



**COUNCIL OF  
THE EUROPEAN UNION**

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**CRIMORG 128  
DROIPEN 79  
ENFOPOL 142  
DATAPROTECT 37  
COMIX 708  
ENFOCUSTOM 84**

**NOTE**

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**From :** Presidency

**To :** Coreper/Council

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COMIX 621 ENFOCUSTOM 77

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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

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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 DPFD 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 answer to the two questions below is without prejudice to the decision on other questions on the DPFD. Obviously, the Presidency is also conscious of the fact that a general approach regarding the DPFD 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 DPFD, 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 DPFD text applies to the cross-border exchange of personal data only. (Of course Member States will be free to apply the DPFD data protection principles to domestic data-processing operations as well). This understanding will also imply an evaluation clause by which the data protection system set in place pursuant to the DPFD, including the formal limitation of its scope to cross-border data exchange, will be the subject of an evaluation by the Commission four years after the date on which the Member States will be obliged to apply the DPFD.
5. *Coreper is requested to invite the Council to agree to the above understanding regarding the scope of the DPFD.*

## **II. Principles relating to the transmission of personal data to another Member 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 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, inspired by Article 25(2) of Directive 95/46/EC). The second element is to allow for a number of exceptions to this principle, under which data can be exchanged even though the adequacy requirement is not met.

*Coreper is requested to invite the Council to agree to the text of Article 14 DPF, based on the above elements, set out in the Annex to this note.*

7. 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. The Presidency is aware of 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. The Presidency therefore proposes that these concerns be addressed by adding a second sentence to the text of Article 27, which would read as follows:

'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.'

*Coreper is requested to invite the Council to agree to the text of Article 27 DPF, based on the above elements, set out in the Annex to this note.*

*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 and the prior consent cannot be obtained in good time. The authority responsible for giving consent must 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 appropriate 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.