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**NOTE**

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From:	United Kingdom delegation
To:	Working Group on Information Exchange and Data Protection (DAPIX)
No. prev. doc.:	7740/15 DATAPROTECT 44 JAI 218 DAPIX 53 FREMP 70 COMIX 158 CODEC 457
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

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1. It is essential for law enforcement authorities in the Union that there is clarity about when the Data Protection Regulation applies and when the Data Protection Directive applies. The Directive must take account of the specific needs of law enforcement and we must avoid creating a complex patchwork regime that risks overburdening police or undermining their ability to protect the public. As long as this matter is unresolved, this uncertainty makes it extremely difficult to make progress on the text of the Directive, and we risk delays on the Regulation and other important dossiers (e.g. the PNR Directive).

Ensuring that all law enforcement processing is covered in a single instrument

2. The Commission maintains that its original proposal for the scope of the Directive is sufficiently broad to cover all work by authorities linked to the enforcement of criminal law.

3. However, a large majority of Member States (18) favour extending the scope of the draft Directive to clarify that processing done by the police and law enforcement authorities for broader law enforcement purposes beyond the investigation, detection prevention or prosecution of criminal offences (for example work with victims or witnesses which could currently fall under the Regulation) falls under the Directive. They wish to be able to implement the Directive domestically such that there is only one instrument for all police and law enforcement activities. Such a desire must, of course, take note of any limits imposed on the EU's competence to legislate to regulate law enforcement activity as set out in the Treaties.

#### Summary of UK concerns

4. At the January informal JHA Council, the Presidency put forward a paper suggesting two options:
- Maintaining the original Commission scope: "*processing by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties*"
  - An alternative solution to include the additional wording '*the maintaining of law and order and the safeguarding of public security*'
5. We understand the aim of clarifying the scope of the Directive to provide for a single set of data protection rules for law enforcement. Noting however that certain elements of police work remain within the scope of Member State competence the UK wishes to highlight the need to ensure that the scope of the Directive remains within the scope of EU law and does not impinge on matters falling within Member State competence.
6. The UK considers that the additional language proposed by the Presidency is problematic for the following reasons:
- "maintaining law and order" is a matter falling within Member State competence and is therefore outside the scope of both the Directive and the Regulation; and
  - Similarly the term "safeguarding of public security" is capable of covering matters which fall within the scope of Member State competence.<sup>1</sup>

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<sup>1</sup> In the UK's view, 'public security' is capable of including elements of national competence, including the maintenance of law and order and the maintenance of internal security.

## UK proposal

7. The UK supports the proposal that in so far as EU data protection rules need to address certain areas of police/law enforcement activity these should be addressed in the Directive only. However, in addressing these elements in the Directive account must be taken of the limits on the EU's competence in this area. In this regard the UK considers that the scope of the Directive should be explicitly confined to processing related to EU measures adopted under Chapters 4 and 5 of Title V of the Treaties. Accordingly the UK proposes the following language:

### *Article 1*

*1. 'This Directive lays down the rules relating to the protection of individuals with regard to the processing of personal data by competent authorities **falling within the scope of Chapter 4 or 5 of Title V of Part Three of the Treaty on the Functioning of the European Union.**'*

8. This formulation will help those Member States with concerns that the current language in the Directive does not cover processing under EU measures relating to wider police work (e.g. the Victims Directive).

## Scope of application of the Directive

9. Member States may wish to apply data protection rules more widely to their law enforcement activities. In order to facilitate this it would therefore be appropriate to make clear in the text of the Directive that it sets a minimum level of harmonisation and is without prejudice to Member States who wish to go further in their national law.
10. The UK suggests that the desire to create a single set of data protection rules for law enforcement activity could best be achieved through a minimum harmonisation provision clarifying that Member States may (but are not required to) extend the provisions of the Directive to cover areas which are national competence. Article 4(3) of the current draft of the Directive appears to provide Member States with the ability to do this. The UK proposes giving greater prominence to this provision by moving it to Article 2 (Scope) and supporting DE's proposal to amend 'shall' to 'may' :

*Article 2*      *new* (based on Article 4(3a))

**4. Member states may set conditions in national legislation relating to the protection of individuals with regard to the processing of personal data which does not fall within scope of this Directive or of Regulation xx/xxxx.**

11. We would then delete the proposed wording in Article 4(3a):

*Article 4*

~~*3a. Member States shall set conditions in national legislation for communication of personal data between competent authorities pursuant to Article 1.1, the communication of personal data from a competent authority of a Member State to other public authorities of the same Member State and communication from the competent authority of a Member State to private parties of the same Member State.*~~

Consequential amendments to the Regulation.

12. However, the wording in the Directive is only one side of the coin. In order to ensure clarity we **also need to make sure that matters covered by the Directive or by national law are clearly excluded from the Regulation.**

13. To achieve this, the UK proposes the following exemptions from the Regulation, which are consequential on the suggested amendments to the Directive:

- An exemption mirroring the scope of the Directive; and
- A further exemption in relation to public security for consistency with the approach taken elsewhere in the Treaties and in Article 21 of the Regulation.

*Article 2*

*2. The Regulation does not apply to the processing of personal data:*

- (a) in the course of an activity which falls outside the scope of Union law (...);*
- (b) (...);*
- (c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of Title V the Treaty on European Union;*

- (d) *by a natural person (...) in the course of (...) a personal or household activity;*
- (e) *Which falls within scope of Directive xx/xxxx*
- (f) *to safeguard public security*

14. This approach provides Member States with language in the Directive that has a clear meaning in Union law and can include activities by the police and law enforcement authorities that are not linked to criminal offences.

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