



**COUNCIL OF  
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**LIMITE**

**CRIMORG 150  
DROIPEN 64  
ENFOPOL 168  
DATAPROTECT 39  
COMIX 825**

**NOTE**

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From : Presidency  
To : Article 36 Committee/Coreper

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No. prev. doc. : 12432/06 CRIMORG 135 DROIPEN 54 ENFOPOL 152 DATAPROTECT 30  
COMIX 715  
13246/1/06 CRIMORG 143 DROIPEN 61 ENFOPOL 161 DATAPROTECT 33  
COMIX 780

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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 on scope

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**Background**

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 3-4 October 2006 delegations commenced the second reading. Regarding the MDG meeting on 19 October 2006, the Presidency has invited delegations to continue the second reading and to commence the third reading. After the MDG meeting on 19 October, the Presidency will consider whether there is a need to revise this note. In particular the issue of the data protection regime for the exchange of data with third countries might be added to a revised version of this note.

As the discussions of the DPF<sup>1</sup> have advanced, a solution for the question on scope, which has already been discussed by the Article 36 Committee (CATS), has become more urgent.

### **I. Only international or also domestic processing of data?**

2. The draft DPF<sup>1</sup> aims to provide common standards to ensure the protection of individuals with regard to the processing of personal data in the framework of police and judicial co-operation in criminal matters, provided for by Title VI of the Treaty on European Union (Article 1(1)). At first sight, it might therefore seem logical to restrict the scope of the DPF<sup>1</sup> to the cross-border transmission of information and the processing of data thus transmitted. A number of delegations<sup>1</sup> has expressed doubts against the inclusion of data processed in a purely domestic context. One of the reasons therefore were doubts as to whether there was a TEU legal basis to regulate data protection in purely domestic cases. On 9 March 2006, the Council Legal Service delivered an Opinion on whether there was a legal basis for the inclusion of data gathered and used in a purely domestic context in the scope of the draft Framework Decision<sup>2</sup>.
  
3. The Commission proposes that the DPF<sup>1</sup> applies to the processing of data in the field of Justice and Home Affairs also in a purely domestic context. The Commission approach was supported by a majority of delegations, by the European Parliament in its opinion on the proposal<sup>3</sup> and by the European Data Protection Supervisor (EDPS)<sup>4</sup>. Whilst the Commission proposal is aimed at ensuring data protection in the context of police and judicial co-operation between the Member States, this inevitably must have certain consequences for purely domestic processing of data as well. It is indeed difficult to see how the Union could put in place an effective data protection regime for police and judicial co-operation if there are not a number of general data protection principles which apply to all, including purely domestic, data processing by competent law enforcement authorities.

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<sup>1</sup> CH, CZ, DK, IE, SE and UK.

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

<sup>3</sup> European Parliament legislative resolution on the 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 (COM(2005)0475 - C6-0436/2005 - 2005/0202(CNS)).

<sup>4</sup> doc. 16050/05 CRIMORG 160 DROIPEN 64 ENFOPOL 185 DATAPROTECT 8 COMIX 864.

Data gathered in the context of an internal investigation could, at a later stage, possibly be exchanged with foreign authorities. From a practical point of view, data which have been gathered in a purely domestic context may be difficult to distinguish from data that have been subject to cross-border transmission. It would seem difficult and at any rate very costly to put in place certain data protection rules solely for the purpose of applying these rules to data which have been received from another Member State.

4. The Presidency is of the opinion that most provisions of the DPF, that is all chapters except Chapter III, should apply both to domestic and cross-border data processing. Regarding the general data protection principles laid down in Chapter II of the DPF, which are already contained in all existing international instruments on data protection, it is difficult to see which reason could justify a restriction of their scope to cross-border data processing. In line with the subsidiarity principle, the concrete implementation of these general principles is left to the Member States. Regarding Chapters IV and V, the Presidency is of the opinion that there are no cogent reasons to restrict the scope of the rights of the data subject (Ch. IV) and the confidentiality measures (Ch. V) to data which have been received from another Member State. To do so would seem to make the data protection system unnecessarily complicated and costly.

The provisions of Chapter VI on judicial remedies and liability hinge upon the provisions of other chapters, so the question of scope does not apply. The same seems to hold true in respect of Chapter VII as the powers of the supervisory authorities are related to the provisions adopted pursuant to the DPF. (Chapter VIII deals with final provisions.) In the view of the Presidency, only the provisions from Chapter III should apply solely in the context of cross-border, for the reasons set out hereafter:

- Article 9: the obligation to verify data that are transmitted is triggered by the future transmission of these data. The more general data protection requirement of accuracy, which is also applicable in a purely domestic context, is laid down in Article 4(d), and the implementation thereof is left to the Member States.

- Article 10: the logging and documenting obligation is triggered by the exchange of data. Discussions in the MDG have clearly demonstrated that there is no willingness to have a general logging obligation for all cases where data are accessed.
  - Articles 11 and 18: it is the clear wish of delegations to have a specific purpose limitation applicable to data received from another Member State
  - Article 15: this provision on the exchange of data to third countries, by its very nature, applies solely in the context of cross-border exchange of data, but the question whether it should apply solely to data received from another Member State or to all data is still open.
5. *Do delegations agree that all provisions from the DPF, with the exception of Articles 9, 10, 11, 15 and 18, should apply to domestic data processing? Should delegations wish to add other provisions to this list, they are invited to present a justification for those articles.*
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