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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 5708/15.

Comments from Member States

1. Austria

The Austrian Delegation would like to submit the following comments:

Art.26a General data protection principles

With regard to lit. b we are of the opinion that the first sentence should not limit the scope by referring to “further” processing of data, also the processing of data should be taken account of. We would be in favour of deleting the word “further”: “(b) collected for specified, explicit and legitimate purposes and not ~~further~~ processed in a manner incompatible with those purposes. [...]”

We would propose to add a principle of erasure to the text, as follows:

“lit. g erased or made anonymous when they are no longer required for the purpose for which they were lawfully collected or are lawfully further processed.”

Art.28 Time limits for the storage of operational personal data

With regard to para 1 the Regulation should explicitly mention an obligation to erase personal data, if they were processed unlawfully.

Regarding para 3 there does not seem to be an ultimate limit for the processing of the mentioned sensitive personal data. We propose that such a limit should be added.

In order to tackle those problems we propose to add the following sentence at the end of para 1:

“Personal operational data shall be erased if they were processed unlawfully. Personal operational data shall in any case be erased by the time national time limits for the erasure of data apply according to the law of the Member State which provided the data concerned.”

New Art. 26c

Eurojust raised doubts whether the Regulation was clear enough as to which rules shall apply to operational personal data and argued that it should be clarified for the sake of legal certainty that Regulation 45/2001 shall not apply to operational personal data.

As we agree with the raised concerns, we would propose the following addition:

“With regard to operational personal data only the following rules provided for by this Regulation shall apply.”

Art.34b Supervision by the European Data Protection Supervisor

Eurojust furthermore mentioned that the European supervision regime concerning the compliance with the data protection provisions would apply even to measures taken by the National Member in accordance with national law.

For Austria it is not acceptable that such procedural measures would be subject to the control of the EDPS. In fact national data protection rules would apply to those measures. Therefore we would be in favour of clarifying this in the Regulation by adding a sentence at the end of para 1: “Whenever National Members act in accordance with/application of national law, in particular when exercising the powers provided for in Art 8 para 1a – 3, Chapter IV of this Regulation shall not be applicable. Such processing of data shall be subject to the rules provided for by national law, including the rules on supervision of the data processing.”

From a procedural point of view it wouldn't make any difference whether procedural measures are ordered by a national authority under national law or by the National Member under national law. Measures taken by the National Member – procedurally – have to be treated the same way as measures taken by national authorities.

2. Czech Republic

CZ would like to submit a proposal to changes in Annex II, par. 1 letter l), and par. 2 letter i) of the draft Eurojust regulation, as follows:

„telephone numbers, email addresses, traffic data and location data, as well as any ~~related~~ data necessary to identify the subscriber or user“

Reasoning: CZ is of the opinion that this paragraph should be in line with current and also future developments in the field of Information technologies, therefore we suggest formulating this provision in more general terms which would encompass also possible future situations.

3. Germany

The Federal Republic of Germany wishes to thank the Chair for the opportunity to additionally submit, in writing, the proposed wording for Article X lit. g and Articles 34a et seqq. of the Eurojust Regulation by way of following up on the COPEN meeting of 27 January 2015.

Article X lit. g

“National Supervisory Authority/Authorities means the national competent authority or authorities designated by the MS for this purpose.”

Article 34a

We would ask that the provision be struck out as a whole as it may be dispensed with.

Article 34b

- The chapeau of paragraph 3 should be amended by the following words:
“**...under this Regulation and, where relevant, taking into account the implications for law enforcement activities by the MS**”
- Paragraph 3 lit. f (“impose a temporary or definitive ban on specific processing operations....”) should be deleted.

Article 35 paragraph 2

- In the first sentence (at the end), the following words should be deleted:
“in carrying out his/her duties set out in Article 34a (2)”
- The second sentence should be struck out as a whole.

Reasoning:

re. 1.

The definition in Article X lit. g (“National Supervisory Authority/Authorities”) should be put into simpler terms and brought in line with the practical needs of Eurojust and the Member States. The Member States should still have sufficient flexibility to integrate the new data protection regime of Eurojust into their national law enforcement systems.

In particular, the Member States should have the possibility, in implementing the Eurojust Regulation, to take recourse to the domestic structures they have already created and put to the test with regard to the JSB in place thus far at Eurojust. The definition in Article X lit. g as proposed here will enable this to be done. On the one hand, the definition has been framed broadly. On the other hand, it is ensured that the European Data Protection Supervisor (EDPS) will be able to easily identify his contacts in the respective Member States. This is ensured by the Member States designating the competent authorities.

By contrast, the definition proposed in Council document 5327/15 EUROJUST 4 stipulates certain requirements in terms of substance as to the powers that the national authorities to be designated must exercise. Thus, one or several agency/agencies are to be designated for each Member State that is/are competent for the supervision of practically every exchange of data by the national prosecution authorities in their respective Member State.

To cite the Federal Republic of Germany as an example: No such agency exists for preliminary investigations under criminal law or for court proceedings. The reasons for not instituting such a (central) agency, such as the principle of judicial independence, do in fact carry weight. Whether Article 85 of the TFEU suffices as a legal basis for stipulating requirements regarding the competence of the national agencies involved is another factor that may have to be considered additionally.

Germany delegates a criminal judge of the Federal Court of Justice (*Bundesgerichtshof*), named *ad personam*, to the Eurojust JSB. This judge has specific knowledge of the particular forms that data protection exigencies may have in criminal proceedings and, as a result of his judicial office, enjoys full independence. By contrast, the German member of the JSB does not have any supervisory powers over the national law enforcement authorities. However, this is not anything that the task in the JSB would demand. This solution takes account both of the requirements of preliminary investigations under criminal law and of the competencies of the law enforcement authorities in Germany, a country with a federal structure. Since the domestic system has stood the test of time, the opportunity should be available to maintain it.

Independently of specific implementation issues that may result for the individual Member States from the definition as proposed in Council document 5327/15 EUROJUST 4, it would go beyond the intent and purpose of the “consultation solution” modelled upon the Europol Regulation to establish, or to have to deploy, a new agency or authority simply in order to have it collaborate with the EDPS on the basis of Article 35 of the Eurojust Regulation. Article 35 of the Eurojust Regulation is intended to ensure that the interests of national law enforcement can be integrated to an appropriate degree into the decisions taken by the EDPS. This purpose can be achieved already by obligating the Member States to designate suitable authorities that are able to take on the tasks described in Article 35. It can be left to the Member States to decide which domestic authority conceivably could do so, and how the necessary communication with the competent law enforcement authorities will be ensured domestically. This does not require the competencies to be harmonised that the authorities to be designated have. The EDPS is responsible for the actual supervisory function over the data exchanged within Eurojust and with Eurojust, cf. Article 35 paragraph 2b, second sub-paragraph, and Article 36 paragraph 2 of the Eurojust Regulation. The competencies of the EDPS are determined in the Eurojust Regulation and the independence of this office is assured.

re. 2.

For the most part, Article 34a has been copied from the Europol Regulation; however, it does not fit in with the system in place at Eurojust and therefore should be struck out. We refer to the reasons cited under number 1. hereinabove. Article 34a may also be deleted as it is easily possible to speak of “the supervisory authorities pursuant to Article X lit. g” in Article 35 of the Eurojust Regulation. For the purposes of Article 35 of the Eurojust Regulation, it is not necessary to include further descriptions of the tasks fulfilled by these authorities; we refer to the reasons cited under number 1. hereinabove.

re. 3.

The adjustment proposed for the chapeau serves to bring this provision in line with the Europol Regulation.

The power of the EDPS pursuant to paragraph 3 lit. f (“impose a ... ban on specific operations...”) seems excessively far-reaching, since this might intrude into law enforcement measures taken by the competent law enforcement authorities in the Member States.

re. 4.

These are merely consequential amendments following in the wake of the suggested deletion of Article 34a of the Eurojust Regulation. These changes can be made without any major provisions in terms of substance being lost in Article 35 of the Eurojust Regulation.

4. Malta

Article 27

Malta finds no objection to the requirements of g, h, i and j in Annex ii although it feels that it is an unnecessary intrusion into the victim/witness private information. It must also be assured that a victim/witness is aware (especially when personal details of such nature are involved) that the information may also end up being stored at Eurojust. It must also be ensured that should a person who has been/ is being investigated, and with regards to Eurojust’s file, since he demands reliance of any papers/ documents in EJ’s procedure, such details pertaining to the victim/witness are not passed in as part of the case file/ information released by EJ.

5. Portugal

Unfortunately it was not possible to send our comments until 12pm, since we are still finalizing internal consultations on the new wording of Articles 34a-35 of the revised version of chapter IV and Annex II concerning to what extent the wording of Europol Regulation is entirely appropriate to the needs of Eurojust and safeguard the differences between Eurojust and Europol.

In addition, we hope that Eurojust can provide for more details about Chapter IV, since we share their concerns about the different roles and structure of Eurojust and Europol, mainly regarding the role of Eurojust National Members as judicial authorities that have the power to take judicial decisions, authorize judicial measures and receive/execute MLA requests.

Although we are aware that “**coherence should be sought between Chapter VII of Europol Regulation, the draft Regulations on Eurojust and EPPO as well as the data protection package, 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**”, we agree that Eurojust should give some input regarding data protection supervisory body, in order to ensure an adequate involvement of Eurojust in the supervision scheme “**where relevant and taking into account the special features of these agencies**”

In this regard, Portugal wants to maintain the scrutiny reservation on all Chapter IV and to articles 34a-35 as it stands in the footnote 1 and 10 of the document 5708/15 of January 29 .

Thus, for the time being, we only have a few comments, that we expect to supplement at the meeting on 13 February:

Article X lit. g

Portugal would prefer to maintain the reference “...**in accordance with its national law**”

Article 27 (4)

Portugal is in conditions to support the new wording of this paragraph, concerning the reference to genetic data, since is now in line with the General Regulation on Data Protection (article 9 (1))

*“... personal data, processed by automated or other means, revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, tradeunion membership, **and the processing of genetic data or data concerning health or sex life** (...)”*

Article 32 (1)

As stated in the last meeting, Portugal totally support that paragraph 1 of this article should begin with the recognition of the right of access, followed by the procedural issues. Therefore, we propose the following wording for a possible 32 (1.a):

“Any data subject shall be entitled to have access to personal data concerning him or her processed by Eurojust under the conditions laid down in this article”

Article 35.º

The frequent references to Cooperation Board in Article 35 shall be replaced by Executive Board

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

Portugal supports the addition of all categories of personal data of indents g), h), i) and j).