

REASONED OPINION WITH REMARKS 2/2012 OF THE JOINT COMMITTEE FOR EU AFFAIRS, DATED 27 MARCH 2012, ON THE COMPLIANCE WITH THE PRINCIPLE OF SUBSIDIARITY BY 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 Lisbon Treaty of 2007, in force since December 1st, 2009, establishes a procedure allowing national parliaments to verify European legislative initiatives' compliance with the subsidiarity principle. The said Protocol has been developed in Spain by Act 24/2009, of December 22, amending Act 8/1994, of May 19. In particular, new articles 3 j), 5 and 6 of Act 8/1994 are the legal basis for this report.

B. 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, has been adopted by the European Commission and conveyed to the national parliaments, which have a deadline of eight weeks to verify the subsidiarity check of the initiative, being the deadline April 14, 2012.

C. The Bureau and the Spokespersons of the Joint Committee for EU Affairs agreed on February 15, 2012, to examine the said European legislative initiative, requesting the Government the report envisaged in section 3 j) of act 8/1994.

D. So far written reports have been received from the Government and the Regional Parliament of the Basque Country in which they considered the European legislative initiative examined to be in compliance with the subsidiarity principle.

E. The Report drafted by the Government indicates that the proposal for a Directive must be welcomed since it fully guarantees the protection of personal data. However, the report recommends that the meaning and scope of the term "national security" be

more clearly specified, for a better comprehension of the Directive. Bearing in mind that Article 2 of the of the proposal lays down that “it shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law, in particular concerning national security”, it is essential to clearly define the concept of “national security” so that the proposal will provide greater legal certainty.

F. The Joint Committee for EU Affairs, in its meeting held on March 27, 2012, adopted the following

REASONED OPINION

1.- Article 5.1 of the Treaty on the European Union indicates that “*the use of Union competences is governed by the principles of subsidiarity and proportionality*”. According to Article 5.3 of the same Treaty, “*under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall only act 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 examined legislative proposal is based on paragraph 2 of Article 16 of the Treaty on the Functioning of the European Union, which lays down 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”.

Moreover, it is to be borne in mind that Article 3 of the Treaty on the European Union establishes 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 of the same Treaty adds that “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”.

3.- The examined proposal for a Directive aims to rule 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. This Directive should not apply to the processing of personal data in the course of an activity which

falls outside the scope of Union law, in particular concerning national security, or to data processed by the Union institutions, bodies, offices and agencies.

4.- The proposal's explanatory memorandum underlines that, after extensive consultations on this matter, it is clear that the enormous fragmentation of national legislations in this field has hampered in the past the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. In this sense, this Joint Committee considers that the proposal can positively contribute to the fulfilment of the Union goals enshrined in the Treaty of Lisbon, although it would like to point out some remarks analysed below. Moreover, this Joint Committee welcomes the proposal since it contributes to strengthening the guarantees of a fundamental right as relevant as that of the right to personal data protection, of great importance in the context of a growing computerised data processing.

5.- In general terms, this Joint Committee considers that the proposal complies with the subsidiarity principle, since it has been proven that data exchange among Member States in police matters requires a certain degree of homogeneity in order to avoid bureaucratic burdens that may hamper prevention, investigation, detection or prosecution of criminal offences. Although in this field there is a Framework Decision 2008/977/JHA in force, the latter has not been implemented by all EU Member States, and some of its aspects are technically improvable. To be more precise, the absence of a common consultation mechanism among Member States concerning the exchange of information has represented an impediment to the enforcement of this Framework Decision, which, in turn, has been detrimental to data exchange in police matters. This and other problems are solved by the present proposal for a Directive.

Likewise, the fact that this is a proposal for a Directive (and not for a Regulation, which would have been possible according to Article 16.2 of the Treaty on the Functioning of the European Union), is a positive element from the point of view of the compliance with the principle of subsidiarity, since it allows Member States to adapt some of the provisions of the proposal to their diverse national situations.

Finally, bearing in mind that this initiative contributes to guaranteeing the same level of protection in all EU Member States with regards to a fundamental right such as the right to the protection of personal data, enshrined in Article 16.1 of the Treaty on the Functioning of the European Union, this proposal is justified from the perspective of the principle of subsidiarity, since the relevance of the goal is reason enough for the adoption of a Directive by the Union institutions.

6.- Without detriment to the latter, this Joint Committee considers that, in order to clearly define the scope of this Directive, according to Article 2 of the proposal, it is necessary to specify the meaning and the scope of the term "national security", in order to avoid any legal uncertainty that would make it difficult for national authorities to

know with the necessary certainty the legal framework for personal data processing in police matters.

CONCLUSION

For these reasons, the Joint Committee for EU Affairs considers that 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, complies with the subsidiarity principle established in the Treaty on the European Union in force. However, this Joint Committee considers that, in order to clearly define the scope of this Directive, according to Article 2 of the proposal, it is necessary to specify the meaning and the scope of the term “national security”, in order to avoid any legal uncertainty in a field as important as that of the prevention, investigation, detection or prosecution of criminal offences in the European Union.