

COMMISSION OF THE EUROPEAN COMMUNITIES

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2005/0207 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

on the exchange of information under the principle of availability

(presented by the Commission)

{SEC(2005) 1270}

EXPLANATORY MEMORANDUM

1. Context of the proposal

- **Grounds for and objectives of the proposal**

The level of law enforcement cooperation required to develop the area of freedom, security and justice (cf. Article 29 TEU), calls for a new principle for the exchange of law enforcement information, which entails that information needed for the fight against crime should cross the internal borders of the EU without obstacles. For that reason, Chapter III.2.1 of the Hague programme invited the Commission to present legislation by the end of 2005 at the latest to implement a "principle of availability", to be operational on 1 January 2008[1]. Chapter 3.1 of the Council and Commission Action Plan implementing the Hague Programme that was adopted by the Justice and Home Affairs Council of 2 and 3 June 2005[2], confirmed the presentation of such a legislative proposal for 2005 in conjunction with a Proposal on adequate safeguards and effective legal remedies for the transfer of personal data for the purpose of police and judicial cooperation in criminal matters. The Justice and Home Affairs Council of 13 July 2005 that met in extraordinary session after the terrorist attacks in London on 7 July, asked the Commission to advance the presentation of the proposal on the principle of availability to October 2005, to provide the Union with the cooperative instruments it needs to prevent and combat terrorism more effectively.

The principle subjects the exchange of law enforcement information to uniform conditions across the Union. If a law enforcement officer or Europol needs information to perform its lawful tasks, it may obtain this information, and the Member State that controls this information, is obliged to make it available for the stated purpose.

- **General context**

The central role of information exchange in the security gambit of the Union became apparent after the abolition of controls at the internal borders pursuant to the Convention Implementing the Schengen Agreement of 1990 ('the Schengen Convention'). It facilitated information exchange based on replying to a request of law enforcement authorities from another Member State, as well as electronic data exchange of alerts on persons and property. Ever since the entry into force of the Schengen Convention in 1995, the possibilities offered were greatly utilised, to the extent that need was felt for more advanced rules as is demonstrated by the large number of consecutive bilateral cooperation agreements.

The current Framework Decision introduces direct online access to available information and to index data for information that is not accessible online, for Member States' law enforcement authorities as well as for Europol officers. This goes beyond the exchange of information provided for by the Schengen Convention and constituting, in this sense, a new form of cooperation which did not previously exist, and hence is not part of the Schengen *acquis* introduced into the European Union by the Schengen Protocol attached to the 1997 Treaty of Amsterdam. For this reason, this Framework Decision is not a development of the Schengen Acquis.

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1 OJ C 53, 3.3.2005, p. 1.

2 OJ C 198, 12.8.2005, p. 1.

This Framework Decision allows Europol to improve the performance of its tasks in accordance with the Convention of 26 July 1995 on the establishment of a European Police Office (Europol Convention)[3] and to develop information strategies on the basis of a wider availability of relevant information, to prevent and combat organised crime, including terrorism, using as much as possible available information channels.

Recently, other EU-wide innovative approaches have been developed of which the most important are the initiative of the Kingdom of Sweden for a Draft Framework Decision on simplifying the exchange of information and intelligence, and the Treaty signed by seven Member States on 27 May 2005 in Prüm to enhance cross-border cooperation, in particular to combat terrorism, cross-border crime, and illegal immigration.

From an analytical perspective, seven main obstacles exist to information to be generally available throughout the EU, that is relevant to make possible, facilitate, or accelerate the prevention, detection or investigation of criminal offences:

– Bi- and multilateral agreements between Member States are either geographically restricted or do not oblige Member States to provide information, making the exchange of data dependent on discretionary factors.

– Current forms of law enforcement cooperation usually require intervention of national units or of central contact points. Direct information exchange between authorities is still the exception.

– No standardised procedure exists yet at EU level to request and obtain information, but progress towards that aim is made in the context of the initiative of the Kingdom of Sweden (see below).

– No efficient mechanism exists at EU level to establish whether and where information is available.

– Differences in the conditions to access and exchange information, as well as in distinctions between police, customs and judicial cooperation interfere with an efficient exchange of information.

– Differences in protection standards hinder the exchange of confidential information.

– Absence of common rules to control the lawful use of information that has been obtained from another Member State and few possibilities to trace the source and original purpose of the information.

The current Framework Decision in conjunction with the Framework Decision on data protection intends to address these obstacles.

- **Existing provisions in the area of the proposal**

– Convention Implementing the Schengen Agreement of 1990. Its Article 39 provides for police information exchange on request, but does not oblige Member States to reply. As a consequence, the outcome of procedure is erratic and, besides, lengthy. Furthermore,

[3] OJ C 316, 27.11.1995, p. 2.

requests and replies go via central authorities and are only exceptionally directly exchanged between officials concerned. The current proposal emphasises direct channels of information exchange, and include a general obligation to reply, without prejudice to a limited number of harmonised grounds for refusal. This speeds the process and makes the outcome more predictable.

– The Europol Convention of 1995 and its Protocols. Pursuant to Article 2 the objective of Europol is to improve the effectiveness and cooperation of the competent Member State authorities to prevent and combat terrorism, and other international and organised crime. At present, a new information exchange system within Europol's mandate is in the rollout phase. Europol's main systemic challenge is the lack of information. Allowing it to obtain information under the principle of availability within the scope of its mandate, will improve its effectiveness.

– The initiative of the Kingdom of Sweden for a Draft Framework Decision on simplifying the exchange of information and intelligence that seeks to improve on the above mechanism established by the Schengen Convention. It further harmonises the legal framework for the exchange of data and reducing response times. The current proposal on the other hand, introduces online access to available information and to index data for information that is not accessible online, following the Member States' notification of information available within their jurisdictions. By doing so, it avoids fishing for data, as it allows knowing whether the information sought is available before issuing an information demand, and permits efficient and targeted requests. It furthermore harmonises the grounds for refusal that are also binding on the authorities that –pursuant to national law- must authorise the access or transfer of information. Therefore, the uncertainty inherent in an information request is reduced to a minimum.

– The Treaty signed on 27 May 2005 in Prüm on enhancing cross-border cooperation, in particular to combat terrorism, cross-border crime, and illegal immigration. This instrument (not yet ratified) will *inter alia* introduce far-reaching measures to improve information exchange. There are similarities between the current proposal and that Treaty, such as the index system and direct access to national databases, but the Treaty is more limited in scope, and actually only concerns seven Member States.

- **Consistency with other policies and objectives of the Union**

This Framework Decision seeks to ensure full respect for the right to liberty and security, the right to respect for private and family life, the right to protection of personal data and the principles of legality and proportionality of criminal offences and penalties (Articles 6, 7, 8, 48 and 49 of the Charter of Fundamental Rights of the European Union).

It does so by authorising only national authorities competent for the prevention, detection or investigation of criminal offences to obtain information, and by obliging the authorities involved to verify the necessity and the quality of the information. Furthermore a committee will establish *ex ante* that information is only available for the equivalent competent authority.

The processing of personal data pursuant to this Framework Decision will be done in accordance with the Council Framework Decision 2006/XX/JHA on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters and the Europol Convention respectively.

2. Consultation of interested parties and impact assessment

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

The Commission organised two rounds of consultations with stakeholders in the area of exchange of data for the purpose of making possible, facilitate, or accelerate the prevention, detection or investigation of criminal offences. The consultations explored the concept of the principle of availability, and gave feedback on implementation strategies and on more effective ways to protect fundamental rights. They also tested the feasibility of different options developed in the context of the impact assessment. The first round entailed stocktaking of the current situation on the basis of a questionnaire. The second round built on the analysis and was more solution-oriented.

On 9 and 10 November 2004 and 2 March 2005, meetings took place with representatives from the national ministries responsible for law enforcement organisations, as well as Europol and Eurojust.

On 23 November 2004 and 8 March 2005 consultations were organised with representatives of human rights interest groups and of the Civil Liberties Committee of the European Parliament, to receive feedback on the concerns of civil society.

On 22 November 2004 and 11 January 2005, representatives of the national data protection authorities were consulted, including the European Data Protection Supervisor, and the Secretariat of the Joint Supervisory Authority.

Summary of responses and how they have been taken into account

The consultation of law enforcement stakeholders confirmed the need for an innovative approach to further the possibilities to exchange information. Moreover, this stakeholder group insisted on the need to be pragmatic, target specific types of information, and provide a common framework for the exchange of information. Because of this consultation, elements of mutual recognition were introduced next to elements deriving from the principle of equivalent access, i.e. treatment of the request for information according to the conditions in the requested Member State. Further to the consultation, a comitology mechanism for the elaboration of technical details of the information exchange was introduced.

The consultation with representatives of human rights interest groups and of the European Parliament focussed mainly on traceability of each step in the information exchange chain to underpin meaningful legal remedies.

Consultations with the representatives of data protection authorities motivated the distinction between general principles applicable to all sectors, and specific ones applicable to certain types of information. It furthermore led to Articles on the traceability of information processed under the principle of availability, and to the inclusion of the right of the defence i.e. to consult the information that was requested and obtained.

- **Collection and use of expertise**

Scientific/expertise domains concerned

The Commission issued a call for tender to study the required scope for legislation for information exchange under the principle of availability for law enforcement cooperation, as well as optimum strategies to protect fundamental rights when processing personal data in that context, on the basis of, *inter alia*, a comparison of existing national situations.

Methodology used

The limited call for tender was issued to conduct a comparative study into existing information exchange systems for law enforcement authorities, for the prevention, detection or investigation of criminal offences. It analysed obstacles to exchange of information and formulated strategies to tackle them. Scientific literature was analysed, and information exchange methods were examined in the context of national legal systems and of the main European instruments. Insight in the autonomy of law enforcement authorities to access data was gathered through analysis of answers to a questionnaire issued to Member States. In a second phase, research hypotheses were tested with Europol Liaison Officers and Europol staff in a round table meeting at Europol on 11 May 2005. The study included a gap-analysis that was at the basis of subsequent testing of research hypotheses.

Main organisations/experts consulted

Member State administrations responsible for national law enforcement organisations, representatives of data protection authorities, including the European Data Protection Supervisor, Europol including the Europol Liaison Officers, Human Rights interest groups, and the Civil Liberties Committee of the European Parliament.

Summary of advice received and used

The existence of potentially serious risks with irreversible consequences has not been mentioned.

The proposal follows the advice to limit the competence to obtain available information to the information that competent authorities may autonomously access, if necessary after having obtained an authorisation from an authority other than the designated authority. Furthermore, the suggestion to introduce an 'Information Demand' was followed to facilitate and track the processing of information that is not accessible online, following a hit on index data that Member State should make available for all relevant information that is not online available.

Means used to make the expert advice publicly available

The conclusions were based on a comparative study, produced on the basis of a limited call for tenders.

- **Impact assessment**

The following four legislative options were assessed in the context of improvement of information exchange between law enforcement authorities in the pre-trial phase.

– No new or additional legislation :

Refraining from action would lead to the continuation of the current situation that does not fully meet topical security challenges. None of the existing instruments or projects brings the improvements that this Framework Decision aims to deliver.

– Application of the principle of equivalent access:

Information exchange based on the principle of equivalent access allows for national treatment of requests for information on conditions not stricter than those that apply in the requested Member State. Although this principle recognises, contrary to the previous option, the common responsibility for security, is does not remedy inherent flaws: lengthy response times, unpredictable outcomes of information requests, absence of an obligation to answer, and difficulties to manage the requests in view of different conditions to comply with.

– Principle of mutual recognition mitigated by a condition of equivalent access in conjunction a mechanism to appraise the equivalence of the authorities that are competent to obtain information:

This option includes national treatment of requests originating in other Member States, like in the previous option, but alleviates some of the management difficulties by making the execution of a request mandatory, on the condition that equivalence has been formally established between the authority that may obtain the information in the Member State that controls it, and the authority in the other Member State that needs this information to carry out its lawful tasks. However, this option does not cater for the situation where no reliable means exist to know whether information is actually available. This reduces the practical impact of a right to access information.

– Principle of mutual recognition mitigated by a condition of equivalent access, in conjunction with a mechanism to appraise the equivalence of the authorities that are competent to obtain information, and an index system to identify information that is not online available:

This option builds on the previous one and removes drawbacks that hinder access to available information, by obliging Member States to make agreed types of information accessible for equivalent competent authorities of other Member States via the same modalities as for their national authorities. This implies providing online access to national databases to which national competent authorities have online access, and informing about the existence of information that is not online available. The proposal sets out that to provide knowledge about existing information that is not online available, Member States shall supply each other with index data for online consultation. These index data will indicate whether or not information is available and which authority controls or handles it. Moreover, this option introduces an 'information demand' further to which the information that is targeted by index data may be obtained. This 'demand' will be issued by the soliciting competent authority. This option avoids fishing for data as it allows knowing whether the information sought is available before making the request, and permits efficient and targeted requests. Logging of requests and

exchanges provides for traceability of the processing of information and for meaningful legal remedies for persons whose data are processed.

As regards impacts on fundamental rights, it should be emphasised that the Framework Decision contributes to the implementation of Articles 2 and 3 of the Charter of Fundamental Rights that states that everyone has the right to life and physical integrity. Enhanced protection of the privacy of persons whose data are processed under this Framework Decision is achieved by means of the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

The Framework Decision furthermore respects Article 6 TEU that puts the respect for human rights and fundamental freedoms in the centre of the activities of the Union. The Framework Decision does this by implementing the fourth option analysed under the impact assessment that ensures reaching the set aim

The Commission carried out an impact assessment (not listed in the Work Programme), that is contained in a report that is accessible at the following URL: http://europa.eu.int/comm/secretariat_general/impact/index_en.htm.

3. Legal elements of the proposal

- **Summary of the proposed action**

The Framework Decision obliges Member States to ensure that law enforcement relevant information, i.e. information able to make possible, facilitate, or accelerate the prevention, detection or investigation of criminal offences, controlled by authorities or by private parties designated for this purpose, is shared with equivalent competent authorities of other Member States if they need the information to carry out their lawful tasks, and with Europol in far as the access to the information by Europol is necessary for the performance of its legitimate tasks and complies with the Europol Convention and its Protocols. Available information is shared either by online access, or by transfer based on an 'information demand' after matching solicited information with index data that Member States shall provide for information that is not accessible online.

No obligation exists to collect information by means of coercive measures.

Where national law requires that transfer of information requires authorisation from an authority other than the one that controls it, the authority that controls or handles this information (the "designated authority") shall obtain this authorisation on behalf of the law enforcement body in the other Member State that needs the information.

Refusal of transfer further to an information demand is limited to grounds fixed by the Framework Decision that, moreover, only apply if less restrictive options have proven to be of no avail. The Framework Decision applies to information exchange prior to the commencement of a prosecution, and does not affect mutual legal assistance mechanisms.

- **Legal basis**

Article 30(1)(b) and Article 34(2)(b) TEU

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason.

The past record of action in Member States in this field has not been satisfying. There are still too many legal and administrative obstacles to information availability, stemming *inter alia* from competition between national services leading to information retention; the differences in national frameworks are also slowing down the exchange of data; in some occasions, in order to obtain information the authorities concerned need to rely on the good-will of national counterparts as there is no clear legal framework.

Serious and organised crime, including terrorism is an international phenomenon that no Member State can effectively tackle in isolation. Common rules and mechanisms to facilitate information exchange at the level of the EU are required to be effective.

Union action will better achieve the objectives of the proposal for the following reason.

Setting rules at EU level will decrease resources needed for information exchange as the need to maintain numerous bilateral contacts and multilateral networks will cease to exist. The cost to keep running ad hoc intergovernmental cooperation, with 25 sets of rules on information transmission, is higher. The European Union is also the adequate level because the information need of law enforcement authorities is largely determined by the level of integration between countries. EU integration being high, most of the relevant information for a Member State is in the hands of other Member States.

One set of rules will do away with 25 highly different sets of rules on information transmission.

The processing of relevant information across the EU by competent authorities will support action at national and at Union level to improve the capacity of the EU to prevent and combat terrorism. The purpose of the action is to empower national law enforcement authorities and Europol to obtain necessary law enforcement relevant information that is accessible in one of the Member States. Without action at the level of the EU, neither the knowledge that information is available in a Member State other than that of the requesting authority, nor uniform and consistent mechanisms to obtain it can be fully ensured.

The proposal therefore complies with the subsidiarity principle, and is without prejudice to Article 33 of the EU Treaty.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons.

The action sets out minimum standards and does not hinder the development of bi- or multilateral systems for information exchange that go beyond the current Framework Decision. Reference to national law is maintained where it does not hinder the efficiency and predictability of the mechanisms of obtaining available information, and since it offers

procedural guarantees.

- **Choice of instruments**

Proposed instruments: A Framework Decision based on Article 34(2)(b) TEU.

Other means would not be adequate for the following reason.

An alternative would have been a Council Decision on the basis of article 34(2)(c) TEU. However, this would not permit the harmonisation of the conditions to issue and reply to the information demand, or to obtain authorisation for access or transfer via the competent authorities in the requested or in the requesting Member State.

4. Budgetary implication

The implementation of the proposed Framework Decision would entail administrative expenditure, to be charged to the budget of the European Communities, for meetings of and the secretarial services for the committee to be established according to Articles 5 and 19.

5. Additional information

- **Correlation table**

The Member States are required to communicate to the Commission the text of national provisions transposing the Framework Decision as well as a correlation table between those provisions and this Framework Decision.

- **Detailed explanation of the proposal**

None.

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COUNCIL FRAMEWORK DECISION

on the exchange of information under the principle of availability

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 30(1)(b) and Article 34(2)(b) thereof,

Having regard to the proposal from the Commission[4],

Having regard to the opinion of the European Parliament[5],

Whereas:

(1) The European Union has set itself the objective to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police and judicial cooperation in criminal matters.

(2) The conclusions of the European Council of 15 and 16 October 1999 in Tampere affirm the need for improved information exchange between the competent authorities of the Member States for the purpose of prevention, detection or investigation of criminal offences.

(3) The Hague Programme on strengthening freedom, security and justice in the European Union, as adopted by the European Council on 4 November 2004, stressed the need for an innovative approach to the cross-border exchange of law-enforcement information under the principle of availability and invited the Commission to submit proposals in this regard by the end of 2005 at the latest. According to such principle, if a competent authority of a Member State needs information in order to perform its lawful tasks, it should be given the ability of obtaining this from the Member State that controls this information, which should make it available for the stated purpose.

(4) Moreover, Europol should have access to available information within the framework of its tasks and in accordance with the Convention of 26 July 1995 on the establishment of a European Police Office[6] (hereinafter referred to as the "Europol Convention").

(5) Increased possibilities for information exchange should be balanced by mechanisms to

[4] OJ C , , p. .

[5] OJ C , , p. .

[6] OJ C 316, 27.11.1995, p. 2, as last amended by the Protocol, drawn up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol), amending that Convention - OJ C 2, 6.1.2004, p. 3.

protect the fundamental rights of persons whose personal data are processed in the context of this Framework Decision. Council Framework Decision 2006/XX/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters[7] (hereinafter referred to as Framework Decision 2006/XX/JHA on the protection of personal data) applies to the processing of personal data by Member States according to the present Framework Decision. The provisions of the Europol Convention concerning data protection apply to the processing of personal data by Europol, including the powers of the Joint Supervisory Body, set up under Article 24 of the Europol Convention, to monitor the Europol activities. Europol shall be liable for the unlawful processing of personal data.

(6) This Framework Decision should lay down an obligation for the Member States to give access to or provide certain types of information available to their authorities to equivalent authorities of other Member States, in so far as these authorities need this information to fulfil their lawful tasks for the prevention, detection or investigation of criminal offences prior to the commencement of a prosecution.

(7) This obligation should only apply to the types of information listed in Annex II.

(8) Member States should notify the Commission of the authorities involved in the application of this Framework Decision, as well as the information that is available in each Member State and the conditions and purpose for its use.

(9) On the basis of the information notified to the Commission, it is necessary to determine the equivalence between authorities that have access to the different types of information, and the conditions that will apply to the access and use of information.

(10) The equivalent competent authority that obtains information under this Framework Decision should only use it for the purpose for which it was provided. The information provided should not be used as evidence of an offence without the prior authorisation of a judicial authority of the Member State that provided that information.

(11) The designated authorities and parties that control information falling within the scope of this Framework Decision should verify the quality of the information prior to and after its provision pursuant to the Framework Decision 2006/XX/JHA on the protection of personal data.

(12) Electronic databases containing a type of information covered by this Framework Decision which are accessible online to competent authorities of a Member State should be online accessible to equivalent competent authorities of the other Member States.

(13) If online access to the information is not possible, the equivalent competent authorities should have online access to index data that distinctively identify information covered by this Framework Decision and can be queried through a search routine for the purpose of establishing whether or not information to which they have access pursuant to this Framework Decision is available in another Member State. The index data should contain a reference to the designated authority that controls or handles that information.

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[7] OJ L […], […], p. […].

(14) Any information demand following a match after consultation of index data should be addressed to the designated authority using the form laid down in Annex I. The designated authority should reply within a limited period of time either providing the equivalent competent authority with the information, or giving the reasons why it cannot or do so immediately.

(15) The designated authority that provides information further to an information demand should be given the ability to subject the use of the information to instructions for use that should be binding on the competent authority that issued the demand.

(16) If a prior authorisation is requested by national law, the authorisation should be requested by the designated authority that controls the information. The authority responsible for the authorisation should reply within a limited period of time after the request is received. If the information demand concerns information that is to be used as evidence of an offence, the judicial authority of the Member State of the authority that controls the information should be responsible for the authorisation.

(17) The designated authority that controls the information should be entitled to refuse it for one of the grounds provided for by this Framework Decision.

(18) If the necessary technical infrastructure is temporarily deficient, the obligations incumbent on designated authorities for the provision of information should be assured to the extent possible by national contact points.

(19) The equivalent competent authority should keep a record of all information obtained according to this Framework Decision under the conditions set out in the Framework Decision 2006/XX/JHA on the protection of personal data. The information obtained for use as evidence should be kept in the relevant criminal file.

(20) The right of access by the data subject to the information demand concerning him and the reply made to it, should be exercised under the conditions set out in the Framework Decision 2006/XX/JHA on the protection of personal data.

(21) The conclusion of bilateral or multilateral agreements or arrangements on cooperation between the authorities of the Member States within the scope of this Framework Decision should be possible in order to further simplify or facilitate the modalities of the provision of information according to this Framework Decision.

(22) This Framework Decision should define the procedure for determining the equivalence between authorities that have access to the different types of information, the conditions applying to the access and use of information as well as for the definition of an electronic format for the communication of information or index data, the technical specifications relating to the information demand and reply and the means for the transmission of information.

(23) Since the objectives of the proposed action, namely improving the exchange of information that is available within the European Union, cannot be sufficiently achieved by the Member States acting alone, having regard to the cross-border nature of security issues. It can therefore by reason of the interdependence of Member States be better achieved at the level of the European Union. The Council may adopt measures, in

accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty and referred to in Article 2 of the EU Treaty. In accordance with the principle of proportionality as set out in Article 5 of the EC Treaty, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

(24) This Framework Decision does not affect specific cooperation regimes between competent authorities established under Title VI of the Treaty on European Union. In addition, in accordance with Article 47 of the Treaty on European Union, this Framework Decision does not affect the protection of personal data under Community law, in particular, as provided for in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[8].

(25) This Framework Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAS ADOPTED THIS FRAMEWORK DECISION :

Article 1

Subject-matter

1. This Framework Decision determines the conditions and modalities under which the types of information listed in Annex II, that are available to competent authorities of a Member State, shall be provided to equivalent competent authorities of other Member States and Europol, in order to assist them in the execution of their lawful tasks for the prevention, detection or investigation of criminal offences.

2. Nothing in this Framework Decision shall be interpreted as to have the effect of impairing respect for the procedural safeguards for the protection of fundamental rights and fundamental legal principles as enshrined in Article 6 of the EU Treaty.

Article 2

Scope

1. This Framework Decision shall apply to the processing of information prior to the commencement of a prosecution.

2. This Framework Decision does not entail any obligation to collect and store information either with or without coercive measures for the sole purpose of making it available to the competent authorities of other Member States and Europol. Information that has been lawfully collected by means of coercive measures shall be treated as available information that may be obtained under the conditions foreseen by this Framework Decision.

3. This Framework Decision shall not apply when a specific cooperation regime between competent authorities is established under Title VI of the EU Treaty.

[8] OJ L 281, 23.11.1995, p. 31.

4. Nothing in this Framework Decision shall affect applicable instruments on mutual legal assistance or mutual recognition of decisions regarding criminal matters.

Article 3

Definitions

For the purpose of this Framework Decision :

(a) "information" shall mean existing information, listed in Annex II;

(b) "competent authority" shall mean any national authority covered by Article 29, first hyphen, of the EU Treaty, as notified according to the procedure foreseen in Article 4, as well as Europol within the limits of its competences pursuant to the Europol Convention and its Protocols;

(c) "equivalent competent authority" shall mean any competent authority determined in accordance with the procedure set out in Article 5, to be equivalent to an authority of another Member State for the purpose of this Framework Decision;

(d) "designated authorities" and "designated parties" shall mean the authorities and parties that control the information or index data, as notified according to the procedure foreseen in Article 4;

(e) "national contact point" shall mean the competent authority for the purpose of providing or accessing information in case of deficiency of the technical means put in place following this Framework Decision, as notified according to the procedure laid down in Article 4;

(f) "online access" shall mean the automated access to an electronic database for the purpose of consultation of and access to its content, from another location than in which the database is located, without intervention of another authority or party;

(g) "index data" shall mean data the purpose of which is to distinctively identify information and that can be queried by means of a search routine to ascertain whether or not information is available.

Article 4

Notification

1. Member States shall, not later than six months after the entry into force of this Framework Decision, notify the Commission of:

   (a) the competent authorities for the purpose of this Framework Decision, with mention of their specific competence under national law;

   (b) the national contact points for each type of information;

   (c) the designated authorities and, as appropriate, designated parties for each type of information or related index data, and, for each designated party, the corresponding designated authority for the execution of the information demand pertaining to information controlled by that designated party;

   (d) the depository of each type of information and related index data, and the modalities to access each type of information and data, in particular whether or not information is accessible online;

   (e) the purpose for which each type of information may be processed and the competences of the authorities of that Member State that may obtain the information under their national law;

   (f) where prior authorisation by an authority is required before providing information, the authority concerned and the applicable procedure;

   (g) where applicable, the channel for the transfer of each type of information referred to by index data.

2. Member States shall forthwith notify the Commission of changes to the elements notified in accordance with paragraph 1 that shall supersede the corresponding previous notification.

Article 5

Equivalence between competent authorities

1. In order to determine the competent authorities which are entitled to access available information under this Framework Decision, the equivalence between competent authorities of the Member States shall be assessed on the basis of the criteria listed in Annex III and the notifications received pursuant to Article 4, not later than six months after the entry into force of this Framework Decision.

2. Measures determining the equivalence between competent authorities shall be adopted in accordance with the procedure laid down in Article 19. These measures shall cover:

   (a) for each type of information that is accessible online for national competent

authorities in a Member State, which competent authorities of other Member States with equivalent competences shall be entitled to access it online, with full respect of the purpose for which that information is processed in the former Member State;

(b) for each type of index data relating to information that is accessible for national competent authorities in a Member State, which competent authorities of other Member States with equivalent competences shall be entitled to consult it, with full respect of the purpose for which that information is processed in the former Member State.

3. The measures adopted according to this Article shall be classified "EU Confidential".

4. After receipt of a notification in accordance with Article 4(2), the measures adopted according to this Article shall be adapted within six months.

Article 6

Obligation to provide information

Member States shall ensure that information shall be provided to equivalent competent authorities of other Member States and Europol, under the conditions set out in this Framework Decision, in so far as these authorities need this information to fulfil their lawful tasks for the prevention, detection or investigation of criminal offences.

Article 7

Purpose limitation

The information under this Framework Decision shall only be used for the prevention, detection or investigation of the criminal offence for which the information is provided.

Article 8

Obligations of designated authorities and designated parties

1. The designated authority or the designated party shall verify the quality of the information prior to and after the provision of information, and inform forthwith the equivalent competent authority of any element affecting the quality of the information, in accordance with Framework Decision 2006/XX/JHA on the protection of personal data.

2. Information shall be provided in the language in which it is available.

3. If information is provided following an information demand pursuant to Article 11, the following data shall be recorded, in addition to the requirements of Article 10 of Framework Decision 2006/XX/JHA on the protection of personal data:

(a) the reference details of the information demand;

(b) the name of the official who authorised the transmission.

4. The record containing the documentation and/or the logging data shall be communicated to a competent supervisory authority in accordance with Framework Decision 2006/XX/JHA on the protection of personal.

5. The technical specifications for logging and recording of data shall be adopted in accordance with the procedure laid down in Article 19.

Article 9

Online access to information

1. Member States shall ensure that equivalent competent authorities of other Member States and Europol shall have online access to the information contained in electronic databases to which their corresponding competent authorities have online access.

2. If online access according to the first paragraph is not possible, Article 10 applies.

3. The technical measures necessary to realise online access to information shall be adopted in accordance with the procedure laid down in Article 19.

Article 10

Online consultation of index data

1. Member States shall ensure that index data of information that is not accessible online, shall be available for online consultation by equivalent competent authorities of other Member States and Europol and shall establish to this end the appropriate technical infrastructure.

2. The index data shall at least contain a reference to the type of information to which it relates as well as to the designated authority that controls or handles that information, and that shall be managing the index data for the purpose of this Framework Decision.

3. The rules necessary for the creation of index data as well as an electronic format shall be adopted in accordance with the procedure laid down in Article 19.

Article 11

Information demand

1. When consultation of index data by an equivalent competent authority results in a match, this authority may issue an information demand in accordance with Annex I, and send it to the designated authority in order to obtain the information identified by the index data.

2. The designated authority shall reply within twelve hours after receipt of the information demand, after having obtained the authorisation provided for in Article 13, where applicable.

3. In the case where the designated authority cannot or not immediately provide the information demanded, the reply shall inform the equivalent competent authority of the grounds thereof. It shall further indicate, where relevant, the procedure necessary to obtain the available information, or to obtain it more rapidly.

4. If the designated authority is not competent to deal with the information demand, it shall forthwith inform the equivalent competent authority of the designated authority that controls or handles the information demanded. The reference to the designated authority in the index data concerned shall be corrected, where necessary.

5. A designated authority that receives an information demand may subject the use of the information it makes available to instructions for use pursuant to Article 12.

6. All transmissions shall be by means that guarantee their integrity and authenticity.

7. Technical specifications relating to the electronic format of the information demand and reply and the means for their transmission shall be adopted in accordance with the procedure laid down in Article 19.

Article 12

Instructions for use

1. A designated authority may, by its reply, limit the use of the information with such instructions as are necessary:

   (a) to avoid jeopardising the success of an on-going investigation ;

   (b) to protect a source of information or the physical integrity of a natural person ;

   (c) to protect the confidentiality of information at any stage of processing.

2. The instructions for use shall be binding upon the competent authority that issued the information demand.

3. A standard format for communication of instructions for use shall be adopted in accordance with the procedure laid down in Article 19.

Article 13

Prior authorisation

1. If required by national law, the provision of information shall be subject to prior authorisation, unless a ground for refusal exists as set out in Article 14. This authorisation shall be requested by the designated authority and the authority responsible for the authorisation shall reply within twelve hours after receipt of the request.

2. In cases where the information is to be used as evidence of an offence, the prior

authorisation shall be requested from a judicial authority of the Member State of the designated authority.

Article 14

Grounds for refusal

1. The designated authority may refuse the provision of information on the following grounds :

   (a) to avoid jeopardising the success of an on-going investigation;

   (b) to protect a source of information or the physical integrity of a natural person;

   (c) to protect the confidentiality of information at any stage of processing;

   (d) to protect the fundamental rights and freedoms of persons whose data are processed under this Framework Decision;

2. A standard format for communicating the grounds for refusal shall be adopted in accordance with the procedure laid down in Article 19.

Article 15

Interim and emergency arrangements

In the case of a temporal deficiency of the technical infrastructure for providing information, the information shall be provided to the extent possible via the national contact points.

Article 16

Traceability

The equivalent competent authorities shall :

(a) keep a record of all information as set out in Article 8;

(b) where authorisation for use as evidence was obtained, include all information that is obtained pursuant to this Framework Decision in the relevant criminal file together with a copy of the information demand issued in accordance with Article 11.

Article 17

Right of access

Under the conditions foreseen in the Framework Decision 2006/XX/JHA on the protection of personal data , the data subject shall have access to the information demand provided for in Article 11 concerning him, and to the reply including the instructions for use issued pursuant to Article 12.

Article 18

Bilateral agreements on cooperation between the authorities covered by this Framework Decision

1. Member States may conclude bilateral or multilateral agreements or arrangements covering the scope of this Framework Decision in order to further simplify or facilitate the modalities of the provision of information according to this Framework Decision which are compatible with this Framework Decision and with Framework Decision 2006/XX/JHA on the protection of personal data.

2. Member States shall notify the Commission of such agreements or arrangements.

Article 19

Committee

1. Where reference is made to this Article, the Commission shall be assisted by a Committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The Committee shall adopt its rules of procedure on a proposal made by the Chair on the basis of standard rules of procedure which have been published in the *Official Journal of the European Union.*

3. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the chairperson may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty establishing the European Community, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The chairperson shall not vote.

4. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

   If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council

a proposal relating to the measures to be taken and shall inform the European Parliament thereof.

5. The Council may act by qualified majority on the proposal, within two months from the date of referral to the Council.

If within that period, the Council has indicated by qualified majority that it opposes the proposal, the Commission shall re-examine it. It may submit an amended proposal to the Council, resubmit its proposal or present a legislative proposal.

If on after the expiry of that period the Council has neither adopted the proposed implementing act nor indicated its opposition to the proposal for implementing measures, the proposed implementing act shall be adopted by the Commission.

6. The representatives of the Member States are designated from the authorities responsible for the implementation of this Framework Decision. Each Member State shall designate one representative.

Article 20

Implementation and application

1. Member States shall take all necessary measures to comply with this Framework Decision within the time limits provided for in this Framework Decision, and in any case on 30 June 2007 at the latest.

2. By the same date, Member States shall communicate to the Council and the Commission the text of the provisions transposing this Framework Decision into their national law, as well as a correlation table between those provisions and this Framework Decision.

3. By December 2008 at the latest, and every second year thereafter, the Council shall assess the implementation of this Framework Decision and take all measures necessary to ensure full compliance with it, on the basis of a report established by the Commission further to the information received in accordance with the second paragraph, as well as other relevant information provided by the Member States and following consultation of the Working Party established under Article 31 of the Framework Decision 2006/XX/JHA on the protection of personal data.

Article 21

Entry into force

This Framework Decision shall enter info force on the twentieth day following its publication in the *Official Journal of the European Union*.

Done at Brussels,

For the Council
The President

ANNEX I

Information demand

[DEMAND]

Further to [reference details of the of the hit] **the undersigned** [name of the competent authority], **issues herewith the present information demand for the attention of the** [name of the designated authority that controls or handles the demanded information] **to obtain the data specified herewith**.

1) Type(s) of information that is requested

2) Issuing competent authority:

Name:
Address :
Member State :
Telephone :
Telefax :
e-mail :

3) Designated authority:

Name:
Address :
Member State :
Telephone :
Telefax :
e-mail :

4) Type of offence(s) or criminal activity(-ies) concerned

5) Purpose for which the information is requested:

6) Known identity(-ies) of the person(s) subject to the action pursuant to which the information is requested:

7) Whether the information shall be used as evidence for a criminal offence:

[Place of issue], [date] <SIGNATURE>

[RESPONSE]

Having regard to the information demand issued by [name authority], the undersigned [name authority], charges [name authority] to respect the following instructions for use of the information that it provides herewith:

Instructions for use

(1) The information that is obtained under this Framework Decision shall only be used to make possible, facilitate, or accelerate the prevention, detection or investigation of criminal offences.

(2) [Other]

[Place of issue], [date] <SIGNATURE>

ANNEX II

Types of information that may be obtained under this Decision to prevent, detect or investigate criminal offences

Under the conditions set out in this Framework Decision, the following types of information may be obtained :

– DNA-profiles, i.e. a code of numbers and letters established on the basis of the seven DNA markers of the European Standard Set comprising as defined in Council Resolution 2001/C 187/01 of 25 June 2001 on the exchange of DNA analysis results[9]. These markers will not contain any information about specific hereditary characteristics.

– Fingerprints.

– Ballistics.

– Vehicle registration information.

– Telephone numbers and other communications data, with the exclusion of content data and traffic data unless the latter data are controlled by a designated authority.

– Minimum data for the identification of persons contained in civil registers.

[9] OJ C 187, 3.7.2001, p. 1.

ANNEX III

Criteria for the appraisal of correlations between equivalent competent authorities pursuant to Article 5

The Committee mentioned in Article 19 shall appraise the equivalence of competent authorities for each of type of information listed in Annex II on the basis of the following elements.

I Name of the authority or authorities of the Member State that controls the information that is or are entitled to access one or more types of information listed in Annex II

I.1 Competence of the authority or authorities with regard to the

I.1.a collection or creation

I.1.b access

I.1.c use

I.1.d other forms of processing of each type of information listed in Annex II

I.2 Purpose for which the information may be processed by the authority or authorities under the law of the Member State that controls the information

I.2.a prevention

I.2.b detection

I.2.c investigation for each type of information listed in Annex II

II Name of the competent authority or authorities for each Member State notified pursuant to Article 4(1)(a)

II.1 Competence of the authority or authorities with regard to the

II.1.a collection or creation

II.1.b access

II.1.c use

II.1.d other forms of processing of each type of information listed in Annex II.

II.2 Purpose for which the information may be processed under national law

II.2.a prevention

II.2.b detection

II.2.c investigation for each type of information listed in Annex II.

ANNEX IV

LEGISLATIVE FINANCIAL STATEMENT

Policy area(s): Justice and Home Affairs

Activit(y/ies): 1806 – Establishing a genuine area in criminal and civil matters

Title of action: Proposal for a Council Framework Decision on the exchange of information under the principle of availability

1. BUDGET LINE(S) + HEADING(S)

NA

2. OVERALL FIGURES

2.1. Total allocation for action (Part B): € million for commitment

NA

2.2. Period of application:

Starting 2006.

2.3. Overall multi-annual estimate of expenditure:

(a) Schedule of commitment appropriations/payment appropriations (financial intervention) *(see point 6.1.1)*

€ million (*to three decimal places)*

	[2006]	[2007]	[2008]	[2009]	[2010]	[2011]	Total
Commitments							
Payments							

(b) Technical and administrative assistance and support expenditure *(see point 6.1.2)*

Commitments							
Payments							

Subtotal a+b							
Commitments							
Payments							

(c) Overall financial impact of human resources and other administrative expenditure *(see points 7.2 and 7.3)*

Commitments/ payments	0.362	0.362	0.362	0.362	0.362	0.362	2,172

TOTAL a+b+c							
Commitments	0.362	0.362	0.362	0.362	0.362	0.362	2,172
Payments	0.362	0.362	0.362	0.362	0.362	0.362	2,172

2.4. Compatibility with financial programming and financial perspective

NA

2.5. Financial impact on revenue:

Proposal has no financial implications

3. BUDGET CHARACTERISTICS

Type of expenditure		**New**	**EFTA contribution**	**Contributions form applicant countries**	**Heading in financial perspective**
Non-comp	Non-diff	NA	NA	NA	**No** NA

4. LEGAL BASIS

Article 30, and 34 (2)(b)TEU

5. DESCRIPTION AND GROUNDS

5.1. Need for Community intervention

5.1.1. Objectives pursued

The Framework Decision establishes an obligation for Member States to make existing information that is accessible to their competent authorities, also accessible to the competent authorities of other Member States and to Europol. It lays down the obligation to make information contained in electronic databases, and directly accessible to competent authorities via online access also accessible via the same means to the competent authorities of other Member States and to Europol. Where this information is indirectly accessible based on an authorisation of an authority other than the one that controls the data, the authorisation shall be given promptly unless a ground for refusal foreseen by this Framework Decision exists. It also lays down the obligation to provide online access to index data of information that is not accessible

online, and to transfer that information further to a formal information demand. It furthermore lays down the limits to these obligations.

Furthermore, according to the Articles 5 and 19 of the Framework Decision a committee, composed of the representatives of the Member States and chaired by a representative of the Commission, shall assist the Commission in order to determine the equivalence between competent authorities of the Member States and to develop, where necessary, technical details of the exchange of information.

5.1.2. Measures taken in connection with ex ante *evaluation*

Representatives of the Governments and of the independent supervisory authorities of the Member States as well as of the European Data Protection Supervisor, Europol and Eurojust were consulted. In particular, taking into account different views the Commission proposes to establish the information exchange on the basis of the principle of availability. In order to estimate the possible cost caused by this measure, the Commission verified the cost (travel expenses, secretarial support for the preparation and organisation of meetings) estimated for the Committee proposed in Article 3(3) of the Proposal for a Council Decision on the improvement of police cooperation between the Member States of the European Union, especially at the internal borders and amending the Convention implementing the Schengen Agreement - COM (2005) 317, 18 July 2005 -, and those currently incurred by the Working Party established according Article 29 of Directive 95/46/EC.

5.2. Action envisaged and budget intervention arrangements

The above mentioned Committee will probably meet regularly, estimated three times a year, whenever necessary. One participant per Member State will have to be reimbursed.

5.3. Methods of implementation

All meetings will have to be organised and hosted by the Commission. The Commission will have to provide secretarial services for the above mentioned committee and to prepare/organise their meetings.

6. FINANCIAL IMPACT

6.1. Total financial impact on Part B - (over the entire programming period)

6.1.1. Financial intervention

NA

6.1.2. Technical and administrative assistance, support expenditure and IT expenditure (commitment appropriations)

NA

6.2. Calculation of costs by measure envisaged in Part B (over the entire

programming period)

NA

7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

The impact on staff and administrative expenditure will be covered in the context of allocation of resources of the lead DG in the context of the annual allocation procedure.

The allocation of posts also depends on the attribution of functions and resources in the context of the financial perspectives 2007-2013.

7.1. Impact on human resources

Types of post		Staff to be assigned to management of the action using existing and/or additional resources		Total	Description of tasks deriving from the action
		Number of permanent posts	Number of temporary posts		
Officials or temporary staff	A B C	0.25 A 0,50 B 1,00 C		0,25A 0,50B 1,00C	Providing secretarial support, preparing the meetings of the working party and the committee
Other human resources					
Total					

7.2. Overall financial impact of human resources

Type of human resources	Amount (€)	Method of calculation *
Officials Temporary staff	1rst year: 189. 000	1 X 108 000 0.5 X 108 000 0,25 X 108.000 = 189 .000
Other human resources (specify budget line)		
Total	189.000	

The amounts are total expenditure for twelve months.

7.3. Other administrative expenditure deriving from the action

Budget line (number and heading)	Amount €	Method of calculation
Overall allocation (Title A7) A0701 – Missions A07030 – Meetings A07031 – Compulsory committees A07032 – Non-compulsory committees A07040 – Conferences A0705 – Studies and consultations Other expenditure (specify)	55.000	3 meetings * (25 * 740€) *per annum*
Information systems (A-5001/A-4300)		
Other expenditure - Part A (specify)		
Total	55.000	

The amounts are total expenditure for twelve months.

Specify the type of committee and the group to which it belongs.

I.	Annual total (7.2 + 7.3)	€ 244.000
II.	Duration of action	
III.	Total cost of action (I x II)	

8. FOLLOW-UP AND EVALUATION

8.1. Follow-up arrangements

The working party and the committee will lay down their rules of procedure, including rules on confidentiality. The European Parliament will be informed analogous to Article 7 of Council Decision 99/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission - OJ L 184, 17.7.1999, p. 23.

8.2. Arrangements and schedule for the planned evaluation

NA

9. ANTI-FRAUD MEASURES

NA