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INFORMATION NOTE

From : Presidency

To : Council

No. prev. doc. : 13019/05 CRIMORG 104 DROIPEN 41 ENFOPOL 124 DATAPROTECT 4
COMIX 642

5485/06 CRIMORG 11 DROIPEN 5 ENFOPOL 9 DATAPROTECT 2 COMIX
62

6450/1/06 REV 1 CRIMORG 31 DROIPEN 13 ENFOPOL 29 DATAPROTECT
5 COMIX 174

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
- Information on state of play of discussions

Background

1. On 4 October 2005, the Commission forwarded to the Secretary-General of the Council a 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. On 13 December 2005, the Council asked the Parliament for its opinion on the proposal.

The European Data Protection Supervisor has delivered his opinion on the proposal¹, which he presented to the MDG-(Mixed Committee) on 12 January 2006. On 24 January 2006, the Conference of European Data Protection Authorities also delivered an opinion on the proposal². On 11 January 2006, the Hungarian delegation submitted an extensive note on the Commission proposal³.

2. At the meetings of the MDG - (Mixed Committee) of 8 February, 9 and 31 March 2006, the first two chapters were discussed in-depth. The Article 36 Committee discussed the question referred to in paragraphs 7 to 10 of this note, at its meeting of 11 April 2006.

DK, LV, NL and SI have a general scrutiny reservation on the proposal. FR, IE, NL, SE and UK have a parliamentary reservation. AT, ES, FI, IT and SE have a linguistic scrutiny reservation.

Main questions discussed so far

3. The MDG-(Mixed Committee) discussed five questions related to the scope of the draft Framework Decision⁴. The Presidency would like to inform the Council of the state of play of the discussion on these important questions. Delegations find hereafter a summary of the most important arguments advanced in the context of this discussion.
4. As to the first question whether both police and judicial co-operation should be included in the scope of the draft Framework Decision, almost all delegations which intervened⁵, were in favour of the inclusion of both police and judicial co-operation, though some indicated that specific rules might be required in respect of judicial co-operation. One delegation⁶ queried whether the Framework Decision should also cover any kind of data processing by courts in non-cross border situations.

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

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

³ doc. 5193/06 CRIMORG 3 DROIPEN 2 ENFOPOL 3 DATAPROTECT 1 COMIX 26.

⁴ doc. 5485/06 CRIMORG 11 DROIPEN 5 ENFOPOL 9 DATAPROTECT 2 COMIX 62.

⁵ CY, CZ, DE, DK, ES, FR, HU, IT, NL, PT and SE.

⁶ UK.

As to the second, related, question whether Article 23 of the 2000 Mutual Assistance Convention should be kept or repealed by the Framework Decision, all delegations which intervened¹, were in favour of keeping the provision.

5. As far as the question of extending the scope to other law enforcement agencies than the police is concerned, most delegations² were in favour of including customs authorities, whilst some were against this³. As far as the Customs Information System (CIS) is concerned, however, no delegation was in favour of bringing it under the scope of the draft Framework Decision and it was therefore concluded that it would be excluded from the scope. Regarding SIS II, it resulted from the discussion that this issue was not yet ripe for decision.
6. Regarding the question whether the Framework Decision should also cover information which is transmitted to third States, the Commission's proposal – to limit the extent to which information exchange with third countries would be subjected to the EU data protection regime to data which had been received from other Member States – received a mixed response. Whereas some Member States agreed with the Commission⁴, others thought there was no need or legal basis for an EU instrument on data protection of data exchanged with third countries⁵. A limited number of other Member States were inclined to take the view that the Framework Decision should cover all data exchanged by Member States with third countries, including domestically gathered data⁶. Various Member States pointed to the possible impact of any future EU data protection regime on existing legal relationships with third States and stated that existing bilateral or multilateral arrangements should be safeguarded. It is clear that this issue is far from being ripe for decision.

¹ AT, DE, FI, GR, HU, LU, NL, PT, SE and UK.

² AT, DE, ES, FR, HU, PT.

³ NL.

⁴ CZ and NL.

⁵ DE, DK, FI, GR, LT, NO and UK.

⁶ AT, BE, ES, HU and PT.

Question on scope

7. The last question was whether the scope of the Framework Decision should be confined to the cross-border transmission of information and the processing of data thus transmitted or whether it should – as foreseen in the Commission’s proposal – also encompass data gathered and used in a purely domestic context. On 9 March 2006, the Council Legal Service delivered an Opinion on whether there was a legal basis for the inclusion of data gathered and used in a purely domestic context in the scope of the draft Framework Decision ¹.
8. A number of delegations have expressed doubts against the inclusion of data processed in a purely domestic context². One of the reasons put forward were doubts as to whether there was a TEU legal basis to regulate data protection in purely domestic cases. Another argument was that the inclusion of purely domestic data would be contrary to the proportionality and the subsidiarity principle. The UK delegation, while admitting that the UK has implemented the EU Data Protection Directive in the JHA area, has advanced figures which show that only a tiny proportion of all police cases in the UK have a cross-border dimension; it would hence be disproportionate to subject all data handled by national police services to a future EU data protection regime.
9. As stated above, the Commission proposes that the Framework Decision applies to the processing of data in the field of Justice and Home Affairs also in a purely domestic context. Whilst the Commission proposal is aimed at ensuring data protection in the context of police and judicial co-operation between the Member States, in the Commission's view this inevitably has consequences for purely domestic processing of data as well. The concrete impact of the Commission proposal on purely domestic handling of data is primarily based on a number of general data protection principles derived from the Data Protection Directive, which are laid down in Chapter II of the draft Data Protection Framework Decision. The Commission has pointed out that all existing international instruments on data protection already contain these principles.

¹ doc. 7215/06 JUR 102 CRIMORG 46 DROIPEN 20 ENFOPOL 45 DATAPROTECT 7 COMIX 251.

² CH, CZ, DE, DK, IE and UK. SE thought the scope of the draft Framework decision should be transfer of data between Member States, but that it would also have an impact on the domestic handling of data on a general level. FI is not opposed to the inclusion of purely domestic data, but was not entirely convinced that there is a legal basis for this. Scrutiny reservations by CY, CZ, PL and MT.

10. The Commission' approach was supported by a majority of delegations.

One of the arguments put forward was that it is difficult to see how two different data protection regimes could apply, as data gathered in the context of an internal investigation could, at a later stage, possibly be exchanged with foreign authorities. It was also pointed out that data which have been gathered in a purely domestic context can hardly be factually distinguished from data that have been subject to cross-border transmission. In the view of the Commission and other delegations, good co-operation between Member States requires there to be full mutual trust regarding the data protection of information received from other Member States. Such a high degree of trust can only be achieved if the protection (and the ensuing reliability) of all data which – at a later stage – may be transferred to other Member States, is fully ensured.

11. The Presidency intends to continue the discussion of this important proposal for a Framework Decision at Working Party level. Once the discussions have lead to a clearer view as to the exact content and impact of the data protection rules to be contained in the draft Framework Decision, the Presidency will revert to the above question on the scope of the Framework Decision.
