



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 9 October 2007

**Interinstitutional File:
2005/0202 (CNS)**

13496/07

LIMITE

**CRIMORG 144
DROIPEN 88
ENFOPOL 160
DATAPROTECT 42
ENFOCUSTOM 97
COMIX 837**

NOTE

from : Presidency
to : Coreper

Nos prev. doc : 12154/2/07 REV 2 CRIMORG 128 DROIPEN 79 ENFOPOL 142
DATAPROTECT 37 COMIX 708 ENFOCUSTOM 84
11365/2/07 REV 2 CRIMORG 118 DROIPEN 66 ENFOPOL 130
DATAPROTECT 30 COMIX 621 ENFOCUSTOM 77

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 General Secretariat of the Council. On 13 December 2005 the Council consulted the Parliament on the proposal. The Parliament delivered its opinion on 27 September 2006. In the meantime, the European Parliament has delivered a second opinion on the revised draft on 6 June 2007. The European Data Protection Supervisor has also delivered three opinions ¹ on the proposal.

¹ 16050/05 CRIMORG 160 DROIPEN 64 ENFOPOL 185 DATAPROTECT 8 COMIX 864;
16015/06 CRIMORG 190 DROIPEN 73 ENFOPOL 208 DATAPROTECT 49 COMIX 1011;
11701/07 CRIMORG 124 DROIPEN 71 ENFOPOL 134 DATAPROTECT 34
ENFOCUSTOM 81 COMIX 655

2. The file was discussed at the Council meeting of 18 September 2007, at which an agreement was reached on the regime for onward transfer of personal data obtained from another Member State to third States. The Council also confirmed the understanding that the DPF text applies to the cross-border exchange of personal data only.
DK, IE, SE and UK have entered a parliamentary scrutiny reservation.
3. After the Commission presented its proposal to the meeting of the Multidisciplinary group on organised crime (MDG) - Mixed Committee on 9 November 2005, the file has been discussed in the Multidisciplinary group for almost two years. Following the discussions at the MDG meeting of 4 and 5 October, the Presidency deems that the remaining issues cannot be resolved at experts level, but should be resolved at Coreper level. It is the objective of the Presidency to reach a general approach on the DPF text at the Council meeting of 9 November 2007. Five political questions which the Presidency wishes to submit to Coreper are set out hereafter. All other outstanding issues on the DPF will first be discussed by JHA Counsellors on the basis of a document to be issued shortly.

4. ***National security:***

It is accepted by all delegations that law enforcement information processed by security services for the purpose of protecting national security should not be governed by the DPF . Given the great variety in the Member States' institutional set-up, and in particular in their law enforcement structures for the protection of national security, the wording of Article 1(4) has been carefully crafted in a general manner so as to encompass various kinds of situations. This wording is inspired by recital 6 of the Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, where the Council was faced with a similar drafting task. The wording also takes account of the situation in some Member States where the protection of national security implies intense exchange of information between national security services and police services or between national security departments and general departments of police services.

5. The Presidency also points out that the current text is already a compromise as some delegations had wished to have a wider exception (by referring to 'national interests' *tout court* rather than 'essential national interests') and others would have preferred a more narrow exception (by confining it to agencies involved in the protection of national security).

The Presidency therefore requests Coreper to invite the Council to confirm the exception for national security matters, as currently drafted in Article 1(4) and recital 7a.

6. *Possibility for Member States to provide higher level of data protection*

At its meeting of 18 September 2007, the Council reached an understanding that the DPFDD text would apply only to the cross-border exchange of personal data. This understanding was linked to the possibility for Member States to apply the data protection principles contained in the DPFDD to national data processing as well. Recital 6a captures this idea.

7. Delegations have long agreed that those Member States that wish to provide for more protective data protection rules should have the possibility to go beyond the norms laid down in the DPFDD. This idea was part and parcel of the initial scope of the DPFDD, which would have applied both to domestic and cross-border data processing operations. In view of the Council's decision to limit the formal scope of the DPFDD to the cross-border exchange of personal data, the Presidency proposes to slightly modify its wording, so as to clarify that Member states, as far as domestic data processing operations are concerned, may provide for more protective data protection standards than those of the DPFDD. The text of Article 1(5) would then read: 'This Framework Decision shall not preclude Member States from providing, for the protection of personal data processed or collected at national level, higher safeguards than those established in this Framework Decision'.

8. This change in wording seeks to allay the concerns of those delegations that have astutely pointed out that the current text of Article 1(5) could, give rise to misunderstandings as it could be read as an authorisation for Member States to impose more stringent data protection requirements than those of the DPFD when exchanging personal data with other Member States. The Presidency deems that the question whether and to what extent a Member State which transmits personal data to another Member State may impose its own data protection rules on the receiving Member State, should be determined in the relevant articles of the DPFD, in particular Article 13, and not in a general provision on scope. The latter question (linked to Article 13) will be further discussed at a later stage by JHA Counsellors.

The Presidency therefore requests Coreper to invite the Council to confirm the modified wording of Article 1(5).

9. *Processing of special categories of data*

Article 7 DPFD lay down an important data protection principle, namely that processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life shall be permitted only when this is strictly necessary and when the domestic law provides adequate safeguards. The principle has an importance, which goes beyond establishing rules for cross-border data processing between Member States, in the sense that it confirms a standard, which will likely be referred to in other contexts as well (e.g. PNR negotiations with third countries).

10. The original Commission proposal provided for a stricter regime in this respect, in the sense that it laid down (like the Council of Europe Convention No. 108 on Data Protection) a general prohibition of the processing of this type of data. As a result of the negotiations in the MDG, this was changed into the current text. Nevertheless, two Member States think that the current wording is still too stringent. In view of the politically important symbol function of this provision and having regard to the long negotiation process, the Presidency does not see any further possibility to change this provision.

The Presidency therefore requests Coreper to invite the Council to confirm the current text of Article 7.

11. *Draft Council declaration on a joint supervisory authority*

The revised draft of DPFDD which was tabled by the German Presidency in March 2007 contained a provision (Article 26) which called upon the merger of the existing supervisory bodies for the Schengen Information System, Europol, Eurojust, and the third-pillar Customs Information System, into a single data protection supervisory authority. In view of, on the one hand, the declaratory nature of this provision, and, on the other hand, the negotiation of such a provision would substantially delay the negotiation of the DPFDD, the Presidency has deemed it appropriate to move the text of this provision to a draft Council declaration, which is annexed to this note.

The Presidency requests Coreper to invite the Council to confirm the text of the draft Council declaration, as set out in annex II to this note.

12. *Relationship of the DPFDD to other Council acts*

The DPFDD aims to set data protection standards to be applied when exchanging personal data between Member States or with EU/EC information systems for law enforcement purposes. However, in many acts adopted under Title VI of the Treaty on European Union, there are already specific provisions for the protection of personal data. Article 27b of the DPFDD stipulates that those specific provisions shall take precedence over the provisions of this Framework Decision, in as far as they govern the same aspects.

The Presidency therefore requests Coreper to invite the Council to confirm the current text of Article 27b.

- (7a) This Framework Decision is without prejudice to legislative and other regulatory measures of Member States in the field of national security.

Article 1
Purpose and scope

4. This Framework Decision is without prejudice to essential national security interests and specific intelligence activities in the field of national security².
5. This Framework Decision shall not preclude Member States from providing, for the protection of personal data processed or collected at national level, higher safeguards than those established in this Framework Decision³.

Article 7
Processing of special categories of data

The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life shall be permitted only when this is strictly necessary and when the domestic law provides adequate safeguards.³

Article 27b
Relationship to other Council acts

In cases where (...) in an act adopted under Title VI of the Treaty on European Union specific provisions for the protection of personal data are laid down, these provisions shall take precedence over the provisions of this Framework Decision governing the same aspects. Matters not regulated by the Council act shall be governed by the relevant provision of this Framework Decision⁴.

² CZ, DE and IT reservation.

³ Scrutiny reservation by CZ and IT.

⁴ BE and CH scrutiny reservation.

DRAFT COUNCIL DECLARATION

“In the future the Council should endeavour to combine the existing data protection supervisory bodies, which have hitherto been established separately for the Schengen Information System, Europol, Eurojust, and the third-pillar Customs Information System, into a single data protection supervisory authority, whilst taking account of the specific nature of these bodies. A single supervisory authority allows the improvement in third-pillar data protection to be taken a decisive step further. A single supervisory authority could therefore be created, which could, where appropriate, also act in an advisory capacity.”
