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**CRIMORG 154
DROIPEN 62
ENFOPOL 181
DATAPROTECT 7
COMIX 821**

NOTE

From : Incoming Presidency
To : Multidisciplinary Group on Organised Crime (Mixed Committee)

No. prev. doc. : 13019/05 CRIMORG 104 DROIPEN 41 ENFOPOL 124 DATAPROTECT 4
COMIX 642 + ADD 1
14326/05 CRIMORG 135 DROIPEN 55 ENFOPOL 151 DATAPROTECT 6
COMIX 761

No. Cion Prop. COM(2005) 475 final

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

After the discussion in the MDG meeting of 9 November, the debate in the Multidisciplinary group on organised crime on 6 December 2005 focused on the scope of the draft Framework Decision. The Commission explained that, in the first place, it had sought to close the existing data protection loopholes in police and judicial co-operation under Title VI of the Treaty on European Union, which had not yet been closed by existing instruments. Whilst acknowledging the specificities of judicial co-operation, the Commission had deemed it better to include also judicial co-operation in the scope of the draft Framework Decision. According to the Commission it would, from a data protection viewpoint, be difficult to justify why an investigation lead by a police officer should not be subject to the same data protection rules as an investigation that was conducted under the direction of a prosecutor or investigating magistrate.

The Incoming Presidency deems it expedient, before starting an article-by-article discussion of the draft Framework Decision, to discuss, and hopefully reach some consensus, on a number of questions related to the scope of the draft Framework Decision. On one question, a large number of Member States have already agreed to the Commission's approach, namely to exclude Eurojust and Europol from the data protection regime of the Framework Decision. The following questions will hopefully allow to further delineate the scope of the draft Framework Decision.

- 1) If the Framework Decision includes, as proposed by the Commission, judicial co-operation, should it provide for differentiated rules or should the same data protection rules apply to police and judicial co-operation? It seems debatable whether the same data protection rules should apply to the exchange of information between law enforcement authorities, on the one hand, and to judicial exchange of information following a request for mutual legal assistance or under the principle of mutual recognition of judicial decisions in criminal matters, where the admissibility of the transmission of the information sought is examined by a judicial authority in the requested/executing State, on the other hand.
- 2) As far as traditional mutual legal assistance is concerned, there is already a data protection regime in Article 23 of the 2000 EU Mutual Assistance Convention. Should the Framework Decision also cover judicial co-operation, it will have to be discussed whether Article 23 of the Convention is to be replaced (as is proposed by the Commission) or is applied as a specific rule to the general rules of the Framework Decision.
- 3) As far as the area of law enforcement co-operation is concerned, should the draft Framework Decision be limited to police co-operation or should it also cover other types of law enforcement co-operation, in particular customs co-operation. At the moment Article 3(2) of the Framework Decision excludes the Customs Information System (CIS) from the scope. Do delegations agree that CIS and other forms of customs exchange of information should be excluded from the scope of the draft Framework Decision?
More generally, delegations are invited to express themselves on the question as to what should happen with existing data protection regimes under co-operation arrangements set up between the Member States (Schengen, Naples Convention).

- 4) Should the Framework Decision also cover information which is transmitted to third States, as is provided for by the proposal (Article 15)? It seems advisable to question the impact on existing legal relationships, for the exchange of information which currently takes place between Member States and third States is often based on existing bilateral or multilateral arrangements. These existing agreements or conventions either already provide for a data protection regime or do not make the exchange of information conditional upon data protection requirements. To make the exchange of information conditional upon the fulfilment of certain data protection requirements not provided for by these arrangements, as Article 15 of the draft Framework Decision appears to do, might therefore be seen as to amount to an infringement of international legal obligations the Member States have committed to in the context of existing arrangements. Even the Union itself could possibly be faced with this dilemma, as it may have agreed to arrangements, which do not contain the same data protection requirements. Thus Article 15 of the draft Framework Decision seems to go beyond what is required under Article 9 of the EU-US Agreement of 26 June 2003 on mutual legal assistance¹.
- 5) Should the scope of the Framework Decision be confined to the cross-border transmission of information and the processing of data thus transmitted or should it also apply to data which were gathered and used in a purely domestic context? The Commission's proposal deals with both situations, the cross-border transmission of information and the gathering and use of data in a purely domestic context. The reason for this is, that, from the Commission's point of view, it was difficult to see how two different data protection regimes could apply, as data which were gathered in the context of an internal investigation could, at a later stage, possibly be exchanged with foreign authorities. The Incoming Presidency does not feel that this is necessarily an insurmountable difficulty, but acknowledges that the creation of a data protection regime which is applicable only to the cross-border transmission of information and the processing of data thus transmitted, may create certain practical difficulties. Data which are obtained from another Member State will normally be used in an internal investigation/prosecution and to subject only those data to the data protection regime envisaged by the Framework Decision, would imply to have two different data protection regimes for data used in the same investigation/prosecution.

¹ OJ, L 181, 19.07.2003, p.34.

It is clear that the answer to this question will be very important to determine the impact of this draft Framework Decision. To include data gathered and processed in a purely domestic context would imply the setting up of a uniform data protection regime to be applied by all domestic law enforcement authorities in all Member States and, depending on the outcome of the debate on question 1, possibly also by all judicial authorities. However, it has to be noted that the decision on whether also purely domestic contexts should be covered has to be coherently reflected by the provisions of the Framework Decision.

Apart from the above questions, the European Data Protection Supervisor will present his opinion on the draft Framework Decision at the meeting of 12 January 2006 (see doc. 16050/05 CRIMORG 160 DROIPEN 64 ENFOPOL 185 DATAPROTECT 8 COMIX 864).
