

REASONED OPINION 2/2012 BY THE JOINT COMMITTEE CONCERNING THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY TO THE 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 [COM (2012) 10 FINAL] [2012/0010 (COD)] {SEC (2012) 72 FINAL} {SEC (2012) 73 FINAL}

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Lisbon of 2007, which has been in force since 1 December 2009, has established a control procedure whereby national parliaments can check whether draft European legislative acts comply with the principle of subsidiarity. This Protocol was transposed into Spanish law by Law 24/2009 of 22 December 2009 amending Law 8/1994 of 19 May 1994. In particular, the new Articles 3(j), 5 and 6 of Law 8/1994 constitute the legal basis for this Opinion.

B. The Proposal for a Directive of the European Parliament and 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 has been approved by the European Commission and submitted to the national Parliaments, which have eight weeks to check whether the measure complies with the principle of subsidiarity. This period will end on 14 April 2012.

C. On 15 February 2012, the members and spokespersons of the Joint Committee on the European Union agreed to examine the European legislative initiative in question, and asked the Government for a report, as provided for in Article 3(j) of Law 8/1994.

D. We received the report from the Government, and a document from the Basque Parliament. Neither one of them states that the European legislative measure fails to comply with the principle of subsidiarity.

E. The Government's report states that the proposal for a Directive provides strong protection of personal data and should therefore be welcomed. However, it does recommend that the meaning and scope of the term 'national security' should be explained more clearly to ensure better understanding of the Directive. Since Article 2 of the proposal rules out the application of the Directive 'in the course of an activity

which falls outside the scope of Union law, in particular concerning national security’, it is essential that the concept of ‘national security’ should be clearly defined to provide the proposal with greater legal certainty.

F. On 27 March 2012 the Joint Committee on the European Union approved this

OPINION

1. Article 5(1) of the Treaty on European Union states that ‘The use of Union competences is governed by the principles of subsidiarity and proportionality’. In accordance with Article 5(3) of the Treaty, ‘the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level’.

2. The legislative proposal in question here is based on Article 16(2) of the Treaty on the Functioning of the European Union, which states that ‘The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.’

It must also be borne in mind that Article 3 of the Treaty on European Union states that ‘the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’. Article 6 adds that ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’.

3. The purpose of this proposal for a Directive is to regulate the processing of personal data by the competent authorities for the purposes of **prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties**. The Directive does not cover any activity which falls outside the scope of Union law, in particular concerning national security and the processing of data by the institutions, bodies and organisations of the Union.

4. It is stated in the explanatory memorandum of the Directive that, following many consultations organised on this matter, it emerged that the extremely heterogeneous national laws in this domain had in the past made it difficult to prevent, investigate, detect or prosecute criminal offences or execute criminal penalties. Given this, the Joint Committee considers that this proposal can make a positive contribution to fulfilling the objectives of the Union set out in the Lisbon Treaty, without prejudice to the need to provide certain safeguards which we will examine below. Moreover, the Joint Committee considers that the proposal should be welcomed since it helps reinforce the protection of such an important fundamental right as the right to protection of personal data, which is becoming increasingly important with the growing processing of computerised data.

5. Generally speaking, the Joint Committee considers that this proposal complies with the principle of subsidiarity since there is evidence that the exchange of data between Member States on police matters requires a certain degree of homogeneity in national laws in order to avoid potential red tape from hampering the prevention, investigation, detection or prosecution of criminal offences. While Framework Decision 2008/977/JHA is already in force in this domain, it has not been applied by all the Member States, and it has several technical aspects which are not likely to be improved in the current context. The lack of a common consultation mechanism for the Member States in relation to the exchange of information has undermined the application of this Framework Decision, and therefore affected the exchange of police data. The current proposal manages to overcome this and other problems.

The fact that this proposal takes the form of a Directive (rather than a Regulation, which would have been possible under Article 16(2) of the Treaty on the Functioning of the European Union) is a positive thing from the point of view of complying with the principle of subsidiarity as it allows Member States to adapt some of the provisions to specific national features.

Lastly, since this measure helps to provide the same level of protection in all Member States for a fundamental right such as the right to protection of personal data, enshrined in Article 16(1) of the Treaty on the Functioning of the European Union, it can be regarded as justified from the point of view of the principle of subsidiarity as the importance of the objective is sufficient reason for the EU institutions to adopt a Directive.

6. Without prejudice to the above, the Joint Committee considers that it is necessary, however, to define clearly the meaning and scope of the term ‘national security’ in order to determine clearly the scope of this Directive in line with Article 2 of the proposal. This would avoid creating any legal uncertainty which would make it difficult for the national authorities to know with certainty the legal framework for the processing of personal data in the area of police matters.

CONCLUSION

For these reasons, the Joint Committee on the European Union considers that the proposal for a Directive of the European Parliament and 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, complies with the principle of subsidiarity set out in the current Treaty on European Union. Nonetheless, the Joint Committee considers that it is necessary to define clearly the meaning and scope of the term ‘national security’ in order to determine clearly the scope of this Directive in line with Article 2 of the proposal so as to avoid any legal uncertainty in such an important domain as prevention, investigation and prosecution of offences within the European Union.