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DATAPROTECT 37
COMIX 708
ENFOCUSTOM 84**

NOTE

From : Presidency

To : 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 cooperation in criminal matters
- Agreement on certain questions

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 European Parliament on the proposal. The Parliament delivered its opinion on 27 September 2006. In the meantime, it has delivered a second opinion on the revised draft on 6 June 2007.

2. The Commission presented its proposal to the meeting of the Multidisciplinary Group on Organised Crime (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. The German Presidency submitted a thoroughly revised draft to the Article 36 Committee at its meeting on 23 March 2007. The MDG-Mixed Committee finalised a third reading of this revised draft on 18 July 2007. Whilst the Council has been informed at several stages of the state of play of negotiations of this important file, no discussion has so far taken place at ministerial level. The Presidency thinks that the two most important questions surrounding the DPFDF need to be decided by the Council as soon as possible in order to be able to fulfil the mandate of the European Council, namely to reach agreement on this proposal for a Framework Decision by the end of the year. The Presidency would like to emphasise that the agreement to the two questions below is without prejudice to the decision on other questions on the DPFDF. Obviously, the Presidency is also conscious of the fact that a general approach regarding the DPFDF as a whole will be possible only in the context of an overall package.

I. Scope: domestic v. cross-border data processing

3. A substantial number of delegations have not been willing to bring purely domestic data processing within the scope of the Framework Decision. After more than a year and a half of intense negotiations on this proposal, the Presidency is aware of the situation that it will not be possible to reach a consensus on a broad scope of the DPFDF, which would formally extend to purely domestic data-processing operations. This situation has been acknowledged already by the Commission as well as the Parliament in its opinion of 6 June 2007.

4. The Council is therefore asked to confirm the understanding that the DPF_D text applies to the cross-border exchange of personal data only. (Of course Member States will be free to apply the DPF_D data protection principles to domestic data-processing operations as well). This understanding will also imply the following three elements:

- The first element is a new recital 6, as set out in the annex to this note.
- The second element is the confirmation of the existing recital 6a (also reproduced in the annex).
- The third element is an evaluation clause by which the data protection system set in place pursuant to the DPF_D, including the formal limitation of its scope to cross-border data exchange, will be the subject of an evaluation by the Commission three years after the date on which the Member States will be obliged to apply the DPF_D. The text of this clause (Article 27a) is also set out in the Annex to this note.

5. *At the Coreper meeting of 11 September 2007, a consensus emerged around the above understanding, subject to the lifting of scrutiny reservations by CH, GR, IS and NO. The Council is invited to confirm to this understanding regarding the scope of the DPF_D.*

II. Principles relating to the transmission of personal data to third States and the processing of those data

6. Regarding this question, there is a growing consensus around a regime based on two elements. The first element is the basic principle that data transmitted or made available by the competent authority of another Member State may be transferred to third States or international bodies or organisations only if a number of conditions (including prior consent and the adequacy requirement) are met. The assessment of adequacy is left to the Member States, which are provided with indicative criteria (see the text of Article 14 (4) DPF_D, inspired by Article 25(2) of Directive 95/46/EC). The second element is to allow for a number of exceptions to this principle.

7. A new Recital 12a is added in order to clarify that Member States are free to determine the modalities of the consent for the onward transfer of personal data they have transmitted or made available to another Member State, including by, for example, giving a general (rather than on a case-by-case basis) consent for categories of law enforcement information or for specified third countries.

The new recital 12b clarifies the meaning of paragraph 2 of Article 14.

At the Coreper meeting of 11 September 2007, an agreement was reached on the text of Article 14 DPFDD together with recitals 12a and b, based on the above elements, set out in the Annex to this note, subject to the lifting of scrutiny reservations by CH, CZ, IS and NO. The Council is invited to confirm this agreement.

8. Article 27 clarifies that the rules flowing from agreements with third countries are left untouched by the Framework Decision and thereby merely states the obvious, namely that a Framework Decision cannot change existing agreements concluded with third countries. Recital 25, as set out in the annex to this note, clarifies that the Council of Europe conventions on judicial co-operation in criminal matters are not touched by the Framework Decision. The concerns of some delegations that no law enforcement data which are transmitted to another Member State be transmitted towards a third State without the consent of the originating Member State are addressed by adding a second sentence to the text of Article 27.

At the Coreper meeting of 11 September 2007, an agreement was reached on the text of Article 27 DPFDD together with recital 25, based on the above elements, set out in the Annex to this note, subject to the lifting of scrutiny reservations by CH, IS and NO. The Council is invited to confirm this agreement.

Recital 6

- (6) The scope of the Framework Decision is limited to the processing of personal data transmitted or made available between Member States¹. No conclusions can be inferred from this limitation regarding the competence of the European Union to adopt acts relating to the collection and processing of personal data at national level or the expediency for the Union to do so in the future.

Recital 6a

- (6a) To facilitate data exchanges in the European Union, Member States intend to ensure that the standard of data protection achieved in national data-processing matches that provided for in this Framework Decision.

Recital 12a

- (12a) Where personal data are transferred from a Member State of the European Union to third countries or international bodies, such transfer can, in principle, take place only after the Member State from which the data were obtained has given its consent to the transfer. Each Member State may determine the modalities of such consent, including, for example, by way of general consent for categories of information or for specified countries.

¹ Change so as to tally the wording with that of Article 1 of the Framework Decision.

Recital 12b

(12b) The interests of efficient law enforcement co-operation demand that where the nature of the threat to the public security of a Member States or a third State is so immediate as to render it impossible to obtain prior consent in good time, the competent authority may forward the relevant personal data to the third State concerned without such prior consent. The same could apply where other essential interests of a Member State of equal importance are at stake, for example where the critical infrastructure of a Member State could be the subject of an imminent threat or where a Member State's financial system could be seriously disrupted.

Recital 25

This Framework Decision does not affect the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Additional Protocol to that Convention of 8 November 2001 or the Council of Europe conventions on judicial co-operation in criminal matters.

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 the execution of criminal penalties,
 - (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 or the execution of criminal penalties,

- (c) the Member State from which the data were obtained has given its consent to transfer in compliance with its national law, and
 - (d) the third State or international body concerned ensures an adequate level of protection for the intended data processing.
- 2. Transfer without prior consent in accordance with paragraph 1, point c, shall be permissible only if transfer of the data is essential for the prevention of an immediate and serious threat to public security of a Member State or a third State or to essential interests of a Member State and the prior consent cannot be obtained in good time. The authority responsible for giving consent shall be informed without delay.
- 3. 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. legitimate specific interests of the data subject, or
 - ii. legitimate prevailing interests, especially important public interests, or
 - (b) the third State or receiving international body or organisation provides safeguards which are deemed adequate by the Member State concerned according to its national law.
- 4. The adequacy of the level of protection referred to in paragraph 1, point d, shall be assessed in the light of all the circumstances surrounding a data transfer operation or a set of data transfer operations. Particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the State of origin and the State or international organisation of final destination of the data, the rules of law, both general and sectoral, in force in the third State or international organisation in question and the professional rules and security measures which are complied with there.

Article 27

Relationship to Agreements with third States

This Framework Decision is without prejudice to any obligations and commitments incumbent upon Member States or upon the European Union by virtue of bilateral and/or multilateral agreements with third States existing at the time of adoption of the Framework Decision.

In the application of these agreements, the transfer to a third State of personal data obtained from another Member State, shall be carried out while respecting the provisions of Article 14(1)(c) and (2) on prior consent.

Article 27a

Evaluation

1. Three years after expiry of the period laid down in Article 28(1), Member States shall report to the Commission on the national measures they have taken to ensure full compliance with this Framework Decision, and particularly also with regard to those provisions that already have to be complied with when data is collected. The Commission shall examine in particular the implications of the provision on scope in Article 1(2).
2. The Commission shall report to the Council and the European Parliament within one year on the outcome of the evaluation referred to in paragraph 1, and shall accompany its report with any appropriate proposals for amendments.