



First Pillar and Third Pillar: Need for a common approach?

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Eurojust

•What Is Eurojust?

- Eurojust is a new European Union (third pillar) body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime.
- Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime

•What Is Eurojust Doing?

- Eurojust stimulates and improves the co-ordination of investigations and prosecutions between competent authorities in the Member States. Eurojust improves co-operation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust supports the competent authorities of the Member States in order to render their investigations and prosecutions more effective when dealing with cross border crime.
- Increasing caseload: from 192 cases in 2002 to probably 1000 cases in 2007

•Data Protection

- Directive 95/46 does not apply
- Rules of procedure on the processing and protection of personal data, adopted by Council on 24/2/2005 (containing main principles Directive but also very detailed rules, tailored made to Eurojust tasks and purposes)



- **Main question at stake: need for a common approach 1st and 3rd pillar?**
 - **Very interesting question**
 - **Not possible to give a “just yes/no” answer**



Don't we already have one common approach 1st and 3rd pillar?

- Council of Europe Convention 108 (1981), ratified presently by 38 countries and signed by another 5
- Article 3 Convention 108: *The Parties undertake to apply this convention to automated personal data files and automatic processing of personal data in the public and private sectors.*
- Explanatory report: *Article 3 imposes obligations on the member States to apply data protection principles even when they process public files – as is usually the case – entirely within their national borders.*
- Article 14 of Eurojust Decision: *CoE 108 is our DP benchmark*



Is Convention 108 enough?

- Convention 108 is indeed quite general: it contains principles, not detailed regulation
- For 1st pillar the EU built on Convention to go further in Directive 95/45/EC
- Recital (11) of preamble: *Whereas the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, which are contained in this Directive, give substance to and amplify those contained in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data;*



But, can we really get further than that?

- Discussion on FD on DP in 3rd pillar shows little willingness of Member States to achieve a harmonised level of DP going further than CoE Convention (MDG discussions).
- In fact:
 - Text under discussion is “agreement of minimums” (lower common denominator), partly because of unanimity requirement
 - Scope reduced to cross-border exchange of personal data (and does not affect existing bilateral agreements...)
 - Many exceptions included and some important issues missing
 - Doubts as to whether the text is even compliant with Convention 108 and additional protocol (see also EDPS opinions + press release of 20/9/07)
 - Eurojust DP rules go much further than proposed text (after several formal motivated requests, happily excluded from scope of application)



Would it be desirable?

- Some MS have applied the Directive also in 3rd pillar
- However, no harmonisation
- Generally not a high level of awareness of DP in judicial environment even if some principles are somehow linked to DP principles: right of defense, secrecy of the judicial file...+ transfers from MS to third countries with no adequate protection take place



Is Directive 95/46/EC the solution?

- in 2004 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament issued a report on data protection, drafted by MEP Capatto, which contained the following statement: *Considers that, in the long term, Directive 95/46/EC should be applied, following the appropriate modifications, to cover all areas of EU activity, so as to guarantee a high standard of harmonised and common rules for privacy and data protection.*



Some examples of 3rd pillar challenges in applying Directive

- Information to be given to data subject (art. 10-11 Directive: at the moment of collection or, at least, at the time of recording the data):
 - “Controlled delivery” of drugs
 - Information to data subject/s on telephone tapping (even if later: German example)
- Access to personal data (art. 12 +13): confirmation of existence of (international) investigation might have great impact in ongoing investigation. Exceptions used very often.
- Right to object (art. 14) !
- Rights of data subjects (not to object) exist in Eurojust rules but specific situation has been taken into account



Future: (Draft) Reform Treaty

- End of pillar structure
- But this does not imply automatic application of Directive to everything
- Sectoral declaration on DP in police and judicial cooperation in criminal matters foreseen



Conclusion: common approach needed?

- Convention 108 offers a basic common approach that needs to be fully respected
- Any new instrument should respect CoE convention + basic principles Directive
- Not in favour of detailed overall instrument covering all pillars, not even the whole third pillar. Specificities of police and judicial work need to be taken into account (need for very clear and specific tailored made rules for the diverse third pillar areas).
- An overall instrument would have to be relatively general but, if it has to have any added-value, it should go further than CoE convention.



Conclusion: common approach needed? II

- It could be good to have a framework instrument for the 3rd pillar in the MS but not too optimistic about level of protection potentially offered by such instrument (although co-decision after reform treaty could help. Paradox of present situation with FD).
- Different categories of data subjects have to be considered (suspects, victims and witnesses: see Eurojust rules)
- Against including Eurojust, Europol and so forth in potential basic instrument: risk of lowering level of protection is high!
- Nothing against an obligation for Eurojust, Europol and so forth to keep the same level of protection. We do anyway!
- Proliferation of regulations issue: not necessarily a bad thing if regulations offer high protection and are compatible with each other!



Thanks for your attention!

- Questions?

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