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LEGAL SERVICE OPINION*

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 flow of such data (General Data Protection Regulation)
- Issue of whether this constitutes a development of the Schengen acquis

I. INTRODUCTION

1. At the meeting of the Working Party on Information Exchange and Data Protection on 27 and 28 June 2012, the Council Legal Service spoke on the issue of whether or not the abovementioned proposal for a Regulation constitutes a development of the Schengen acquis. This opinion elaborates on that contribution.

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II. FACTUAL AND LEGAL FRAMEWORK

2. On 27 January 2012, the Commission referred two proposals to the Council: one for a Regulation (5853/12) and the other for a Directive (5833/12). The aim of the proposals is to put in place a new legal framework for the protection of personal data in the EU. They are based on Article 16(2) of the Treaty on the Functioning of the European Union (TFEU), a new legal basis introduced by the Lisbon Treaty. The proposed Regulation is intended to replace Directive 95/46/EC on data protection in the former area of Community competence¹, while the proposed Directive is designed to replace Framework Decision 2008/977/JHA on the protection of data in the framework of police and judicial cooperation in criminal matters². The proposal for a Directive has already been deemed a development of the Schengen acquis (in January 2012)³. This opinion therefore refers solely to the proposal for a Regulation.

3. Recital 4 of the proposal for a Regulation states that "*The economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows. The exchange of data between economic and social, public and private actors across the Union increased.*" According to the explanatory memorandum, the aim is "*to build a stronger and more coherent data protection framework in the EU, backed by strong enforcement that will allow the digital economy to develop across the internal market, put individuals in control of their own data and reinforce legal and practical certainty for economic operators and public authorities*".

¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data (OJ L 281, 23.11.1995, p. 31).

² Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30.12.2008, p. 60).

³ See point 5 of 5817/12.

4. The proposed horizontal Regulation has a very broad scope. It "*applies to the processing of personal data (...)*" (Article 2(1)) by the Member States when carrying out activities which fall within the scope of Union law; one of the few exceptions is the processing of data when dealing with criminal matters, which will be covered by the parallel proposal for a Directive (see the list in Article 2(2)).

5. The Commission indicates in its proposal that the Regulation is both:
 - a "*text with EEA relevance*" (first page of the proposal); and
 - "*a development of provisions of the Schengen acquis to the extent that it applies to the processing of personal data by authorities involved in the implementation of that acquis*", in respect of Iceland, Norway and Liechtenstein (recitals 136 and 138), which are signatories to the Agreement on the European Economic Area (EEA), but also in respect of Switzerland (recital 137) (hereinafter "the associated States").

6. We shall therefore examine whether or not the proposed Regulation constitutes a development of the Schengen acquis for some or all of these associated States.

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