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NOTE

From : Presidency
To : JHA Counsellors/Coreper/Council

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Subject : Proposal for a Council Framework Decision on the protection of personal data
processed in the framework of police and judicial co-operation in criminal matters
- Questions to Council

1. The above Commission Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (DPFD) has been discussed extensively in the Multidisciplinary group on organised crime (MDG) - Mixed Committee. At the MDG meeting on 15-16 November 2006 delegations finalised the third reading of this proposal.

The Presidency submits the questions set out hereafter to the Council with a view to reaching a general approach on them.

I Scope: domestic v. cross-border data protection

2. A number of delegations¹ have been reluctant to include data processed in a purely domestic context into the scope of the Framework Decision. Notwithstanding the Council Legal Service's Opinion on the legal basis for the inclusion of data processed in a purely domestic context in the scope of the draft Framework Decision², some delegations³ have expressed doubts as to whether there was a TEU legal basis to regulate data protection in purely domestic cases.

3. The main argument in favour of including domestic data processing in the scope is that this proposal, which is aimed at ensuring data protection in the context of cross-border police and judicial co-operation, inevitably must have certain consequences for domestic processing of data as well. Any data gathered in the context of an internal investigation could, at a later stage, possibly be exchanged with foreign authorities. It is difficult, if not impossible, to distinguish data which may be subject to cross-border transmission at some stage in the future from those that may not. It would at any rate seem very costly to put in place two different types of data protection rules. However, should certain Member States be of the opinion that they are able and willing to make such a distinction, the Presidency's proposal set out hereafter allows them to do so, whilst at the same time ensuring that all data which may possibly be exchanged between Member States' law enforcement authorities, are subject to the same data protection principles throughout the European Union.

¹ CH, CZ, DK, IE, IS, MT, SE and UK.

² 7215/06 JUR 102 CRIMORG 46 DROIPEN 20 ENFOPOL 45 DATAPROTECT 7 COMIX 251.

³ CZ, IE, MT and UK.

4. In order to clarify the scope of the Framework Decision, the Presidency proposes a new Article 1(2a):

"Chapter II of this Framework Decision shall apply to personal data that are or may be transmitted or made available to the competent authority of another Member State. Chapter III of this Framework Decision shall apply to personal data that are transmitted or made available to the competent authority of another Member State. Chapters IV and V of this Framework Decision shall apply to personal data that have been or may be transmitted or made available to the competent authority of another Member State."

Can delegations accept the definition of scope as proposed in Article 1(2a)?

II. General principles on data processing (Chapter II)

5. Chapter II includes the main principles relating to data quality (Article 4) and criteria for making data protection legitimate (Article 5).

Whilst several delegations still have a scrutiny reservation on minor aspects of Article 5, all delegations except two⁴ seemed to be able to accept its underlying philosophy. The negotiations have amply demonstrated that it is impossible to devise rules which can be applied in an identical manner in all Member States. Article 5(3) is therefore an optional provision, which clarifies the basic requirement laid down in Article 4(1)(b) by listing purposes that may be considered as not incompatible with the purposes for which the data were initially collected. The Presidency is aware that some delegations⁵ are opposed to the illustrative nature of this list, but the Presidency asks those delegations to acknowledge the impossibility to devise rules which would apply identically in all 25 domestic law systems. In the same spirit, the Presidency invites those delegations⁶ that still have a scrutiny reservation on the acknowledgment of consent as valid legal basis for further processing, to lift those reservations. Given optional nature of Article 5(3), the acknowledgment of consent as a valid ground for further processing does not oblige any Member State to provide for this under its domestic law.

⁴ COM and DE.

⁵ COM, AT, HU and IT.

⁶ COM, ES, GR and IT.

Recital 5b clarifies the type of situations in which consent might be useful and also repeats the basic rule that consent can obviously be a valid ground for further data processing only if allowed for by domestic law.

Can delegations accept the current text of Articles 4 and 5?

6. There is large consensus on Articles 6 and 7. Some delegations have outstanding scrutiny reservations, which they are invited to lift.

Can delegations accept the current text of Articles 6 and 7?

III. Principles relating to the transmission of personal data to another Member States and the processing of those data

7. Chapter III lays down the principles relating to the to the transmission of personal data to another Member States and the processing of those data. Section I provides rules to be applied in case of transmission of personal data to another Member State, namely the verification of the data quality (Article 9) and the logging and documentation of all exchanges of personal data (Article 10). Whilst several delegations still have a scrutiny reservation on minor aspects of these provisions, there is a broad consensus on their structure and content.

Can delegations accept the current text of Articles 9 and 10?

8. Section II of Chapter III defines the rules on the further processing of data received from another Member State. Article 11 sets out the purposes for which personal data may be used other than the ones for which they were transmitted, in a way similar to Article 23 of the 2000 EU Mutual Assistance Convention. Switzerland has indicated that it wishes to maintain the position it has with regard to that provision under the Joint Declaration of the Contracting Parties to the Agreement on the association of Switzerland to the Schengen acquis⁷. Should the Council later decide that this Framework Decision (including Article 11) would replace the said Article 23, it seems only fair that the Council would honour the joint declaration and that Switzerland would be allowed to retain its position.

In order to deal with all operational law enforcement concerns, Article 11(2) allows Member States to require a prior consent or impose special conditions for further processing in exceptional cases.

Whilst some delegations still have a scrutiny reservation on (parts of) Article 11, it seems that all delegations except two⁸ can agree to the basic philosophy of Article 11.

Can delegations accept the current text of Article 11?

⁷ Joint Declaration of the Contracting Parties to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis on Article 23(7) of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between Member States of the European Union.

⁸ GR and IT.

9. Article 15 lays down the rules to be followed for the possible transmission of personal data received from another Member State to a third State. Throughout the negotiations, the Presidency has continually argued in favour of the inclusion all, including purely domestic, data in the scope of the proposed DPFDD regime for the exchange of data with third countries. It is therefore a matter of some regret that the Presidency has to find that this proposal is not supported by thirteen delegations, including the Commission⁹. It therefore seems that the scope of Article 15 will have to be restricted to data received from another Member State, in accordance with the Commission's original proposal. The Presidency acknowledges that the logical consequence of this limitation would be to delete all references to the adequacy requirement, as third states can easily circumvent such adequacy requirement by asking the data concerned to the originating Member State, which will not be bound by any EU adequacy requirement. In addition, the assessment of the adequacy requirement at national level creates the risk of divergent assessments in different Member States. (The risk of diversity exists at any rate as consequence of the myriad of bilateral and multilateral treaty obligations of Member States towards third states, which will not be affected by the Framework Decision.) However, the Presidency also understands that a number of Member States set great store by the adequacy requirement. As a compromise proposal, the Presidency therefore proposes that the scope of Article 15 be confined to data received from another Member State and that the adequacy requirement be retained.

Can delegations agree to this compromise proposal on Article 15?

⁹ COM, CH, CZ, DK, IE, IS, NL, NO, SI, SK and UK. DE, NL and SE would prefer that this matter be not dealt with in the Framework Decision at all. NO thinks there is no competence for the EU to legislate on this matter for COMIX countries in case of purely domestic data. AT and MT have a scrutiny reservation on this question.