



**COUNCIL OF
THE EUROPEAN UNION**

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**DATAPROTECT 146
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DAPIX 129
FREMP 153
COMIX 564
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ADDENDUM TO NOTE

from: Swedish delegation
to: Working Party on Information Exchange and Data Protection

No. prev. doc.: 11624/1/13 DATAPROTECT 83 JAI 570 DAPIX 90 FREMP 96 COMIX 403
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No. Cion prop.: 5833/12 DATAPROTECT 6 JAI 41 DAPIX 9 FREMP 8 COMIX 59 CODEC 217

Subject: 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
- Chapters I-IV

Delegations will find below comments from the Swedish delegation on the above proposal.

General remarks

Sweden welcomes the revised text of the proposal presented by the presidency and the possibility to send in proposals for amendments.

In spite of substantial improvements in the revised text Sweden maintains its general scrutiny reservation and general remarks made to the original proposal. In particular, Sweden stresses

- the difficulty to see today the justification for expanding the area of application of EU legislation to purely national processing of data in law enforcement and criminal justice,
- the standpoint (supported by the Swedish parliament) that the proposed extension of the directive beyond the area of application of the framework decision is not in conformity with the subsidiarity principle,
- the necessity to examine whether the proposed directive is clearly within the legislative competence of the Union,
- the need to clarify the relationship between the proposed directive and the proposed general data protection regulation and
- the need to assure conformity with the principle of proportionality.

Our comments and proposals may be reviewed in the light of further discussions.

*Comments and proposals for amendments**Article 1 and 2*

EU-regulation of national processing of personal data in the area of law enforcement and criminal justice is not in conformity with the principle of subsidiarity. A thorough analysis is needed of the implications for EU legislative competence in the area of criminal justice and law enforcement of the wording "...by the Member States when carrying out activities which fall within the scope of Union law" in Article 16 TFEU.

Article 1.2 b

The meaning of Article 1.2 b is unclear and contradictory. It should be clarified or deleted.

Article 2

Despite the amendment in recital 12 Sweden believes that there should be an article, as in the Data Protection Framework Decision (DPFD), stating that “This [Directive] shall not preclude Member States from providing, for the protection of personal data collected or processed at national level, higher safeguards than in this [Directive].”

Article 3

Generally, definitions should be the same in the Directive and in the Regulation. This is particularly important since Member States will issue complementary legislation to implement the Directive. National authorities, such as courts dealing with both civil and criminal matters, will have to apply both the Regulation (when dealing with a civil matter) and the national legislation implementing the Directive (when dealing with a criminal matter). Some court cases are at the same time both criminal and civil (for instance a criminal case containing a claim for damages). Therefore we must try and make it as easy as possible for data controllers to simultaneously apply both the Regulation and legislation implementing the Directive. One aspect of this is that definitions in the Regulation and the Directive should, as far as possible, be identical.

Changes of definitions established in existing instruments should be carefully considered and generally avoided unless they can be explicitly motivated.

Article 3 (4) ‘restriction of processing’

'restriction of processing' means the marking of stored personal data with the aim of limiting their processing ~~in the future~~;

Article 3 (11) ‘biometric data’

The term does not appear anywhere else in the text of the Directive. If the definition is to be kept, the meaning of ‘behavioural characteristics’ needs clarifying.

Article 3 (12) 'health'

Some types of data commonly used for identification (scars, limp etc.) still risk to fall within this definition and thus under the limitations of Article 8, which cannot be the intention.

Article 8

There is a very strong need for the secure identification of persons in the area covered by the proposed directive. The on-going development of biometric methods has contributed substantially to improvements during recent years. It is a major challenge to make legislation technology neutral, thus allowing further progress, while maintaining the level of protection of integrity. To strike the proper balance between the legitimate interests of security and integrity, further discussion is needed on i.a. the definitions of genetic and biometric data, as well as on the regulation of their use for identification purposes by law enforcement and criminal justice. Also, the differences between interests covered by the two proposed instruments should be highlighted and examined.

Due to the definition of 'health' in article 3 (12) some types of external characteristics commonly used by the competent authorities for identification of persons (such as scars or limp) may fall within the "special categories" of Article 8. Since this can hardly be the intention, an exception should be made.

Article 11 - 11 b

An exception for situations where the data subject already has the relevant information should be added, in line with the proposed article 14.5 of the Regulation.

Concerning information to be provided where the data have not been obtained from the data subject there should be an exception that corresponds to Article 11.2 in Directive 95/46/EC.

Further, there should be an exception covering personal data processed

- in alarm messages if there is no time to provide information and
- by collecting personal data using images or sound.

Article 14

The scope of the article should be considered.

Article 15

“Right to rectification, erasure or blocking and restriction of processing”

Throughout the article blocking should be used as an alternative to erasure. This is necessary partly to comply with archive legislation but also to secure the rights of individuals in cases where the previous existence of incorrect or incorrectly processed data is of importance.

Article 17

The rules of the directive risk clashing with the national procedural rules on what information courts, prosecutors etc. shall provide the parties with. Courts and prosecutors may have electronic files (instead of traditional paper files), which include depositions by the parties, exhibits and video recordings from court hearing – all in an electronic format. What they do with such information is strictly regulated by national procedural law rules. It is hence transparent to the parties or any other data subject what courts and judicial authorities can and will do with the information in these files.

It needs therefore to be clarified that Article 17 covers all information which is part of a case file, by exchanging “judicial decision or record” by “judicial decision, record or case file”.

Article 24

Logging as such cannot show the purpose of a particular processing operation. This can only be verified by checking case files etc. It should be considered to move this article to section 2, “Data security”.

Article 26

Prior consultation should not be necessary when a new system is created by legislation.
