Council of the
European Union

Brussels, 19 January 2015
(OR. en)

5360/15

Interinstitutional File:
2013/0256 (COD)

EUROJUST 6
EPPO 5
CATS 6
COPEN 8
CODEC 60

NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	17045/14 EUROJUST 223 EPPO 79 CATS 210 COPEN 322 ODEC 2543
No. Cion doc.:	12566/13 EUROJUST 59 EPPO 4 CATS 36 COPEN 109 CODEC 2163
Subject:	Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust) - Written comments from Member States on the revised text of Chapter IV and Annex II

Delegates will find in annex written comments from Member States on document 17045/14.

Comments from Member States

1. Austria

Article 27 para 3:

The terms “in exceptional cases”, “for a limited period of time” and “data … relating to the circumstances of an offence” seem to need further clarification in our opinion. Art 8 of the Charter of Fundamental rights of the EU states that data “must be processed fairly for specified purposes and on the basis of […] some other legitimate basis laid down by law”. Art 8 of the Charter is related to Art 8 of the European Convention on Human Rights. So far the European Court of Human Rights stated that exemptions have to be foreseeable and sufficiently precise. For citizens it must be clear when and to which extent public bodies may process personal data.

Austria is therefore of the opinion that the above mentioned terms should be clarified, which should at least be done within additional recitals.

Article 27 para 4:

Austria would suggest the following amendment: “[…] if they supplement other personal data relating to the same person already processed” in order to clarify that data (mentioned in para 4) shall not relate to other persons than accused, victims or witnesses mentioned in para 1 and 2.

Article 28 para 3:

With regard to the time limits for the storage of operational personal data we would suggest to add an ultimate limit to make sure that time limits cannot be prolonged for good. Such an ultimate limit should at least be the time when the Member State initially providing the data would have an obligation to delete it.

2. Czech Republic and UK (Joint position)

Article 27

Article 27 states that the national members of Eurojust can only process data which are listed in the Annex 2. However, the experience of the national desks show that the MLA requests which are sent to the national members from the national competent authorities often include also other data, not listed in the Annex. In this regard, we would highlight Eurojust's response to the additional questions raised at the COPEN Working Party (10622/14).

Paragraphs 3 and 4 contain the possibility to process also data other than those listed in the Annex in exceptional cases, however the permission to process those data is subject to very strict rules, including the involvement of an extra entity (another national member, DPO, the College) that needs to examine the conditions under which it should be allowed that the data are processed. Requests received by the national members are frequently very urgent and may include data referred to under paragraph 4. Such strict rules may inhibit the efficient work carried out by the national members and might jeopardize a successful resolution of the case.

The Czech Republic and the United Kingdom therefore jointly proposes the following changes in Article 27 par. 2, 3 and 4.

First of all we would like to delete the words “strictly” in each of the paragraph, as we are of the opinion that the word “necessary” is sufficient.

In paragraph 3 it is unclear why <u>two</u> national members should decide (and there is no reference who the other national member should be), we suggest specifying “the relevant national members” (by which we mean the national members involved in the case). The recourse to the DPO we have put in brackets, as it is not clear if he or she has any decisive role in the process. Should it be just short information to the DPO, without any feedback on whether the data could be processed or not, than it might not inhibit the efficient work of Eurojust.

In paragraph 4 we have deleted the reference to the College, as we feel that referring such matters to College every time, which is a very time consuming procedure, would seriously impede the work of the national members and the interests of the national competent authorities (not given the fact that it goes contrary to the aim of the reform of Eurojust where the College should be reduced of any unnecessary workload). We must take into account that this is an everyday practice of the national members. The reference to DPO is again in brackets, see the explanation above.

(The dots imply that the paragraph remains unchanged from the PRES proposal).

Article 27

Processing of operational personal data

1. …..

2. Eurojust may process only the personal data listed in point 2 of Annex 2, on persons who, under the national legislation of the Member States concerned, are regarded as witnesses or victims in a criminal investigation or prosecution regarding one or more of the types of crime and the offences referred to in Article 3, The processing of such personal data may only take place if it is ~~strictly~~ <u>strictly</u> necessary for the fulfillment of the tasks of Eurojust, within the framework of its competence and in order to carry out its operational functions.

3. In exceptional cases, Eurojust may also, for a limited period of time which shall not exceed the time needed for the conclusion of the case related to which the data are processed, process personal data other than those referred to in paragraphs 1 and 2 relating to the circumstances of an offence where they are immediately relevant to and included in on-going investigations which Eurojust is coordinating or helping to coordinate and when their processing is ~~strictly~~ necessary for the purposes specified in paragraph 1. [The Data Protection Officer referred to in Article 31 shall be informed immediately of recourse to this paragraph and of the specific circumstances which justify the necessity of the processing of such personal data]. Where such other data refer to witnesses or victims within the meaning of paragraph 2, the decision to process them shall be taken jointly by ~~at least two~~ **the relevant** national members.

4. Personal data, processed by automated or other means, revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data ~~and data~~ concerning health or sex life may be processed by Eurojust only when such data are ~~strictly~~ necessary for the national investigations concerned as well as for coordination within Eurojust and if they supplement other personal data already processed. [The Data Protection Officer shall be informed immediately of recourse to this paragraph.] Such data may not be processed in the Index referred to in Article 24(4). ~~Where such other data refer to witnesses or victims within the meaning of paragraph 3, the decision to process them shall be taken by the College.~~

4(a) …..

Article 32

We feel strongly that at least the content of Article 19(7) of the current Eurojust Decision (2002/187/JHA) needs to be replicated in Article 32 of the proposal for a new Regulation. This is because the ‘neither confirm nor deny’ principle is an important tool to preserve the integrity of investigations.

Article 32

Modalities regarding the exercise of the right of access to operational personal data

1. Any data subject wishing to exercise the right of access to operational personal data **relating to him or her (held by Eurojust)** may make a request to that effect free of charge to the authority appointed for this purpose in the Member State of their choice. That authority shall refer the request to Eurojust without delay and in any case within one month of receipt.

6(a) Eurojust shall inform the data subject in writing on any refusal or restriction of access, on the reasons for such a decision and of his right to lodge a complaint to the [European Data Protection Supervisor][JSB]. **If access is refused or restricted according to paragraph 2a or if no personal data concerning the data subject are processed by Eurojust, the latter shall notify the data subject that it has carried out checks, without giving any information which could reveal whether or not the data are processed by Eurojust.**

3. Finland

Article 27

Processing of operational personal data

4(a). No decision which produces adverse legal effects concerning a data subject or severely **affects him or her** shall be based solely on automated processing of data referred to in paragraph 4, unless the decision is expressly authorised pursuant to national or Union legislation **which also lays down suitable measures to safeguard the data subject's legitime interests.**

4. Portugal

Portugal continues supporting the position that the new Eurojust Regulation needs to be aligned with the data protection provisions in the legal acts relating to other JHA agencies, in particular with Europol General approach, as well as the general data protection package which are currently under negotiations, in order to ensure consistency.

In this regard Portugal wants to maintain the scrutiny reservation **on all Chapter IV**, as it stands in the footnote 1 of the document 17045/14 of November 19. Accordingly, we want also to point out that is, in our opinion, extremely importante to take into account the footnote number 2 of the same document.

We retain the right to make further comments at the next working group meeting, and in the future, after having knowledge of the new wording to Articles 35 and 36, that are being prepared by the Presidency. The objetive is to find the best solution to one of the biggest question of this Regulation: the agreement on t**he Data Protection Supervisor Body** (at national and European level), taking into account the development of the ongoing negotiations on the "data protection reform" package, and the conclusions reached at JHA Council about Europol General Approach :

The Council meeting of 5-6 June 2014 reached a general approach on the text of Europol regulation, in order to constitute the basis for negotiations with the European Parliament in the context of the ordinary legislative procedure of Article 294 TFEU, **noting that in order to have a coordinated approach to the data protection provisions in the legislative acts relating to various JHA agencies, in particular Eurojust and EPPO, where relevant and taking into account the special features of these agencies, coherence should be sought between Chapter VII of this Regulation, the draft Regulations on Eurojust and EPPO as well as the data protection package**.

1. **Article X**

As said before, we totally support the inclusion of the Article X containing a set of definitions that **should cover only those concepts (**personal data, operational personal data, administrative personal data, etc), **which are included in the text of Eurojust Regulation**, and where separation and clarification is clearly required, in line with "data protection reform" package.

2. **Article 27 (4) – Processing of <u>operational</u> personal data**

Portugal insists on the inclusion of the reference to the genetic data, to align the text with the first paragraph of Article 9 of the General Data Protection Regulation which provides for an equal treatment of genetic data with other special categories of personal data, but the sentence must be reformulated as follow:

*"Personal data, processed by automated or other means, revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, tradeunion membership, **<u>and the processing of genetic data or data concerning health or sex life</u>** may be processed by Eurojust only when such data are strictly necessary for the national investigations concerned as well as for coordination within Eurojust and if they supplement other personal data already processed(…)"*

3. **Annex 2 - Categories of personal data referred to in Article 27**

Portugal can support the addition of the categories of personal data of indents g), h), and i). Concerning the expression "or other adequate number" in point g), that have displeased some Member States we would like to contribute with the following wording sugestion: "or other equivalent national number"

Portugal has no difficulties with the addition of the number of license plates of a victim or a witness, as a new categorie of personal data.

5. Slovakia

General comment:

SK has a preference for keeping the Joint Supervisory Body within the Eurojust mechanism.

Article 26a lit a:

SK suggests **deleting** a word **"fairly".** The meaning of this term is unclear and may lead to practical difficulties. In case of keeping the term in the text an explanation should be given in recitals.

Article 26b para 3 (and Article 31 para 5)

SK suggests **redrafting of** the provision and **merging** it with Article 31 para 5 in a new Article 27a as follows:

Article 27a

Non-compliance with the data protection provisions

"If the Data Protection Officer considers that the provisions of Regulation (EC) No 45/2001 related to the processing of administrative personal data **or the provisions of this Regulation related to the processing of operational personal data** have not been complied with, he or she shall inform the Administrative Director, requiring him or her to resolve the non-compliance with a specified time. If the Administrative Director does not resolve the non-compliance within specified time, the Data Protection Officer shall refer the matter to the College. If the College does not resolve the non-compliance of the processing within the **reasonable** time, the Data Protection Officer shall refer the matter to the **JSB.**

Moreover the content of the provision should be further explained. It seems that the wording is based on the presumption that the procedure of resolving of non-compliance is related to non-respecting of the time limit. However, it is unclear, whether the provision can be used also in cases, where Data Protection Officer is not satisfied how the non-compliance was resolved (so the matter of the substance is in question). Furthermore, If it is just a matter of time, we propose that in case of non-respecting the time limit it would be a step-by-step procedure (Administrative Director was not able to resolve the non-compliance and he or she would directly refer the matter to the college and to notify the Data Protection Officer about the procedure; the College would act similarly in a case of no resolution on the non-compliance).

Article 27

a) General comment on deadlines

It seems that the period for storage of data does not correspond with the idea of providing Eurojust with sufficient information for necessary for its work (for instance to be able to identify the links of the cases to other Member States). On one hand, the national authorities are obliged to provide a number of information; on the other hand, data should be deleted shortly. The provision on deadlines is complicated to follow, it contains a number of conditions and cross-references. We suggest that consideration should be given to an extension of the general time limit for storage, e.g. to five years and to simplify the whole mechanism of time limits.

b) Paragraph 1

SK suggest adding **”or accused”** after a word “suspected” in a fifth line of para 1.

In the SK criminal law system a term “suspect” is not defined. The legislation defines a term “accused”. Therefore it would lead to practical difficulties if the accused is not covered by the text. There is another reason for the proposed addition that is the consistency with other legal texts in the field of a criminal law (e.g. Directive 2013/48/EU)

c) Paragraph 4

SK suggests **deleting** a word **"strictly"** in para 4.

We believe that necessity of data should be sufficient. We also question what it means that the Data Protection Officer should be informed of recourse of the paragraph. Should he or she have an access to genetic data, data concerning health or sex life? In some cases there is a necessity to process such data. However, the access to data should be strictly limited to those involved in the investigation, prosecution and coordination of the case.

Article 28

a)Paragraph 1

We support keeping the text **"Eurojust is informed that"** in paragraph 1 lit b). Moreover, we believe that such wording should be added as a general condition for all situations listed in paragraph 1. There is an obligation for Eurojust not to store data beyond the first applicable among different dates. Non-compliance may have consequences for Eurojust. However, Eurojust may act only if it is notified that one of the conditions was applicable to the data stored by it. In other words the Eurojust may not store data beyond the applicable dates if it knew that such conditions were applicable.

b) Paragraph 3

The relations between paragraph 1 and 3 should be improved. Paragraph 1 provides general condition that data may not be stored by Eurojust beyond the first of applicable dates. This is without prejudice to paragraph 3. However, paragraph 3 refers to situation where one of the storage deadlines in paragraph 1 has already expired. I would be more logical to make a review of the need for a storage of data longer before the deadline expires or on the basis of the information provided to Eurojust that one of the conditions in paragraph 1 is applicable.

Article 28a

SK would appreciate more information on technical and organisational measures, as well as the expenses of the measures outlined in paragraph 2. In principle we support the idea to take appropriate measures with regards to data security, however, no sufficient information has been provided so far on practical, administrative and financial consequences of this provision.

Article 31 para 1be

SK suggests more flexible conditions for the appointment of the Data Protection Officer. The work of the Data Protection Officer requires a lot of knowledge and experience. We should reconsider whether the maximum term of the office is really needed. Secondly SK does not support the need for consent of the European Data Protection Supervisor to a dismissal of the Data Protection Officer. We would, however, see reasons for the involvement of the College to the process of a dismissal.

Article 32

a) Paragraphs 1 and 2

SK suggests **keeping** the words **"directly to Eurojust or"** in paragraph 1.

This provision regulates the right of access to operational data processed **by Eurojust.** Therefore the Eurojust should be the authority to which a request should be addressed.

It should also be considered that in exceptional cases organized crime groups may consider to send to Eurojust high volume of requests under paragraph 1 in order to decrease the Eurojust ability to fulfil its tasks. Therefore it should be further considered, whether the rule should be without any exemptions as it stays now. Paragraph 2a provides exemptions only for the access, not for the time limits.

b) Paragraph 2a)

SK requests for further clarification of the last sentence of this paragraph: “When the applicability of an exemption is assessed, the interests of the person concerned shall be taken into account”.

c) Paragraph 6a

This provision requires major changes. If it is clearly stated that in cases covered by paragraph 2a a person is notified only that Eurojust carried out the checks. Such regulation gives to suspects or accused clear information that Eurojust is having an interest in cases related to such persons. This situation is inappropriate. Article 19 para 7 of the current Eurojust decision provides a possible basis for a solution to the issue.

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