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NOTE

From : Presidency
To : Article 36 Committee/Coreper/Council

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DATAPROTECT 26 COMIX 642

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
- Questions on scope

Background

1. The above Commission 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 (DPFD) has been discussed extensively in the Multidisciplinary group on organised crime (MDG) - Mixed Committee.

As the MDG is completing the first reading of the entire proposal, the Presidency deems it appropriate to submit some fundamental questions on the scope of the draft Framework Decision to the Article 36 Committee/Coreper/Council.

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

I. Only international or also domestic processing of data?

2. The draft DPFDD aims to provide common standards to ensure the protection of individuals with regard to the processing of personal data in the framework of police and judicial co-operation in criminal matters, provided for by Title VI of the Treaty on European Union (Article 1(1)). This raises the question whether the scope of the DPFDD 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. A number of delegations had previously expressed doubts against the inclusion of data processed in a purely domestic context. 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. 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 Decision¹.

3. Another argument was that the inclusion of purely domestic data would be contrary to the proportionality and the subsidiarity principle. The Commission proposes that the DPFDD 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 laid down in Chapter II of the DPFDD. The Commission has pointed out that all existing international instruments on data protection already contain these principles. The Commission approach was supported by a majority of delegations and by the European Data Protection Supervisor (EDPS)².

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

² doc. 16050/05 CRIMORG 160 DROIPEN 64 ENFOPOL 185 DATAPROTECT 8 COMIX 864.

It is indeed difficult to see how the Union could put in place an effective data protection regime for police and judicial co-operation if there are not a number of general data protection principles which apply to all, including purely domestic, data processing by competent law enforcement authorities. 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 may be difficult to distinguish from data that have been subject to cross-border transmission.

Do delegations agree that a number of general data protection principles to be provided for in Chapter II of the DPFDD should apply to all data processing by competent authorities, including purely domestic data processing?

The Presidency would like to emphasise that agreement to this question does not necessarily imply agreement to all the details currently included in Chapter II.

II. Exchange of data with third countries

4. The Commission proposed to limit the extent to which information exchange with third countries would be subjected to the DPFDD to data which had been received from other Member States³. Four Member States argued in favour of an extension of the scope of Article 15 to all law enforcement data, including purely domestic data⁴. This betrays the principal view that, if there is agreement on the principle that a number of general data protection principles from Chapter II of the DPFDD apply also to purely domestic data processing (see question 2), this should also condition the possibility to transfer data to third countries.

³ This view was supported by a limited number of Member States CZ, CH, ES, NL and PL.

⁴ BE, FI, HU, PT.

5. This principal view, if supported, however, needs to be adjusted by taking account of the fact that existing bilateral or multilateral agreements between Member States and third countries will not be affected by the DPF. This necessarily implies that the impact of any DPF requirements for exchange with third countries is limited to those cases where the exchange takes place in the absence of a treaty basis. It seems that most judicial co-operation as well as a significant portion of police information exchange takes place on the basis of an international arrangement of some kind and would therefore not be affected by the DPF. The primary question therefore is whether, and, if so, to which extent, the exchange of law enforcement data with third countries (necessarily limited to exchange not yet regulated by existing treaty arrangements) should be subjected to the DPF. A number of Member States thought that the Framework Decision should not deal with the transfer of data to third countries⁵.

CATS/Coreper/Council are invited to decide whether:

- 1) the exchange of law enforcement data with third countries should not be subjected to the DPF; or*
- 2) only the exchange with third countries of law enforcement data obtained from other Member States should be subjected to the DPF; or*
- 3) the exchange of all, including purely domestic, law enforcement data with third countries should be subjected to the DPF.*

6. Some delegations have moreover pointed out that the proposed procedure of adequacy finding is very complex. In view of the limited practical application that an adequacy requirement in Article 15 would at any rate have, the Presidency suggests the following with regard to the adequacy requirement:

- 1) to confine it to those cases in which co-operation takes place in the absence of a treaty basis (i.e. a treaty existing prior to the adoption of the DPF);

⁵ DE, DK, IE, NO, SE and UK. DK, ES, NO and UK thought there was no legal basis for this.

- 2) to delete the procedure for assessing the adequacy as proposed in Articles 15(4) and 16. In addition to the above-mentioned criticisms on the cumbersome nature of this proceeding, it does not seem necessary nor appropriate to have a 'European' procedure, which would apply only in some cases and only to some Member States, depending on whether there is a pre-existing treaty between the Member State and the third country concerned.

Do delegations agree with the two proposed limitations of the adequacy requirement?

III. National Security

7. Several delegations⁶ are of the opinion that processing of personal data in connection with national security purposes is outside the scope of the draft Framework Decision, and would like express clarification of this in the instrument. According to the EDPS this follows from Article 33 TEU.

- There is a UK proposal to insert a new paragraph 3a in Article 1, which would read: "For the avoidance of doubt, this Framework Decision does not apply to national security matters".

- There is a HU proposal for a new recital (8ter): "This framework decision is without prejudice to essential national security interests, and it should not jeopardize the success of specific intelligence activities in the field of State security".

Delegations are invited to express themselves as to whether they agree in principle with the view that the DPFDD should not apply to processing of personal data in connection with national security purposes and to give a preference for either text proposal.

⁶ (CH, CY, CZ, DK, ES, HU, IE, IT, NO, PT and UK)