or largely unregulated the transfer of data to private companies, and to public bodies other than law enforcement bodies;
- reduces key procedural rights for individuals (such as the rights to access, to information, and erasure or correction of inaccurate data);
- weakens the collective protection of data protection rights by means of supervisory authorities; and
- creates a simply unintelligible degree of overlap between the Framework Decision and the data protection rules in over a dozen other EU instruments.

It is clear from this analysis that if the Framework Decision is adopted on the basis of the newly revised text, every key basic protection principle will either be ineffectively protected or will simply fall outside its scope. The result will be an unacceptably low standard of protection for a basic human right.

### Introduction

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In autumn 2005, the Commission proposed a Framework Decision which would address the issue of data protection in the spheres of criminal law and policing. The proposal was discussed during the Austrian Presidency of the EU Council in the first half of 2006, and then intensively during the Finnish Presidency in the second half of 2006. Member States were however divided on certain basic issues

concerning the Framework Decision, as well as many of the details of the proposal. See Statewatch observatory for full documentation and analysis: <http://www.statewatch.org/eu-dp.htm>

In an attempt to restart the discussions, the German Presidency in the first half of 2007 announced that it would revise the text of the proposal. The hugely revised text was distributed to Member States on 13 March, but it has not been made accessible to the public.

The following analysis compares the German Presidency proposal ('the German text') both to the Commission's initial proposal ('the original proposal') and to the draft of the proposed Framework Decision as it stood at the end of the Finnish Presidency in late 2006 ('the Dec. 2006 text').

Although the European Parliament adopted a detailed report - with some 60 amendments - on this proposal back in September 2006, it is clear that the German Presidency has paid no attention whatsoever to the EP's opinion.

It is also clear that most of the points made by the European Data Protection Supervisor in his two opinions on the proposal have been ignored. In particular, the amendments made in the German text directly contradict most of the suggestions made in his second opinion on the proposal. The January 2006 opinion on the proposal, adopted by the Conference of European Data Protection Authorities, was similarly ignored.

### Detailed analysis

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One of the most contentious issues has been the scope of the proposal, with the UK leading a small number of Member States opposed in principle to the application of the Framework Decision to data protection issues which are purely domestic (ie involving the processing of data only within a single Member State). Also, the question of how to regulate transfers of data going *outside* the EU has been contentious. Even as regards the comparatively uncontroversial issues of data movements *between* Member States and procedural rights, there have been a number of detailed disagreements.

### Scope of the proposal

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The German text has maintained the application of the Directive to domestic data protection and to transfers outside the EU, as discussed further below. However, the provisions on these issues have been radically simplified, perhaps with a view to winning over those Member States opposed to any detailed EU rules on these issues.

Next, the Presidency proposal (Art. 1(4)) maintains the exclusion of security agencies from the Framework Decision, in more clearly-drafted way than in the Dec. 2006 text (the original proposal did not allow for such an exclusion).

Another important issue of scope is the relationship between this Framework Decision and other EU measures. The Commission had proposed that the Framework Decision would not apply to Europol, Eurojust or the Customs Information System (Article 3(2), initial proposal), but the German text would apply the Framework Decision to those bodies, without actually amending or repealing the data protection provisions in the relevant EU measures.

As for existing measures, the initial proposal would have repealed Articles 126-130 of the Schengen Convention (which govern data protection as regards the exchange of personal data within the scope of the Convention, except for the Schengen Information System), as well as the data protection provision of the EU's mutual assistance Convention.

Furthermore, any references in EU legislation to the Council of Europe's data protection Convention would have been replaced by a reference to this Framework Decision. This would have entailed, for example, the replacement of a reference to the Council of Europe Convention in the Schengen Information System (SIS) provisions of the Schengen Convention, the agreed text of the Decision establishing a second-generation SIS (SIS II) and the proposed Decision giving law enforcement authorities access to the Visa Information System, by a reference to this Framework Decision.

The German text instead drops all of the provisions of the Framework Decision which repeal any provisions in any other EU texts. Instead, the German text provides that the Council can provide for higher safeguards in existing or future texts, and that such higher safeguards will take precedence over the Framework Decision. Recital 20 of the preamble states that 'care must be taken' so that 'more extensive data protection rules' in other measures 'remain unaffected', and that '[w]here the Framework Decision is to replace existing specific data protection provisions', it 'stipulates this explicitly'. But there is no explicit replacement of any other measure. This appears to be a different rule than the rule that higher standards apply in the event of an overlap. Recital 25 now states that the Framework Decision 'does not affect' the Council of Europe Convention.

The net result is that the Framework Decision will co-exist with the specific data protection provisions regulating Europol, Eurojust, the SIS, VIS and CIS, the mutual assistance Convention, the customs cooperation Convention, the Schengen policing provisions (and measures building on them), the exchange of information under the Prum Treaty (and the proposed Council Decision transposing it into EU law), and several others, with no clear indication of when the specific provisions take precedence over the Framework Decision because they set higher standards, or must remain unaffected, or are not replaced explicitly by the Framework Decision.

### **Domestic data processing**

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The key provisions of the proposed Framework Decision concern data quality and the legitimacy of data processing (Articles 4 and 5 of the initial proposal). Article 3 of the German text removes many of the detailed data protection principles contained in the original proposal (and largely retained in the Dec. 2006 text). In particular, the German text:

- a) drops the requirement for data to be processed 'fairly and lawfully', along with the requirement in the original Article 5 that processing has to be 'provided for by a law';
- b) drops the provision requiring data to be collected 'only for specified, explicit and legitimate purposes';
- c) drops the detailed rules on accuracy of data, including a crucial point about distinguishing between data based on their reliability (ie whether the data constitute facts or merely intelligence), replacing this rule with a very general rule in its Article 4;

- d) drops the requirement to keep the data in a specified form in order to enable the deletion of the data when no longer required;
- e) drops the requirement to make a distinction between suspects, victims and other categories of persons as regards criminal offences; and
- f) drops the detailed explanation of the 'necessity' requirement.

Further processing of data (ie processing of the data for reasons other than the reason why the data was originally collected) would be permitted as long as the processing was compatible with the original purpose, as well as lawful, appropriate and essential (Article 3(2)). This compares to the requirement in the original proposal that further processing be allowed only for 'specified, explicit and legitimate purposes' (Article 4(1)(b)), and the very detailed regulation of this issue in the Dec. 2006 text (Article 5(3)).

There is still no provision concerning the processing of personal data concerning 'spent' sentences.

### **Cross-border transfers**

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As regards cross-border transfers, the German text would no longer contain Article 8 of the original proposal, which provided that data could only be transferred between Member States in the context of criminal or police proceedings; but the Dec. 2006 text had already deleted this provision.

Next, Article 9, which deals with the accuracy of personal data transmitted between Member States and which had already been weakened considerably by the time of the Dec. 2006 text, is weakened further still in the German text.

The provisions of Article 12 of the German text (Article 11 of the original proposal) do nothing to improve the rules on further processing of data in the second Member State (ie the processing of the data for reasons other than the reason why the data was originally collected), which had been dramatically weakened by the time of the Dec. 2006 text. In fact, the German text makes the position still worse, because of the weakening of the rule on further processing in a domestic context (to which the cross-border rules refer) and because the new text deletes a special rule providing for higher safeguards in the case of 'exceptional procedural requirements or of particularly sensitive data', which had appeared in the Dec. 2006 text.

The German text replaces detailed rules on the transfer of data within the second Member State with a simple rule that the second Member State must follow the rules which would apply in the first Member State (ie if the first Member State allows for wide access to personal data, the second Member State can do so also). Also, the German text no longer regulates the issue of the transfer of data to private bodies or to public bodies other than law enforcement agencies - leaving wide scope for the second Member State to pass the data along to public or private bodies not covered by the rules in the Framework Decision at all.

### **Transfers outside the EU**

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The Commission originally proposed a detailed regime for authorising transfers of data outside the EU. These provisions were considerably watered down by the Dec. 2006 text, but some essential rules were still retained, including in particular the requirement to assess the adequacy of data protection in the non-EU State,

although this requirement was undercut by a provision that stated that pre-existing treaties between the EU or Member States with non-EU States would not be affected by the Framework Decision.

The German text now provides that the Framework Decision is without prejudice to existing *or future* agreements with non-EU states, whereas the Dec. 2006 text only protected existing agreements. So Member States or the EU will now be free in future to negotiate treaties that undercut the protections provided for in the Framework Decision, as well as to maintain existing treaties that do not meet its standards.

As for the transfer of data in the absence of an agreement, the German text now provides only that the second Member State must follow the rules which would apply in the first Member State (ie if the first Member State would allow for the transfer of data to a particular third country, the second Member State can do so also). So the requirement to examine the adequacy of the data protection rules of any non-EU country in at least some cases has been entirely dropped.

### **Rights of the data subject**

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The German text greatly reduces the content of the 'right to information' of the data subject (ie the right to be informed that data is being collected and processed within the context of the Framework Decision), although at least it drops the requirement from the Dec. 2006 text that such information need only be given 'on request'. Substantial restrictions on this right remain.

The right of access to data is reduced in scope, and is still subject to major exceptions. In any event this right can only be exercised effectively if a person is aware, or suspects, that his or her data is being processed. The right of rectification and erasure is only now addressed vaguely in the German text, as compared to the Commission and Dec. 2006 texts. The requirement to inform third parties of corrected or deleted data (so that they also correct their records) has simply been dropped (it was Article 22 of the original proposal). So has the requirement to keep a register of data processing operations (Article 25 of the original proposal).

### **Monitoring**

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The creation of a working party of national data protection authorities to monitor the application of the Framework Decision has been dropped. National supervisory authorities are still referred to, but the German text drops a detailed reference to their consultative role, as well as provisions on their jurisdiction, cooperation between different authorities, and the drawing up of annual reports.

One innovation of the German text is the idea that the various supervisory authorities created by EU instruments to govern EU bodies should be replaced by a single body - but Eurojust has already objected to this idea.

Documents (click to access)

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COM (2005) 475, initial proposal for Framework Decision (original proposal)  
<http://www.statewatch.org/news/2006/sep/eu-com-dp-proposal-475-05.pdf>

Council doc. 13958/06, text of certain other EU 'third pillar' provisions regarding data protection:  
<http://www.statewatch.org/news/2006/oct/eu-dp-gen-sec-13958-06.pdf>

Council doc. 13246/5/06, text of proposal for Framework Decision at end 2006 (Dec. 2006 text):  
<http://www.statewatch.org/news/2006/oct/eu-dp-counc-draft-13246-rev2-06.pdf>

Council doc. 7315/07, revised proposal for Framework Decision (German text)  
<http://www.statewatch.org/news/2007/mar/eu-dp-presidency-draft-mar-07.pdf>

European Data Protection Supervisor, first opinion, Dec. 2005  
<http://www.statewatch.org/news/2006/sep/eu-com-dp-edps-opinion.pdf>

European Data Protection Supervisor, second opinion, Nov. 2006  
<http://www.statewatch.org/news/2006/nov/eu-dp-edps-2nd-opinion.pdf>

European Parliament, Opinion, Sept. 2006  
<http://www.statewatch.org/news/2006/sep/ep-dp-rep-27-sept-06.pdf>

Statewatch analysis: (October 2006)  
<http://www.statewatch.org/news/2006/oct/eu-dp.pdf>

Statewatch observatory on EU data protection:  
<http://www.statewatch.org/eu-dp.htm>