



**COUNCIL OF  
THE EUROPEAN UNION**

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**LIMITE**

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MI 264  
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COMIX 233  
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**NOTE**

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

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Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) – Art 2(2), point e)  
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 – Material scope

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Important aspects of the Romanian position regarding the Regulation proposal aim at rendering a sufficient level of protection of personal data, raising the level of awareness amongst data subjects and promoting economical development. However, the Romanian delegation identified an oversight as regards the scope of the regulation, which, in our opinion, could have a major impact on the activities of competent authorities, once the data protection package is adopted. The aspect we hereby refer to is the one mentioned in article 2(2), point e), which states that the Regulation does not apply to the processing of personal data: *e) by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.*

As stated in recital (16), it is intended to exclude from the application of the regulation those activities carried out by law enforcement authorities whose main tasks are related to criminal offences and penalties. Those activities will be subject to another instrument, i.e. the Directive. The question remains open whether the “competent authorities” may be other than **public** competent authorities. But this document does not intend to deal with this aspect.

The Romanian delegation has often expressed its concerns during the DAPIX meetings regarding the unclear delimitation between the scopes of the two instruments, where the Regulation ends and where the Directive starts. We welcome the changes brought by the new Directive, but we believe that in drawing up the scope, the legislator has overseen a part of the police activities which should have been included in order to render the legislative instrument more clarity and consistency.

Symmetrically, the Regulation will have to exclude them from its material scope. The current Directive 95/46/EC excludes them also. Those activities refer to the activities of **maintaining and assuring the public order**. The Directive 95/46/EC mentions them by a generic term in art. 3(2): *“This Directive shall not apply: - (...) in any case to processing operations concerning public security (...)”*.

Article 2(2), point e) provides that the Regulation does not apply to the processing of personal data, *inter alia*, for the purposes of prevention of criminal offences. It is to be highlighted that there is no equivalence between the notion of **prevention of criminal offences** and **maintaining and assuring the public order**. The former term refers to the activity carried out by the law enforcement authority (police/gendarmerie) that contains a first component of public awareness regarding a potential danger towards the property, safety, rights and freedoms of persons and a second component that implies only the visible presence of police officers patrols in the street. Whereas the latter term is wider in meaning and includes all the situations when law enforcement police officers have to take the legal measures to defend public and private property, protect the fundamental rights of citizens and social values, combat violent actions during football matches, cultural-artistic activities, meetings, demonstrations organized in public areas etc., and in the end re-establish the public order. However, the two notions are close related in that prevention is a purpose for maintaining and assuring the public order.

Please note that, by no means, does the activity of **maintaining and assuring the public order** include, for example, the issuing of passports, or other such activities carried out by the administration, instead, it should always be considered from an operational perspective.

As indicated above, **maintaining and assuring the public order** is not included in **prevention**, therefore, it will fall under the provisions of the Regulation. Romanian delegation stresses the fact that this will have negative consequences for the activity of police authorities both at national level and at EU level in cases of transfer of personal data between member states. Because of the uncertain delimitation between the two instruments, there will be situations of processing personal data in which provisions of both instruments will apply. We provide an example of this hereafter.

### **National level**

A police officer while on duty on a patrol carries out the identification of an individual who appears suspect. According to the Regulation, the provisions of which apply in this case, the police officer is obliged to request the consent of the individual to process his/her personal data in order to establish his/her identity. Let's say the individual agrees and the officer verifies him/her on his mobile terminal. Following the verification, the officer discovers that the individual is a wanted person for aggravated theft. From this point, the officer has to take the appropriate legal measures to retain the person and, as regards the processing of personal data of that individual, the provisions of the Directive will be applicable. It is a simple example when the provisions of both legislative instruments apply. The process to establish the identification falls under maintenance of public order and the one to retain the person falls under the detection of criminal offences. In the case presented, we presume that the police officer knows very well the provisions of the Regulation and the Directive, but in practice we foresee that, instead of fulfilling his attributions efficiently, he will have to thoroughly analyse every time, while on duty, which provisions of personal data apply. Needless to mention that, according to the Regulation, the law enforcement officer has to prove the consent the individual initially gave him. What about the situation when the individual would not approve for the processing of his personal data? In this case, the officer would have wished him a good day.

### **Different sanction regime (penalties, administrative sanctions) across Member States**

As stated above, the lack of clarity of scopes results in uncertainty in implementing the legislative instruments. There is a risk that personal will be treated differently in member states, which will lead in a non-consistent application. For example, personal data transferred from Romania to a Member State will be treated differently, if the act which the personal data refers to is considered a crime in Romania (according to Romanian legislation) but only a minor offence in that MS. In this case, Romania will treat the personal data according to the Directive and the other Member State according to the Regulation.

The Art. 29 Working Group has expressed its opinion in the same spirit (doc 8366/12, page 39):

*“The Working Party notes the difficulty of separating the scope of application of the Directive from the scope of application of the Regulation. The Directive does apply if competent authorities process personal data for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Under all other circumstances, the Regulation as the general instrument for the protection of personal data applies. However, account should be taken of the different traditions in the Member States to define the activities of their authorities as related to law enforcement purposes or merely administrative (for example, in the areas of customs, immigration, environmental affairs). In consequence, both instruments, the Directive and the Regulation, might apply to the same institution. Situations must be avoided where the same data processing operation, such as in relation to maintaining public order, in one country is covered by the Regulation, where in other Member States the laws based on the Directive apply. This is particularly troublesome if both instruments lack consistency, as is currently the case. From this point of view more consistency between the two instruments is needed and more clarity with respect to the definition of “competent authorities” would be necessary. The Working Party considers that it must be clear to which activities vested in competent authorities by law the Directive applies.”*

Taking into account the above mentioned, we stress the necessity that the activities of maintaining and assuring the public order be governed by the Directive, not the Regulation, so that a unitary application of the legislative package be ensured in all Member States and that the work of the law enforcement bodies is not clogged and blocked by ambiguous dispositions. We are very aware of the fact that the law enforcement bodies are organized differently in every member state, but they carry out the same attributions as described in this document.

Therefore, we propose that the material scope of the Directive be extended with the processing of personal data for the purposes of **maintaining and assuring the public order** or an equivalent wording, for example: **assuring public security**, which should be mentioned and defined within a recital. Correspondingly, these activities will be excluded from the material scope of the Regulation in art. 2(2), point e). The proposed text should be as follows:

REGULATION:

*Article 2*

***Material scope***

1. This Regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system.
2. This 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) by the Union institutions, bodies, offices and agencies;
  - (c) by the Member States when carrying out activities which fall within the scope of Chapter 2 of the Treaty on European Union;
  - (d) by a natural person (...) in the course of (...) a personal or household activity;
  - (e) by competent **public** authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties **and for the purposes of maintaining and assuring the public order.**

## DIRECTIVE

### *Article 1*

#### *Subject matter and objectives*

1. This Directive lays down the rules relating to the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties **and for the purposes of maintaining and assuring the public order.**

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