



Groningen, Ghent, Uppsala, Turku & Göttingen
Annual Legal Research Network Conference 2009
2009, hosted by Ghent University

**Council Framework Decision 2008/977/JHA – a
backdoor to EU-wide data protection in the third
pillar?**

Jeanne Pia Mifsud Bonnici*

April, 2009

Abstract

Traditionally, member states alone are responsible for providing appropriate safeguards for personal information collected and processed for State security, defence and criminal law purposes. The European Union (EU) has (theoretically, at least) no legal basis to introduce EU wide rules on the use of personal information for third pillar purposes. Indeed, the EU's central legislation on the protection of personal data, Directive 95/46/EC,¹ specifically excludes the application of the Directive to any activity “concerning public security, defence, State security ... and the activities of the State in areas of criminal law”.² The same principle has been reconfirmed (albeit indirectly) in the European Court of Justice's February 2009 decision, *Ireland v Parliament and Council*.³

Conversely, as noted in the Hague Programme⁴, the exchange of personal information in the framework of police and judicial cooperation in criminal matters (proposed in the Programme) should be supported by clear rules to protect fundamental rights (including personal data protection). In this context, in November 2008, the European Council approved Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.⁵

This Framework Decision has had a mixed reception. Data protection experts (including the European Data Protection Supervisor⁶) consider that this Framework Decision does

not go far enough to protect citizens' personal information in the context. Others argue that this is actually as far as the European Council could legally go.

This paper examines whether this Framework Decision can be seen as a start of an EU take-over of an area previously reserved to Member States and the implications of such a shift in competence. It reviews the background to the Framework Decision, the disparate collection of data protection rules for personal data collected in the context of criminal and security matters within the Member States and cross-border law-enforcement organisations (such as Europol and Eurojust) and the recent European Court of Human Rights decision (in *S and Marper v UK*⁷).

The paper argues that the Framework Decision is a disappointingly weak legal instrument and would have been preferable had the EU taken a stronger lead in this area. The lukewarm approach seen in this Framework decision does little to encourage Member States to achieve a better balance between the protection of fundamental rights and the needs of law enforcement and security. Yet it is, arguably, only a matter of time for the EU to accept responsibility for this area. It will do so, ironically perhaps, not to protect citizens' fundamental rights but to prevent the creation of further barriers within the market for the exchange of personal data.

Keywords: third pillar, data protection, criminal law, fundamental rights

*To be confirmed later. (University of Groningen)

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 on the free movement of such data. OJ L 281 , 23/11/1995 P. 0031 – 0050.

² Directive 95/46/EC -Article 3 – Scope.

³ Case 301/06 Decided 10 February 2009 (This decision relates to Ireland's challenge of the Data Retention Directive. Ireland had submitted that Article 95 EC was not the right legal basis for the Directive since its "centre of gravity" does not concern the functioning of the internal market but rather the investigation, detection and prosecution of crime, and that measures of this kind ought therefore to have been adopted on the basis of the articles of the EU Treaty related to police and judicial cooperation in criminal matters. The Court found that the provisions of the directive are essentially limited to the activities of service providers and do not govern access to data or the use thereof by the police or judicial authorities of the Member States and hence the legal basis was correct. Indirectly confirming that had the scope of the Directive required the intervention by the police or law-enforcement authorities of the Member States then the EU would not have had a legal basis on which to legislate.)

⁴ The Hague Programme on strengthening freedom, security and justice in the EU was adopted by the European Council on 4 November 2004 (in The Netherlands). Amongst other issues, the programme promotes the availability of law-enforcement information between member states.

⁵ OJ L350, 30/12/2008 P.0060-0071.

⁶ See e.g. EDPS Press Release 28 November 2008 available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2008/EDPS-2008-11_DPDFD_EN.pdf

⁷ Case of *S. and Marper v. The United Kingdom* decided by the Grand Chamber ECtHR on 4 December 2008. (Applications nos. 30562/04 and 30566/04) Case reference: [2008] ECHR 1581 (4 December 2008)