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ADDENDUM TO NOTE

from:	Danish delegation
to:	delegations
No. Cion prop.:	5833/12 DATAPROTECT 6 JAI 41 DAPIX 9 FREMP 8 COMIX 59 CODEC 217 + ADD 1 + ADD 2
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

General remarks

1. With regard to the subsidiarity principle, the Commission has stated *inter alia* that the right to the protection of personal data, which is expressly laid down in Article 8 of the Charter of Fundamental Rights of the European Union and Article 16(1) of the Treaty on the Functioning of the European Union, presupposes the same level of data protection throughout the EU.

Moreover, according to the Commission, there is a growing need for law enforcement authorities in Member States to process and exchange information ever more intensively for the purposes of preventing and combating transnational crime and terrorism.

The Commission takes the view that the proposal's objectives can better be achieved at EU level. In its opinion, a Directive is therefore the best instrument to ensure harmonisation at EU level in this area while at the same time leaving the necessary flexibility to Member States when implementing the principles, the rules and their exemptions at national level.

Denmark shares the Commission's view that clear and consistent rules on data protection at EU level may help strengthen cooperation between Member States' law enforcement authorities with a view to preventing and combating transnational crime and terrorism.

Therefore, Denmark's preliminary assessment is that the subsidiarity principle is satisfied in respect of the regulation of personal data characterised by a cross-border element.

However, it has doubts as to whether that principle is satisfied in respect of the processing of personal data in police and criminal law matters not characterised by such an element.

It is therefore difficult to see why the scope of the current Framework Decision needs to be extended to cover personal data processing operations which are not characterised by a cross-border element.

2. It appears from recital 76 that the Directive builds upon the Schengen acquis, under Title V of Part Three of the Treaty on the Functioning of the European Union, and therefore Denmark shall, in accordance with Article 4 of the Protocol on the position of Denmark, decide within six months after adoption of this Directive whether it will implement it in its national law. In Denmark's view, the question of the extent to which the proposed Directive may be regarded as "Schengen-related" needs to be discussed further.

3. The following comments by Denmark concerning individual articles should be read in the light of the above general remarks.

Article 1 of the proposal

Denmark considers it important that the Directive should not stand in the way of national legislation offering at least the same level of protection as at present; moreover, the possibility of enacting national rules offering a higher level of protection must remain open even after the Directive has been adopted. This possibility should therefore be made clear in Article 1.

Article 2 of the proposal

It is important that the scope of the Directive be defined very clearly. There is still an unfortunate lack of clarity regarding the delimitation between the Commission proposal and the General Data Protection Regulation. This applies, for example, to cases where the competent authorities, including the police, handle the same personal data in different connections. It should be ensured that there is no overlap, and that a situation cannot arise in which it is unclear how to proceed in cases where the data concerned may be processed under either of the proposed regulatory systems.

In Denmark's opinion, the extent to which the Directive needs to apply to the processing of personal data at a purely internal level is still unclear. There is no knowledge-based justification for extending the scope of the Directive with regard to the 2008 Framework Decision currently in force. Careful consideration should therefore be given to the question of whether the processing of personal data at national level, as provided for by the proposal for a Directive, ought to be excluded from its scope (cf. Article 2(3)). In that connection, reference is also made to the introductory remarks.

There must be absolute certainty that the Directive will not cover the processing of personal data by EU Member States' security services.

Article 3 of the proposal

A number of the definitions contained in Article 3 need to be considered in more detail and clarified. This applies, for example, to Article 3(4) and (9) to (12). For instance, it is unclear what is meant by the term "alteration" in Article 3(9).

Consideration should also be given to the need for the definition contained in Article 3(13), since the Directive contains no other references to children or children's rights.

Furthermore, the exact scope of Article 3(14) needs to be clarified as it is unclear at present how far special authorities, including supervisory authorities, may be regarded as competent authorities within the meaning of the Directive and should therefore be deemed to be covered by its provisions.

Article 4 of the proposal

The Danish authorities believe that it is inappropriate that Article 4 does not impose the same requirements on the data controller as those applied in Article 5 in the Commission's proposal on general data protection regulation.

It is not clear what the term "fairly" in letter (a) in fact means and, accordingly, this needs to be clarified. In that regard, it should be noted that recital 18 of the preamble states that processing (of personal data) must be "fair and lawful".

Article 5 of the proposal

The objective of Article 5 is not clear. For instance, it is not sufficiently clear what the legal implications are, if any, for a data subject to be in one or the other category. Following the drafting of the proposed Directive, it would thus appear to be an underlying assumption that all categories require the same level of protection.

In Denmark's opinion, the Article does not bring any added value. Accordingly, the processing of personal data in respect of individuals in different categories could be managed adequately through compliance with general principles of data protection rules, including the principle of proportionality.

In addition, the Article does not take sufficient take into account the fact that an individual may be in different categories at different times during the examination of a case. An individual's status may thus change in the course of a police investigation of a case and this is not reflected in the provision. It is important that the distinction between different categories does not affect the scope for the effective investigation and detection of crime.

Furthermore, the Article will be difficult to implement in practice and may entail significant administrative costs, including the establishment of new IT systems. In that regard, it should be noted that it is unclear what is meant by: "as far as possible, the controller makes a "clear" distinction between personal data of different categories of data subjects". Nor is it clear how the provision should be applied in respect of non-automatic (manual) processing of personal data.

The definitions of the individual categories are not clear, either. For instance it is not clear how the following should be understood: "serious grounds for believing that they (…) *are about* to commit a criminal offence" in point (a) of the Article, "…persons with regard to whom certain facts give reasons for believing that he or she *could be* the victim of a criminal offence" in point (c), or "… a contact or associate to one of the persons mentioned in (a) and (b)" in point (d). It is also not clear why "persons who do not fall within any of the categories referred to above" in point (e) should be data subjects at all, and which persons might be referred to here.

The Danish authorities believe that these issues need to be resolved and serious consideration should be given to deleting the provision entirely.

Article 6 of the proposal

It is essential that the investigation, etc., of crime should not be hindered by provisions which do not involve any added value.

The objective of Article 6 is not clear. For instance, it is not sufficiently clear what the legal implications are - if any - for distinguishing between personal data. In Denmark's view the provision does not entail any added value.

The practical application of the provision also gives rise to serious concerns as regards administrative costs, including those arising from the establishment of new IT systems to meet the provision's requirements. In addition, it is not clear how the provision should be applied in respect of non-automatic (manual) processing of personal data.

Furthermore, it is not clear what is meant by "the Member States *shall ensure* that as far as possible personal data (...) are distinguished". Article 5 states that "Member States *shall provide* that, as far as possible, the controller makes a clear distinction between personal data (of different categories of data subjects)". The difference in wording leads to confusion as regards, for instance, to whom the provision applies.

Para. 1: The provision leaves many unanswered questions, including those concerning the provision's application in practice and the number of categories of personal data that are subject to scrutiny. It is also unclear how the last part of the provision should be read in conjunction with Article 15 on rectification.

Para. 2: The provision is not deemed to contribute any added value. It is difficult - and in practice probably unrealistic - to make a distinction in all cases. This is especially true in relation to police work.

The Danish authorities consider that the need to protect the accuracy and reliability of personal data is sufficiently guaranteed by the basic principles set out in Article 4 of the proposed Directive.

Article 7 of the proposal

It is essential that the capacity for the investigation, etc., of crime is not restricted and it is therefore important that Article 7 does not provide over-restrictive limits within which personal data may be lawfully processed. This means that, in respect of the exercise of their authority, the remit of competent authorities to process personal data should not be restricted when that processing is necessary.

Consideration should be given to whether the provision should include processing on the basis of, for instance, consent given by the victim of a criminal offence.

Consideration should also be given to whether the provision should lay down that processing of personal data for historical, statistical or scientific purposes is lawful, in accordance with the relevant provisions in Articles 3 and 11 of the existing Framework Decision.

If the transfer of data is necessary for the receiving authority, data transfer at a purely national level may be relevant in some cases, even though there is no legal obligation to do. Point (b) should therefore be redefined so as to allow data transfer in these instances (in cases where processing of data at a purely national level is covered by the Directive, as indicated in the introductory remarks).

Consideration should be given to the issue whether point (d) in this Article should be reformulated so that the relevant authorities may also process personal data if the threat to public security is serious without being immediate.

Article 8 of the proposal

It is essential that the scope for the investigation, etc., of crime should not be restricted.

The processing of personal data as referred to in Article 8(1) will often be necessary in respect of the work of the police, the courts and the prosecution and prison services. Accordingly, the processing of health data will be necessary, for instance, in many cases in the execution of criminal penalties. It is therefore essential that the scope for the processing of data covered by Article 8 should not be restricted. In that regard, it should be considered whether the provision should be worded as a *prohibition*, subject to exemptions. A structure based on Article 6 of the existing Framework Decision is more appropriate. Furthermore, the list of special categories of personal data should be identical to that in Article 6 of the existing Framework Decision.

Consideration should be given to whether the provision should include processing on the basis of, for instance, consent given by the injured party.

Under point 2(a), there is a need to clarify whether reference is made to *national* legislation. In addition, it is not clear what is meant by "appropriate safeguards".

For the purposes of investigation, consideration should be given as to whether the scope of application in point (b) should be wider.

With regard to point (b), there is a need to clarify when data are "manifestly made public".