

**13869/04**

**LIMITE**

**CRIMORG 116  
ENFOPOL 152  
COMIX 658  
ENFOCUSTOM 75**

**OUTCOME OF PROCEEDINGS**

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of : Multidisciplinary Group on Organised Crime

on : 21-22 October 2004

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No. prev. doc. : 10215/04 CRIMORG 46 ENFOPOL 69 ENFOCUSTOM 49 COMIX 382 +  
ADD1 + COR1 (en) + COR2 (es) + COR3 + ADD1 COR1 + ADD1 REV1 (en)  
11725/04 CRIMORG 67 ENFOPOL 104 ENFOCUSTOM 52 COMIX 489  
13178/04 CRIMORG 94 ENFOPOL 130 COMIX 596 ENFOCUSTOM 65

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Subject : Draft Framework Decision on simplifying the exchange of information and  
intelligence between law enforcement authorities of the member States of the  
European Union, in particular as regards serious offences including terrorist acts.

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On 21 October 2004, the MDG discussed the above mentioned Framework Decision on the basis of document 13178/04 CRIMORG 94 ENFOPOL 130 COMIX 596 ENFOCUSTOM 65.

The following delegations have entered a general scrutiny reservations: AT, CY, DE, DK, GR, FI, IT, PL, COM. Parliamentary reservations have been laid down by: FR, UK, IRL, DK.

The discussion in the MDG focused on the precise areas of law enforcement cooperation that will be covered and in particular the delineation between law enforcement cooperation and judicial cooperation. A number of delegations (AT, CZ, DE and FR) argued against the inclusion of cooperation with judicial authorities within the scope of the draft Framework decision. The Swedish delegation explained that, in its opinion, it was necessary to maintain judicial authorities within the scope of the draft instrument in order to attain the main aim of making bilateral exchange of

information more fluid. Otherwise, important pieces of information, which in some Member States are accessible pursuant to a judicial authorisation only, would be excluded. The Swedish delegation also reminded the Group that it was for every Member State to determine which authorities, police or judicial, can access information. A separate paper on this issue is found in doc 13867/04 CRIMORG 115 CATS 47.

The detailed comments made by delegations at last and previous meetings are included in the text below. Where appropriate, the Presidency has included suggestions to amend the text, so as to enable delegations to consider them in view of the next meeting of the MDG.

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## **DRAFT FRAMEWORK DECISION**

**on simplifying the exchange of information and intelligence between law enforcement authorities of the member States of the European Union, in particular as regards serious offences including terrorist acts.**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 30(1) (a) – (b) and 34(2) (b) thereof,

Having regard to the initiative of the Kingdom of Sweden,

Having regard to the Opinion of the European Parliament,

Whereas:

1. One of the Union's core objectives is to provide its citizens with a high level of security within an area of freedom, security and justice;
2. That objective is to be achieved by preventing and combating crime through closer co-operation between law enforcement authorities in the Member States, while respecting the principles and rules relating to human rights, fundamental freedoms and the rule of law on which the Union is founded and which are common to the Member States;
3. Exchange of information and intelligence on crime and criminal activities is the basis for law enforcement co-operation in the Union serving the overall objective of improving the safety of the Union's citizens;

4. The timely access to accurate and up to date information and intelligence is a crucial element for the possibility of law enforcement authorities to successfully detect, prevent and investigate crime or criminal activity, in particular within an area where internal border controls have been abolished. As terrorists and other serious criminals' activities are carried out clandestinely, they need to be controlled, and information relating to suspected terrorists, need to be exchanged in a particularly rapid manner;
5. It is important that the possibilities for law enforcement authorities to obtain information and intelligence concerning serious crime and terrorist acts from other Member States be viewed horizontally and not in terms of differences with regard to types of crime or division of competencies between law enforcement or judicial authorities;
6. Currently, effective and expeditious exchange of information and intelligence between law enforcement authorities is seriously hampered by formal procedures, administrative structures and legal obstacles laid down in Member States' legislation; such a state of affairs is unacceptable to the citizens of the European Union which call for greater security and more efficient law enforcement while protecting human rights;
7. It is necessary for law enforcement authorities to be able to request and obtain information and intelligence from other Member States at different stages of investigation, from a phase of criminal intelligence gathering to a phase of criminal investigation. The Member State's systems are different in that respect, but this Framework Decision does not purport to change these systems. However, it intends, as regards certain types of information and intelligence, to ensure that certain information vital for law enforcement authorities is exchanged in a rapid manner within the Union, so as not to hamper investigations into serious crime and terrorism acts.
8. The absence of a common legal framework for the effective and expeditious exchange of information and intelligence between the law enforcement authorities of the Member States is a deficiency that will have to be remedied; the Council therefore deems it necessary to adopt a legally binding instrument on simplifying the exchange of information and intelligence;

9. The Member States' common interest to fight crime of a cross-border nature must strike the appropriate balance between a fast and efficient law enforcement co-operation and agreed principles and rules on data protection, fundamental freedoms, human rights and individual liberties; the present text achieves that balance;
10. In the declaration on combating terrorism as adopted by the European Council at its meeting on 25 March 2004, the European Council instructs the Council to examine measures regarding simplifying the exchange of information and intelligence between law enforcement authorities of the Member States. The present Framework Decision fulfils that instruction.
11. As regards Iceland and Norway, this Framework Decision constitutes a development of the provisions of the Schengen acquis which falls within the area referred to in Article 1 of Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen acquis<sup>1</sup>. The procedures set out in that Agreement have been followed in respect of this Framework Decision.
12. The personal data processed in the context of the implementation of this Framework Decision will be protected in accordance with the principles of the Council of Europe Convention of 28 January 1981 for the protection of individuals with regards to the automatic processing of personal data.
13. This Framework Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected by the Charter of Fundamental Rights of the European Union.

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<sup>1</sup> OJ L 176, 10.7.1999, p 31.

HAS ADOPTED THE PRESENT DECISION:

## TITLE I

### SCOPE AND DEFINITIONS

#### *Article 1*

##### **Objective and scope**

1. The purpose of this Framework Decision is to establish the rules under which Member States' law enforcement authorities effectively and expeditiously can exchange existing information and intelligence for the purpose of conducting crime investigations or crime intelligence operations and in particular as regards serious offences, including terrorist acts. It shall not affect more favourable provisions in national law<sup>1</sup>, bilateral or multilateral agreements or arrangements between the Member States or between Member States and third countries and shall be without prejudice to instruments of the European Union on mutual legal assistance or mutual recognition of decisions regarding criminal matters<sup>2</sup>.
2. This Framework decision does not imply any obligation on the part of the Member States to gather and store information and intelligence only for the purpose of providing it to the competent law enforcement authorities of other Member States.
3. This Framework Decision does not imply any obligation on the part of the Member States to provide information and intelligence to be used before a judicial authority as evidence, nor does it give any right to use such information or intelligence for that purpose. Where a Member State has obtained information or intelligence in accordance with this Framework

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<sup>1</sup> UK remarked that care should be taken so as to ensure that this could not be construed so as to mean provisions with a lower level of data protection.

<sup>2</sup> DE, AT considered that the relationship between this instrument and judicial cooperation needed to be clarified.

Decision, and wants to use it as evidence in a criminal proceeding, it has to obtain consent<sup>1</sup> from the Member State that provided the information or intelligence, where necessary through use of instruments regarding judicial cooperation in force between the Member States<sup>2</sup>.

4. This Framework Decision does not imply any obligation to obtain information or intelligence by means of coercive measures<sup>3</sup> in the State receiving the request for information or intelligence.<sup>4</sup>

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<sup>1</sup> FI considered that the current situation with regard to the use of information or evidence should be maintained. SE, AT were opposed to this idea.

<sup>2</sup> UK suggested that the last sentence could be replaced by the text of the Schengen Implementing Convention, Article 39:2, and that Article 13:1 could be deleted. Other delegations considered that the relationship between the Framework Decision and Articles 39 and 46 of that Convention needed to be studied further. COM opined that Article 39 is wider than the scope of the current draft Framework decision and should therefore be maintained. The Presidency proposes to deal with this issue by amending the text of Article 13(1) in such a manner that the text of Article 39(2) of the Schengen Implementing Convention is not repealed in its entirety, but only to the extent that the Framework Decision covers areas contemplated in Article 39.

<sup>3</sup> Instead of defining coercive measures, the UK suggested to give some examples, for instance "such as body searches, house searches, formal questioning of persons, interception of telecommunications" (see explanatory memorandum). NO thought that this should be left to each country to decide. BE concurred in that, but stated that also the interference in the private life was an important element.

<sup>4</sup> AT thought that information that had been obtained through use of coercive measures previously should be excluded even if it was available ("existing") in a file. FI, NO and SE opposed to this idea. BE, FR and LU thought that this information can only be exchanged on the basis of a judicial request for mutual assistance. DE has a scrutiny reservation. The Presidency decided to revert to the question whether such information should be excluded from the scope of application, at a later stage.

## Article 2

### Definitions

For the purposes of this Framework Decision:

- (a) ‘competent law enforcement authority’: a national police, customs or other authority<sup>1</sup>, that is authorised by national law to detect, prevent or investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities. [A judicial authority is regarded as competent law enforcement authority if the information or intelligence, according to national law, is only held by or accessible to that judicial authority]<sup>2</sup>;
- (b) ‘crime investigation’: a legal framework within which measures are taken by competent law enforcement or judicial authorities, including public prosecutors, with a view to establishing and identifying facts, suspects and circumstances regarding one or several identified concrete criminal acts;
- (c) ‘criminal intelligence operation’: a legal framework, having not yet reached the stage of a criminal investigation supervised and controlled by judicial authorities including public prosecutors, within which a competent law enforcement authority is entitled by national law to collect, process and analyse information about crime or criminal activities with the view to establishing if concrete criminal acts has been or may be committed;

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<sup>1</sup> PL suggested to include FIUs. FR was opposed to this suggestion, as the FIUs were not always involved in the proper investigative phase. Several delegations considered that the reference to "other authorities" was too vague. It was pointed out however that it is only those authorities that are authorised by national law to detect, prevent or investigate offences or criminal activities and to exercise authority and take coercive measures that are covered. Following a suggestion made by one delegation, it was decided that this question be solved through a system of designation to the General Secretariat and the Commission.

<sup>2</sup> AT, PL, DE, BE and HUN had certain queries about the last sentence. It was however agreed to seek to redraft the sentence with the limited scope indicated in the cover note. AT laid down a scrutiny reservation. The COM suggested to include the meaning of this sentence in another Article.



(d) 'information and intelligence'<sup>1</sup>; any type of existing information or data; appraised, processed and analysed or not, that could be used<sup>2</sup> in a crime investigation or a criminal intelligence operation to detect, prevent or investigate a crime or a criminal activity. Such information or intelligence includes<sup>3 4</sup>:

- (i) information and intelligence in records or files kept by competent law enforcement authorities,
- (ii) information kept in records or files by other authorities, to which competent law enforcement authorities have access, either directly or indirectly,
- (iii) information on holders, ex-directory and listed respectively, of telephone-, cell-phone, telex-, fax-, e-mail or web-site subscriptions or addresses kept by telecom operators,
- (iv) information on persons and freight kept by transport companies,
- (v) any other information or intelligence or data; appraised, processed and analysed or not, that has been obtained within the framework of a criminal investigation or a criminal intelligence operation or that may be obtained without the use of coercive powers.

### *Article 3*

### **Offences**

Exchange of information and intelligence under this Framework Decision may take place concerning offences punishable by the law of the requesting Member State by a custodial sentence or a detention order for a maximum period of at least 12 months. Member States may agree on a bilateral basis to make the procedures applicable under this Framework Decision applicable on a broader basis.

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<sup>1</sup> The COM considered that intelligence and information could not be put on the same footing.

<sup>2</sup> AT considered the wording too broad and suggested that a criterion on "necessary" or "required" information should be used.

<sup>3</sup> DK suggested that the list could be made more precise. FI wondered if the list was needed. AT and CZ had queries about in particular iv and v and considered that they went too far as access to some of the information mentioned would require a judicial authorisation. AT and COM also wanted to exclude criminal records which would become the subject of a specific system.

<sup>4</sup> BE and UK stated this list could not cover intelligence held by intelligence services.

## TITLE II

### EXCHANGE OF INFORMATION AND INTELLIGENCE

#### *Article 4*

##### **Provision of information and intelligence**

1. Member States shall ensure that information and intelligence, held by or accessible without the use of coercive means to competent law enforcement agencies, can be provided to the competent law enforcement authorities of other Member States in accordance with this Framework Decision.
2. Member States shall ensure that conditions not stricter than those applicable at national level for providing and requesting information and intelligence are applied for providing information and intelligence to competent law enforcement authorities of other Member States.
3. Information and intelligence shall be provided on request by a competent law enforcement authority, acting within the limits conferred upon it by national law, conducting a crime investigation or a criminal intelligence operation.

#### *Article 4a*

##### **Time limits for provision of information and intelligence**

1. Information and intelligence shall be provided without delay and to the furthest possible extent within the timeframe requested. If information or intelligence cannot be provided within the requested timeframe, the competent law enforcement authority having received a request for information or intelligence shall indicate the timeframe within which it can be provided. Such an indication shall be made immediately.

2. Member States shall ensure that they have procedures in place so that they may respond within at most 12 hours<sup>1</sup> to requests for information and intelligence where the requesting State indicates that it is carrying out a crime investigation or a criminal intelligence operation as regards the following offences, as defined by the law of the requesting State:

- participation in a criminal organisation,
- terrorism
- trafficking in human beings,
- sexual exploitation of children and child pornography,
- illicit trafficking in narcotic drugs and psychotropic substances,
- illicit trafficking in weapons, munitions and explosives,
- corruption,
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests,
- laundering of the proceeds of crime,
- counterfeiting currency, including of the euro,
- computer-related crime,
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,
- facilitation of unauthorised entry and residence,
- murder, grievous bodily injury,
- illicit trade in human organs and tissue,
- kidnapping, illegal restraint and hostage-taking,
- racism and xenophobia,
- organised or armed robbery,
- illicit trafficking in cultural goods, including antiques and works of art,
- swindling,
- racketeering and extortion,
- counterfeiting and piracy of products,
- forgery of administrative documents and trafficking therein,

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<sup>1</sup> Several delegations (LV, IRL, I) suggested that a more flexible time limit could be inserted.

- forgery of means of payment,
- illicit trafficking in hormonal substances and other growth promoters,
- illicit trafficking in nuclear or radioactive materials,
- trafficking in stolen vehicles,
- rape,
- arson,
- crimes within the jurisdiction of the International Criminal Court,
- unlawful seizure of aircraft/ships,
- sabotage,
- conduct, which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods,
- smuggling of goods,
- infringements of intellectual property rights,
- threats and acts of violence against persons and property, in particular violence during sports events or international events such as meetings of The European Council,
- torture

Where the requesting State indicates that it wishes to have the information more rapidly, the requested State shall use its best endeavours to respond quickly to the request.

#### *Article 5*

### **Requests for information and intelligence**

1. Information and intelligence may be requested for the purpose of detection, prevention or investigation of an offence or a criminal activity involving the offences referred to in Article 3 where there are reasons to believe that relevant information and intelligence is available in another Member States.
2. The requesting competent law enforcement authority shall refrain from requesting more information or intelligence or setting more narrow timeframes than necessary for the underlying purpose of the request.

3. Requests for information or intelligence shall contain at least the information contained in the Annex to this Framework Decision (*to be prepared*).

#### *Article 6*

#### **Categories of persons regarding which information or intelligence may be exchanged**

1. Exchange of information and intelligence under this Framework Decision may relate to persons who, in accordance with the national law of the requesting Member State:
  - a) are suspected of having committed or taken part in a offence or a criminal activity involving the offences specified in Article 3, or
  - b) may, according to criminal intelligence or other evidentiary circumstances, commit or take part in an offence or a criminal activity involving the offences specified in Article 3, or
  - c) are not falling under category a) or b), but there are factual reasons to believe that an exchange of information and intelligence, as a necessary part of a criminal investigation or criminal intelligence operation, could assist in detecting, preventing or investigating a crime or a criminal activity involving the offences specified in Article 4a.
2. Exchange of information and intelligence may also take place with a view to identifying persons falling under categories 1 a) – c).

#### *Article 7*

#### **Communication channels**

1. Exchange of information and intelligence under this Framework Decision may take place via the SIRENE Bureaux or in accordance with Article 4 (4) and 5 (4) of the Convention on the establishment of a European Police Office (the Europol Convention) or in customs matters via the central units as defined in Article 5 (1) of the Convention on mutual assistance and

cooperation between customs administrations or within any other framework established at bilateral or multilateral level among the Member States of the European Union. Any such framework shall be notified to the General Secretariat of the Council within 3 months of the entry in to force of this Framework Decision and subsequently notified to the other Member States. The notification shall be published in the Official Journal

2. Member States may agree, on a case-by-case basis or in general, that other channels may be used for the exchange of information and intelligence under this Framework Decision, for instance through liaison officers or directly between national or local law enforcement authorities.
3. Information or intelligence not exchanged by virtue of Article 4 (4) and 5 (4) of the Europol Convention shall be communicated also with Europol in accordance with the Europol Convention insofar as the exchange refers to an offence or criminal activity within the Europol mandate.

#### *Article 8*

#### **Spontaneous exchange of information and intelligence**

1. Without prejudice to Article 11 a) – c), the competent law enforcement authorities shall, without being so requested, provide to the competent law enforcement authorities of other Member States concerned information and intelligence in case there are factual reasons to believe that the information and intelligence could assist in the detection, prevention or investigation of offences or a criminal activities involving the offences referred to in Article 4a.
2. The provision of information and intelligence shall be limited to what is deemed relevant and necessary for the successful detection, prevention or investigation of the crime or criminal activity in question.

## *Article 9*

### **Data protection**

1. Each Member State shall ensure that the established rules and standards on data protection provided for when using the communication channels referred to in Article 7(1) are applied also within the procedure on exchange of information and intelligence provided for by this Framework Decision.
2. Each Member State shall ensure that where a communication channel referred to in Article 7(2) is used, the equivalent standards of data protection as referred to in paragraph 1, are applied within the simplified procedure for exchange of information and intelligence provided for by this Framework Decision.
3. Information and intelligence, including personal data, provided under this Framework Decision may be used by the competent law enforcement authorities of the Member State to which it has been provided for the purpose of:
  - a) proceedings to which this Framework Decision applies;
  - b) other law enforcement proceedings directly related to the one referred to under a);
  - c) for preventing an immediate and serious threat to public security;
  - d) for any other purpose including prosecution or administrative proceedings only with the explicit prior consent of the competent law enforcement authority having provided the information or intelligence.

4. When providing information and intelligence in accordance with this Framework Decision, the providing competent law enforcement authority may pursuant to its national law impose conditions on the use of information and intelligence by the receiving competent law enforcement authority. Conditions may also be imposed on reporting the result of the criminal investigation or criminal intelligence operation within which the exchange of information and intelligence has taken place. The receiving competent law enforcement authority shall be bound by such conditions.

#### *Article 10*

### **Confidentiality**

The competent law enforcement authorities shall take due account, in each specific case of exchange of information or intelligence, of the requirements of investigation secrecy. To that end the competent law enforcement authorities shall, in accordance with their national law, guarantee the confidentiality of all provided information and intelligence determined as confidential.

#### *Article 11*

### **Reasons to withhold information or intelligence**

A competent law enforcement authority may refuse to provide information or intelligence only if there are factual reasons to assume that the provision of the information or intelligence would:

- (a) harm essential national security interests of the requested Member State or;
- (b) jeopardise the success of a current investigation or a criminal intelligence operation or;
- (c) in case the requested information and intelligence is clearly disproportionate or irrelevant with regard to the purposes for which it has been requested.



## TITLE III

### FINAL PROVISIONS

#### *Article 12*

##### **Implementation**

1. Member States shall take the necessary measures to comply with the provisions of this Framework Decision 2 years after the entry into force of this Framework Decision.
2. Member States shall transmit to the General Secretariat of the Council and the Commission the text of any provisions transposing into their national laws the obligations imposed on them under this Framework Decision. On the basis of this and other information, the Commission shall, 2 years after the date in paragraph 1., submit a report to the Council on the operation of this Framework Decision. The Council shall no later than 1 year after that date assess the extent to which the Member States have complied with this Framework Decision.

#### *Article 13*

##### **Relation to other instruments**

1. Article 39, paragraphs 1 and 2 of the Schengen Implementation Convention are hereby repealed to the extent this Framework decision covers matters that are contained therein.
2. Member States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for exchanging information and intelligence falling within the scope of this Framework Decision.

3. Member States may conclude bilateral or multilateral agreements or arrangements after this Framework Decision has come into force in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for exchanging information falling within the scope of this Framework Decision.
4. The agreements and arrangements referred to in paragraphs 2 and 3 may in no case affect relations with Member States which are not parties to them.
5. Member States shall, within three months from the entry into force of this Framework Decision, notify the Council and the Commission of the existing agreements and arrangements referred to in paragraph 2 which they wish to continue applying.
6. Member States shall also notify the Council and the Commission of any new agreement or arrangement as referred to in paragraph 3, within three months of signing it.

*Article 14*

**Entry into force**

This Framework Decision shall enter into force on the day after its publication in the Official Journal.

Done at

For the Council  
The President

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