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From: Presidency
To: Working Group on Information Exchange and Data Protection (DAPIX)
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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
- Chapter IX and X

In view of the Friends of Presidency meeting on 9 September 2015 delegations will find attached Chapters IX and X of the above Directive, as aligned to the text of the General Data Protection Regulation as agreed in the General Approach reached on 15 June 2015.

All changes made to the original Commission proposal are underlined text, or, where text has been deleted, indicated by (...). Where existing text has been moved, this text is indicated in *italics*. The most recent changes are marked in **bold underlining** or where text has been deleted in ~~striketrough~~. When text has been reverted to the Commission proposal such text is marked in **bold**.

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 or the safeguarding against and the prevention of threats to public security, and the free movement of such data¹

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

After consulting the European Data Protection Supervisor²,

Acting in accordance with the ordinary legislative procedure,

¹ DE, ES, HU, IT, NL, LV, PT, SI, UK scrutiny reservation on the whole text.

² OJ C... , p.

(66) (...)

(67) In order to ensure uniform conditions for the implementation of this Directive, **implementing powers should be conferred on the Commission for: as regards** (...) the adequate level of protection afforded by a third country or a territory or a specified sector within that third country or an international organisation; **mutual assistance; the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board.** ~~**implementing powers should be conferred on the Commission.**~~ Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers³.

(68) The examination procedure should be used for the adoption of ~~measures~~ **implementing acts on as regards** (...) the adequate level of protection afforded by a third country or a territory or a specified sector within that third country or an international organisation; **mutual assistance; the arrangements for the exchange of information by electronic means between supervisory authorities, and between supervisory authorities and the European Data Protection Board, the arrangement** given that those acts are of general scope.

(69) The Commission should adopt immediately applicable implementing acts where, in duly justified cases relating to a third country or a territory or a specified sector within that third country or an international organisation which no longer ensure an adequate level of protection, imperative grounds of urgency so require.

³ OJ L 55, 28.2.2011, p. 13.

- (70) Since the objectives of this Directive, namely to protect the fundamental rights and freedoms of ~~natural persons~~ **data subjects** and in particular their right to the protection of personal data and to ensure the free exchange of personal data by competent **public** authorities within the Union, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (71) Framework Decision 2008/977/JHA should be repealed by this Directive. **Processing already under way on the date of the entry into force of this Directive should be brought into conformity with this Directive within the period of two years after which this Directive enters into force. However, where such processing is in compliance with the Union law applicable prior to the entry into force of this Directive, the requirements of this Directive concerning the prior consultation of the supervisory authority should not apply to the processing operations already under way prior to the entry into force of this Directive, given that these requirements, by their very nature, are to be met prior to the processing.**
- (72) Specific provisions **of acts of the Union adopted in the field of judicial co-operation in criminal matters and police co-operation 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 in acts of the Union** which were adopted prior to the date of the adoption of this Directive, regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, should remain unaffected. The Commission should evaluate the situation with regard to the relationship between this Directive and the acts adopted prior to the date of adoption of this Directive regulating the processing of personal data between Member States or the access of designated authorities of Member States to information systems established pursuant to the Treaties, in order to assess the need for alignment of these specific provisions with this Directive.

- (73) In order to ensure a comprehensive and coherent protection of personal data in the Union, international agreements concluded by Member States prior to the entry into force of this Directive (...), and which are in compliance with the relevant ~~and~~ Union law applicable prior to the entry into force of this Directive, should remain in force until amended, replaced or revoked. To the extent that such agreements are not compatible with Union law, Member States are⁴ required to take all appropriate steps to eliminate any incompatibilities (...).
- (74) This Directive is without prejudice to the rules on combating the sexual abuse and sexual exploitation of children and child pornography as laid down in Directive 2011/9~~23~~23/EU of the European Parliament and of the Council of 13 December 2011.⁵
- (75) In accordance with Article 6a of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, as annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, the United Kingdom and Ireland are not bound by the rules laid down in this Directive which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the Treaty on the Functioning of the European Union where the United Kingdom and Ireland are not bound by the rules governing the forms of judicial co-operation in criminal matters or police co-operation which require compliance with the provisions laid down on the basis of Article 16 of the Treaty on the Functioning of the European Union.

⁴ CH suggested adding ",as far as possible,".

⁵ OJ L 335, 17.12.2011, p. 1.

- (76) In accordance with Articles 2 and 2a of the Protocol on the position of Denmark, as annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not bound by the rules laid down in this Directive or subject to their application which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the Treaty on the Functioning of the European Union. Given that this Directive builds upon the Schengen acquis, under Title V of Part Three of the Treaty on the Functioning of the European Union, Denmark shall, in accordance with Article 4 of that Protocol, decide within six months after adoption of this Directive whether it will implement it in its national law.
- (77) As regards Iceland and Norway, this Directive constitutes a development of provisions of the Schengen acquis, as provided for by the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis⁶.
- (78) As regards Switzerland, this Directive constitutes a development of provisions of the Schengen acquis, as provided for by the Agreement between the European Union, the European Community and the Swiss Confederation concerning the association of the Swiss Confederation with the implementation, application and development of the Schengen acquis⁷.
- (79) As regards Liechtenstein, this Directive constitutes a development of provisions of the Schengen acquis, as provided for by the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis⁸.

⁶ OJ L 176, 10.7.1999, p. 36.

⁷ OJ L 53, 27.2.2008, p. 52.

⁸ OJ L 160 of 18.6.2011, p. 19.

- (80) This Directive respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaty, notably the right to respect for private and family life, the right to the protection of personal data, the right to an effective remedy and to a fair trial. Limitations placed on these rights are in accordance with Article 52(1) of the Charter as they are necessary to meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
- (81) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (82) This Directive should not preclude Member States from implementing the exercise of the rights of data subjects on information, access, rectification, erasure and restriction of their personal data processed in the course of criminal proceedings, and their possible restrictions thereto, in national rules on criminal procedure.

CHAPTER IX
(...) IMPLEMENTING ACTS

Article 56

Exercise of the delegation

(...)⁹

Article 57

Committee procedure

1. The Commission shall be assisted by **a the committee established by Article 87 of Regulation (EU) XXX**. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
3. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 5 thereof, shall apply.

⁹ Cion scrutiny reservation against deletion.

CHAPTER X FINAL PROVISIONS

Article 58

Repeals

1. Council Framework Decision 2008/977/JHA is repealed.
2. References to the repealed Framework Decision referred to in paragraph 1 shall be construed as references to this Directive.

Article 59

Relationship with previously adopted acts of the Union for judicial co-operation in criminal matters and police co-operation

The specific provisions for the protection of personal data **in acts of the Union adopted in the field of judicial co-operation in criminal matters and police co-operation with regard to the processing of personal data by competent (...) authorities for the purposes of prevention, investigation, detection or prosecution or criminal offences or the execution of criminal penalties in acts of the Union adopted** prior to the date of adoption of this Directive regulating the processing of personal data between Member States and the access of designated authorities of Member States to information systems established pursuant to the Treaties within the scope of this Directive remain unaffected.¹⁰

¹⁰ DE scrutiny reservation.

Article 60

Relationship with previously concluded international agreements in the field of judicial co-operation in criminal matters and police co-operation¹¹

International agreements involving the transfer of personal data to third countries or international organisations which were concluded by Member States prior to the entry into force of this Directive and which are in compliance with Union law applicable prior to the entry into force of this Directive shall remain ¹²in force until amended, replaced or revoked.

¹¹ Cion reservation. CH, SK and DE scrutiny reservations. For the UK and CZ Article 60 as it was drafted here was unacceptable. SI said that DPF¹² was more acceptable and that the text contained no element of flexibility.

AT meant that the aim should still be to adapt as soon as possible agreements that do not conform to the provisions of the Directive. AT suggested that intermediate solutions be set out in a recital.

¹² DE suggested to reword Article 60 as follows: “International agreements involving the transfer of personal data processed by competent authorities for the purposes referred to in Article 1(1) to third countries or international organisations which were concluded by Member States prior to the entry into force of this Directive shall remain unaffected. To the extent that such agreements concluded by Member States are not compatible with this Directive, the Member State or States concerned shall make appropriate efforts to eliminate the incompatibilities established.” DE aligned the first sentence to Article 59 and clarified that existing agreements did not need to be renegotiated. SI could accept reverting to Article 26 in DPF¹² or the DE suggestion. BE and CZ supported "unaffected." ES, PL supported the deletion of the second sentence of the Article.

Article 61
Evaluation

1. The Commission shall evaluate the application of this Directive.

2. The Commission shall review within five years after the entry into force of this Directive other acts adopted by the European Union which regulate the processing of personal data **for the purposes set out in Article 1 (1) by competent public authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, in particular including** those acts adopted by the Union referred to in Article 59, in order to assess the need to align them with this Directive and make, where appropriate, the necessary proposals to amend these acts to ensure a consistent approach on the protection of personal data within the scope of this Directive.¹³

3. The Commission shall submit reports on the evaluation and review of this Directive pursuant to paragraph 1 to the European Parliament and the Council at regular intervals. The first reports shall be submitted no later than four years after the entry into force of this Directive. Subsequent reports shall be submitted every four years thereafter. The Commission shall submit, if necessary, appropriate proposals with a view of amending this Directive and aligning other legal instruments. The report shall be made public.

¹³ DE wanted to add a sentence in the end of paragraph 2 to clarify that the same minimum standards must apply to the EU bodies as to the Member States: “The Commissions proposals shall ensure that the data protection provisions applicable to institutions, bodies, offices and agencies of the European Union within the scope of Article 1(1) at least correspond to the standard set by this Directive.”

Article 62

Implementation

1. Member States shall adopt and publish, by [date/ two years¹⁴ after entry into force] at the latest, the laws, regulations and administrative provisions¹⁵ necessary to comply with this Directive. They shall forthwith notify to the Commission the text of those provisions.

They shall apply those provisions from xx.xx.201x [date/ two¹⁶ years after entry into force].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 63

Entry into force and application

This Directive shall enter into force on the first day following that of its publication in the *Official Journal of the European Union*.

Article 64

Addressees

This Directive is addressed to the Member States.

¹⁴ For DE, ES, FI, NL, CZ, SK, RO and SE two years was too short. CZ, DE and RO preferred three or four years, BE five years and FR three years.

¹⁵ BE and AT asked an explanation of what was meant with *regulations and administrative provisions*.

¹⁶ DE, NL, SI, IT, DK, FI wanted that the provisions be applicable four years after the entry into force.