

## **Availability vs. Privacy: whither data protection after The Hague Programme?**

**Jeanne Pia Mifsud Bonnici**

Centre for Law, Information & Converging Technologies, University of Central Lancashire

Email: [jpmifsud-bonnici@uclan.ac.uk](mailto:jpmifsud-bonnici@uclan.ac.uk)

**Joseph A. Cannataci**

Centre for Law, Information & Converging Technologies, University of Central Lancashire

Email: [jacannataci@uclan.ac.uk](mailto:jacannataci@uclan.ac.uk)

### **Abstract**

The discovery in the UK in January 2007 of the 27,000 backlog of files on crimes committed by Britons abroad not being entered in the Police National Computer refreshes the debates on the security and reliability of personal data retained by the Police, both at a national level and at a European Union wide level.

The European Union has been keenly working on improving the cross-border exchange of law-enforcement information between the Member States. Under the Dutch Presidency in 2004, the EU Member States agreed to The Hague Programme on strengthening freedom, security and justice in the European Union. One way of strengthening security, it is argued, is by improving the cross-border exchange of law-enforcement information – or as it is being called – ‘the principle of availability’ of law-enforcement information. The UK discovery of the backlog of files on crimes committed abroad supports the need for a Europe-wide effort of improving the cross-border exchange of law-enforcement information.

While from a security and law enforcement perspective there are undoubtedly good arguments in support of a Europe-wide ‘principle of availability of law-enforcement information’, from a citizen’s perspective there are also important data protection considerations to be made.

Even though the The Hague Programme stresses that key principles of data protection should be observed in the effort to improve the cross-border law enforcement data exchange, there is strictly speaking no EU data protection standard to apply in this situation. The EU Data Protection Directive 95/46/EC specifically excludes its application to activities “outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law”.<sup>1</sup> Some Member States, particularly those party to the Schengen and Europol agreements admittedly have adopted a common data protection standard for police data since both agreements have subscribed to the principles set out in the Council of Europe Recommendation 87(15) regulating the use of personal data in the police sector. Yet this is not an EU wide standard.

The EU not only has no EU wide standard of data protection in security and police matters but has arguably, by means of the recent<sup>2</sup> Data retention Directive 2006/24/EC sent across an ‘anti-data protection’ principles for police data message by effectively cancelling the protection of one of the main principles in data protection – ‘the purpose specification principle’.

In view of the above, how does the European Commission propose to meet the concerns voiced in the The Hague Programme? It proposes a ‘Framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters’.<sup>3</sup> This proposal was adopted by the Commission in February 2006.<sup>4</sup>

This paper proposes to assess the level of protection that this adopted proposal for a Framework Decision is proposing to the Member States. It does so by:

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<sup>1</sup> Article 3 of Directive 95/46/EC

<sup>2</sup> March 2006

<sup>3</sup> 4<sup>th</sup> October 2005 Doc. Ref. COM(2005) 475 final

<sup>4</sup> OJ 2006 C49 /12

- (a) tracing the history of the document adopted by the Commission, then traces the path that the proposal has travelled so far – submission to Council and to the European Parliament,<sup>5</sup> the report of the European Parliament Rapporteur, Martine Roure,<sup>6</sup> discussed over two sessions<sup>7</sup> before being adopted by the European Parliament that have lead to a partial agreement to the proposal.<sup>8</sup>
- (b) Comparing the proposed Framework decision to the established principles found in EU Directive 95/46/EC and Council of Europe Recommendation 87(15).

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<sup>5</sup> 4-10-2005

<sup>6</sup> Presented to Parliament 18-05-2006 (Doc. Ref. A6-0129/2006)

<sup>7</sup> 14-06-2006 and 27-09-2006

<sup>8</sup> 27-09-2006