COUNCIL OF
THE EUROPEAN UNION

Brussels, 13 November 2008 (17.11)
(OR. en,fr)

12694/4/08
REV 4

LIMITE

CRIMORG 136
TELECOM 123

PUBLIC

NOTE

from:	Presidency
to:	Council
Subject:	Draft conclusions of the Council of the European Union on combating the criminal misuse and anonymous use of electronic communications

Delegations will find attached draft conclusions on combating the criminal misuse and anonymous use of electronic communications.

The text was discussed at meetings of the Multidisciplinary Group on Organised Crime (MDG) on 18 September and 17 October 2008 and at meetings of the Article 36 Committee (CATS) on 2 and 3 October and 30 and 31 October 2008. At Coreper's meeting on 12 November 2008, consensus was reached on the text attached as Annex I.

Ireland has informed the Presidency that it intends to make the statement attached as Annex II when the Council adopts the conclusions.

ANNEX I

Conclusions of the Council of the European Union
on combating the criminal misuse and anonymous use
of electronic communications

THE COUNCIL OF THE EUROPEAN UNION,

RECALLING the importance it attaches to the development in the territory of the European Union of electronic communications and of roaming, which are corollaries of the principle of the free movement of persons and of the establishment of a real "People's Europe";

WELCOMING the efforts of the European Commission, the Member States, national regulators and providers of electronic communications to improve communications between users, in particular through roaming agreements;

WELCOMING the reduction of roaming costs resulting from Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the framework Directive) and Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC;

RECALLING that the free movement of persons and the development of electronic communications must go hand in hand with the establishment of an area of freedom, security and justice, one of the substantive objectives of the European Union;

BEARING IN MIND Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, and amending Directive 2002/58/EC;

EMPHASISING the importance of the rules contained in the abovementioned instruments for both the protection of data derived from electronic communications and the conservation of such data for the purposes of criminal investigations;

DRAWING ATTENTION to the fact that organised criminal groups take advantage of the implementation of the principle of free movement of persons and the development of electronic (and especially mobile) communications to conduct their criminal activities in the territory of the Union;

NOTING that the impossibility, for the competent authorities, of identifying users of mobile telephones working with prepaid SIM cards can allow perpetrators of criminal offences to communicate with co-perpetrators or accomplices with complete impunity;

NOTING also that cross-border crime can be facilitated by the fact that, in roaming, the identity of the subscriber of the telephone line, registered with the home operator, is unknown to the host country operator registered in the destination country, whether that line operates on the basis of a subscription or a prepaid SIM card;

CONSIDERING the advantage there would be in being able to know the identity of the purchaser of a prepaid SIM card, in order to trace the user of a terminal;

EMPHASISING furthermore that mobile telephony is the medium of numerous criminal offences against mobile phone operators such as fraudulent reloading of prepaid phone cards and VAT fraud;

INSISTING that the development and intensification of police and judicial cooperation in criminal matters in European Union territory must be accompanied by improvements in the partnership between the public and the private sectors;

BEARING IN MIND its conclusions of 8 May 2003, in which it considered that the tracing of the use of prepaid mobile telephone cards could improve criminal investigations and particularly those relating to serious criminal offences,

CONCLUDES THAT IT IS NECESSARY TO COMBAT THE CRIMINAL MISUSE AND ANONYMOUS USE OF ELECTRONIC COMMUNICATIONS, AND TO THAT END:

RECALLS the importance of making the best possible use of the potential offered by the abovementioned European instruments;

INVITES Member States to supply, at the request of the Commission, all relevant information on legislative and non-legislative measures or technical solutions implemented to identify users of communications media, and their degree of operational effectiveness;

INVITES the Commission, in the context of the report referred to in Article 14 of the abovementioned Directive 2006/24/EC, and by 15 September 2010, to inform it of the legislative and non-legislative measures or technical solutions notified by the Member States and, on that basis, to propose non-legislative and technical solutions to help the services and authorities responsible for compliance with the law to better identify users of electronic communications services such as users of mobile phone lines opened with prepaid SIM cards and, if after evaluation it is apparent that these measures are unsuccessful in effectively ensuring traceability, to propose legislative measures;

SUGGESTS that these proposals also address the question of the reasonable retention period for information necessary to identify the phone user, given the time required for criminal investigations and in particular for those relating to serious forms of crime;

STRESSES that these proposals must take account of the objective of keeping the processing of personal data to a minimum and of using anonymous or pseudonymous data where possible, pursuant to the abovementioned Directive 2006/24/EC;

STATES that it is important that these proposals take account of their cost in relation to their anticipated benefit, and of a fair balance between the needs of the authorities and services responsible for criminal investigations and the economic development of operators and distributors, bearing in mind the constraints which already weigh on them;

HOPES, finally, that the Commission proposals will, if appropriate, address any other difficulty encountered by Member States or their competent authorities in the framework of criminal investigations relating, in particular, to serious forms of crime, as regards the traceability of electronic communications, whether mobile or not – for example, difficulties relating to instant messaging used from a portable computer.

ANNEX II

Statement by Ireland

"Ireland notes that the Council Conclusions contain a number of references to Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, and amending Directive 2002/58/EC.

In that context, Ireland draws the attention of the Council to the fact that Directive 2006/24/EC is currently the subject of a challenge before the Court of Justice of the European Communities. Accordingly, any reference to the Directive in the Council Conclusions must be regarded as being subject to the outcome of the relevant proceedings before the Court of Justice."