



**COUNCIL OF
THE EUROPEAN UNION**

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**Interinstitutional dossier:
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REV 1(en)**

LIMITE

**CRIMORG 87
DROIPEN 42
ENFOPOL 97
DATAPROTECT 20
COMIX 477
ENFOCUSTOM 53**

(EN translation provided by the Presidency)

NOTE

from: Presidency

to: Article 36 Committee

No previous doc: 7315/07 CRIMORG 53 DROIPEN 18 ENFOPOL 45 DATAPROTECT 10
COMIX 267 ENFOCUSTOM 30 + COR 1

Subject: Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters

1. On 4 October 2005, the Commission forwarded a proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters ("DPFD") to the Secretary-General of the Council. On 13 December 2005, the Council consulted the Parliament on the proposal. The Parliament delivered its opinion on 27 September 2006. The European Data Protection Supervisor has also delivered his opinion¹ on the proposal, which he presented to the Multidisciplinary Group on Organised Crime (MDG)-Mixed Committee on 12 January 2006. On 24 January 2006, the Conference of European Data Protection Authorities also delivered an opinion² on the proposal.

¹ 16050/05 CRIMORG 160 DROIPEN 64 ENFOPOL 185 DATAPROTECT 8 COMIX 864.

² 6329/06 CRIMORG 28 DROIPEN 12 ENFOPOL 26 DATAPROTECT 4 COMIX 156.

2. The Commission presented its proposal to the meeting of the MDG - Mixed Committee on 9 November 2005. The MDG discussed the proposal at length and completed the third reading at its meeting on 15 and 16 November 2006. At the meeting of the Article 36 Committee on 25 and 26 January 2007, the Presidency set out a series of basic points¹ for revising the proposal, with the aim of removing outstanding reservations and making a real improvement in third-pillar data protection. The draft² as revised by the Presidency in agreement with the Commission was submitted to the Article 36 Committee at its meeting on 23 March 2007 and was given a first reading by the MDG on 29 and 30 March and on 3 April 2007. The text was revised following the MDG reading dated 24 April 2007³ and was presented to the Article 36 Committee on 27 April 2007. This text was discussed in the MDG on 10/11 May 2007. Discussions in the MDG will be continued on 6 and 15 June 2007.
3. The Presidency holds the view that agreement should be reached among Member States with regard to the scope and the regulation governing the transfer of data to third states as soon as possible.
4. The Presidency proposed a wording in Art. 1 (2) of the Draft Framework Decision according to which Member States are required to fully comply with the Framework Decision governing data protection in the Third Pillar when exchanging data across borders. It was not intended explicitly to extend the scope to merely national processes. A recital 6a was to be included where Member States state their intention to ensure that, in order to facilitate data exchanges in the European Union, the standard of data protection achieved in national data-processing matches that provided for in this Framework Decision. The Presidency holds the view that a requirement according to which the scope of the Framework Decision is extended explicitly to merely national data processing owing to the provisions contained in the actual articles will not meet with the necessary approval of all Member States, at least not in the foreseeable future.

¹ Dok. 5435/07 CRIMORG 12 DROIPEN 4 ENFOPOL 5 DATAPROTECT 3 ENFOCUSTOM 9 COMIX 57.

² Dok. 7315/07 CRIMORG 53 DROIPEN 18 ENFOPOL 45 DATAPROTECT 10 COMIX 267

³ Dok. 7317/1/07 REV 1 CRIMORG 53 DROIPEN 18 ENFOPOL 45 DATAPROTECT 10 COMIX 267 ENFOCUSTOM 30

The Presidency is of the opinion that the solution it suggested will lead to situations where Member states will extend the provisions contained in the Third Pillar Data Protection Framework Decision also to merely national data processing at least in all cases where a distinction between transferred data or data to be transferred at a later stage and those to be treated exclusively at the national level is not possible or reasonable. Furthermore, Recital 6a ensures that Member States apply data protection provisions in national data-processing which match the protection provided by the Framework Decision Governing Data Protection in the Third Pillar.

5. The Presidency suggests the following new Article 27a, to be included apart from the provisions in Article 1 (2) and Recital 6a, in order to prevent a situation where the adoption of the Framework Decision is indefinitely delayed owing to the unsolved issue of its scope:

Article 27a

Evaluation

1. *Member States shall inform the Commission at maximum five years into the implementation of the Framework Decision what national measures they have taken to ensure that data exchanges fully comply with the Framework Decision, in particular with regulations that need to be adhered to when collecting data. The Commission shall furthermore examine whether the provisions contained in Article 1 (2) governing the scope of the Framework Decision have led to situations where data were not communicated to other Member States, international bodies or to information systems of the European Union, because provisions contained in the Framework Decision were not fully complied with in national data-processing.*
2. *The Commission shall inform the Council and the European Parliament within one year about the results of the evaluation in line with paragraph 1 above. Should the evaluation show that the provision governing the scope needs to be amended in order to protect data subjects and to promote judicial and police cooperation, the Commission shall submit a proposal to that effect.*

6. The Presidency presented a new provision governing the transfer of data to third countries and international bodies when it submitted the revised proposal of 24 April 2007 (Article 14) ¹ Accordingly, data may only be transferred to third countries or international bodies if they ensure an appropriate level of data protection. In specific exceptional cases, the transfer to third states is permissible, though. This provision is geared to Article 2 of the Additional Protocol to Council of Europe Convention No. 108. Following the discussions in the MDG on 10/11 May 2007, the Presidency has revised this provision in various aspects. The Presidency does not deem it necessary, however, to lay down individual criteria governing the adequacy of data protection in a third state or international body, or to define specific regulations to be followed to establish whether the data protection level is adequate. It should be kept in mind that the proposed provision already presents a compromise, as several Member States have already voiced objections to a detailed provision governing the transfer of data to third states. Against this backdrop, the Presidency proposes to word Article 14 as follows:

Article 14

Transfer to competent authorities in third States or to international bodies

1. *Member States shall provide that personal data transmitted or made available by the competent authority of another Member State may be transferred to third States or international bodies or organisations established by international agreements or declared as an international body only if*
- (a) it is necessary for the prevention, investigation, detection or prosecution of criminal offences, or for the execution of criminal sanctions,*
 - (b) the receiving authority in the third State or receiving international body or organisation is responsible for the prevention, investigation, detection or prosecution of criminal offences,*
 - (c) the Member State from which the data were obtained has given its consent to transfer in compliance with its national law, and*

¹ Doc. 7317/1/07 REV 1 CRIMORG 53 DROIPEN 18 ENFOPOL 45 DATAPROTECT 10 COMIX 267 ENFOCUSTOM 30

(d) *the third State or international body concerned ensures an adequate level of protection for the intended data processing.*

2. *By way of derogation from paragraph 1, point d, personal data may be transferred if*

(a) *the national law of the Member State transferring the data so provides for it because of*

i. *predominantly legitimate specific interests of the data subject, or*

ii. *legitimate prevailing interests, especially important public interests, or*

(b) *the receiving authority in the third State or receiving international body or organisation provides appropriate safeguards which are deemed adequate by the Member State concerned according to its national law.*

3. *Data may only be transferred without prior consent as set out in paragraph 1 (c) above, if such transfer of data is essential to avert an immediate and serious threat to public security and it is impossible to obtain consent beforehand.*

7. The Presidency proposes that the Article 36 Committee should approve the new Article 27a and the new wording of Article 14 as set out above in order to achieve agreement with regard to two core issues concerning the Framework Decision governing Data Protection in the Third Pillar.
