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**NOTE**

From:	Presidency
To:	Standing Committee on operational cooperation on internal security (COSI)
No. prev. doc.:	6127/13, 8223/13, 12566/13
Subject:	Cooperation between JHA agencies: information exchange

**Introduction**

Since the Lisbon Treaty, the legal basis of all the main JHA agencies has been reviewed or is in the process of being reviewed. In accordance with the Council's Rules of Procedure, the negotiations on these legislative texts is conducted through the relevant working groups, which rarely consider the texts of the other Agencies in detail. As such, the negotiations follow the logic of the individual proposal before them and (can) take little or no regard of corresponding or related issues addressed in any other proposal.

On the other hand, one of COSI's core tasks is to "help ensure the consistency of action by [the JHA agencies]". There is no other Council body that has the oversight that COSI should be exercising with regard to the operational cooperation of, with and through the JHA agencies in matters of internal security.

At a time where legislative proposals regarding Europol and CEPOL as well as Eurojust<sup>1</sup> are under negotiation, the Presidency is of the opinion that COSI should examine the overall balance between these legislative texts to ensure continuing coordination and cooperation between the agencies. This should not overlap with the specific negotiations done in the relevant working groups and will not concern the drafting of these texts. Rather, COSI should take a helicopter view on the interaction between the different agencies and, indirectly, with the concerned Member States' authorities.

A first brief discussion on this kind of issues was held at the meeting of 11 February 2013<sup>2</sup>, with COSI looking at aspects that affect operational co-operation in the field of internal security based on the then existing legal framework. A follow up debate, taking advantage of the fact that legislative proposals are available, is therefore considered useful.

### **Issues for debate**

The collection and analysis of information is a core task of different JHA(-related) agencies, each within their specific mandate and for their particular role regarding internal security. This may lead, as was stated in the previous discussion paper, to the situation that *"similar information on identical crime phenomena may be gathered by different Agencies and analytical capacities already available and well-developed at one Agency may be developed separately by another."*

The Presidency therefore proposes<sup>3</sup> that COSI discusses the operational requirements regarding information exchange between agencies/Union bodies as well as the information supply from Member States to the agencies. The aim is to ensure that existing or proposed measures are complementary and not in contradiction.

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<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA ("draft Europol Regulation", doc. 8229/13); proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation ("draft Eurojust Regulation", doc. 12566/13).

<sup>2</sup> Doc. 6127/13

<sup>3</sup> At a later stage, other aspects of inter-agency cooperation could be discussed.

**To structure the debate, delegations are invited to answer the following questions:**

- what principal guidelines can be set regarding information exchange between agencies, which should serve as a basis for upcoming negotiations and future working arrangements between agencies, in order to improve the information exchange between the different bodies mentioned above ?
- are there overlaps in the information gathering and analysis capacities by the different bodies ?  
how does this affect national authorities' work (e.g. double entries to different agencies) ? is there room for (more) synergies, taking into account the different roles of the agencies ?

These operational requirements should then inform the negotiations on the draft Europol Regulation and the draft Eurojust Regulation.

As summary background information, Annex 1 to this document describes either the current situation and/or the proposed provisions regarding the cooperation between the different agencies, notably as set out in the Frontex Regulation, the recently agreed text for the new OLAF Regulation, the draft "Europol Regulation" and the draft "Eurojust Regulation". A second Annex provides the overview of the relevant provisions for Europol and Eurojust respective Regulations regarding tasks, general provisions, specific bilateral provisions and restrictions on information exchange.

**Summary description of the situation on information exchange with and between JHA agencies**

For the sake of readability of this paper, the description has been kept very brief. A more elaborate study on the detailed provisions on information exchange between the different agencies could be provided at a later stage if this was considered useful for COSI's work.

1. General provisions

The draft **Europol** Regulation states in a general provision that one of Europol's tasks is "to provide the Union bodies established on the basis of Title V TFEU and OLAF with criminal intelligence and analytical support in the areas that fall under their competence". (Art. 4(1)(j)) Pursuant to Article 29 (second and third paragraphs) and Article 30 Europol may *exchange and process all information*, including personal data, with Union bodies, in so far as it is necessary for the performance of their tasks.

Europol receives information mainly from Member States' police authorities and other law enforcement services. Europol's analysis function is aimed at finding new investigative leads, reconstructing the modus operandi and links of a criminal network operating in several Member States. This analysis work is based mainly on police and intelligence sources and is aimed at ensuring that a criminal phenomenon is identified and/or an organised crime network is tackled in its entirety by law enforcement. Europol's strategic analysis results include as flagship products the SOCTA and the TE-SAT reports.

**Frontex** is tasked with carrying out risk analysis (Art. 2(1)(c) of the Frontex Regulation), falling into two categories: strategic analysis and operational analysis. For the strategic analysis, Frontex collects and analyses data (statistics, analytical reports from MS and reports of individual incidents) and delivers analytical products that build up a picture of the situation, patterns and trends in irregular migration and cross-border criminal activities at the external borders, including trafficking in human beings. Operational analysis activities yield a great number of weekly and periodic reports that provide a fresh and detailed picture not only for operational personnel but also for Frontex management, the European Commission and national and international law enforcement bodies (e.g. a report was drawn up on stolen vehicles trafficking for the JPO organised in the framework of the OAP on Western Balkans).

**Eurojust's** task is to "support and strengthen coordination and cooperation between national investigating and prosecuting authorities ... on the basis of operations conducted and information supplied by the Member States' authorities and by Europol". In that context, Eurojust receives information mainly from prosecution and judicial authorities, and in some cases from investigating authorities (when acting under the authority of a prosecutor or judicial authority). Article 22 of the draft Eurojust Regulation (mirroring an existing provision of the Eurojust Decision) provides that Eurojust "shall provide competent national authorities with information on the results of the processing of information, including the existence of links with cases already stored in the Case Management System, [including] personal data". Eurojust's analysis is therefore mainly case-oriented and is aimed at supporting judges and prosecutors in their judicial handling of the criminal cases. More strategic analysis at Eurojust is aimed at identifying recurring judicial cooperation issues and possible best practices in prosecutions. The findings of strategic analysis can be used to feed internal and external strategic products as well as providing contributions to TE-SAT and SOCTA reports.

As regards relations with other Union bodies and agencies, Article 38 states that "Eurojust may directly exchange all information, with the exception of personal data with [Union bodies and agencies]" and "receive and process personal data received from" these entities. Finally, Article 44 allows Eurojust to directly transfer personal data to Union bodies or agencies.

**OLAF** shall provide assistance to the Member States in order to coordinate their action, contribute to the design and development of methods of preventing and combating fraud, corruption and any other illegal activity affecting the financial interests of the Union, as well as to promote and coordinate, with and among the Member States, the sharing of operational experience and best procedural practices in the field (Article 1.2 of the draft OLAF Regulation<sup>4</sup>). In order to fulfill this mandate, OLAF shall "prior to the opening of an investigation, ... have the right of access to any relevant information in databases held by the institutions, bodies, offices or agencies when this is indispensable in order to assess the basis in fact of allegations". (Article 6 of the draft OLAF Regulation) Article 8 also contains relevant provisions in this context about the obligation of the institutions, bodies, offices and agencies to transmit any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union and any document or information they hold relating to an on-going investigation by [OLAF].

## 2. Interagency cooperation

### a) ***Europol - Eurojust***

Next to the general provision of Article 4(1)(j), the draft Europol Regulation provides in its Article 27 that Eurojust shall, within its mandate, have direct *access to and be able to search all information that has been provided to Europol* for cross-checking and for strategic analyses. Access to information provided for operational analysis shall be indirect (hit/no hit).

Pursuant to Article 29 (second and third paragraphs) and Article 30 Europol may *exchange and process all information*, including personal data, with Eurojust, in so far as it is necessary for the performance of their tasks.

Next to the more general Articles 38 and 44, Article 40 of the draft Eurojust Regulation defines the relations with Europol and provides for indirect access of Europol to information provided to Eurojust on the basis of a hit/no hit system, for the purpose of identifying whether information available at Eurojust matches with information processed at Europol.

Article 4 of the draft Eurojust Regulation (copying the existing Decision) sets out that Eurojust may "provide Europol with opinions based on analyses carried out by Europol".

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<sup>4</sup> OJ C 089E, 27/03/2013, p. 1.

In practice, Eurojust may provide an opinion on cases, in particular for those cases where coordination meetings are organised, to the national authorities involved in those cases. These opinions and (if available) related case analyses are shared with Europol on a case-by-case basis according to operational needs. Generally, the two organisations are participating in each other's operational/coordination meetings to ensure complementarity.

**b) Europol - Frontex**

For the *exchange of all information*, including personal data, between Europol and Frontex, the same provisions apply as described above (Article 4(1)(j), Article 29(2) and (3), Article 30). However, Frontex is not included in Article 27 and therefore it is not envisaged that Frontex would have *access to and be able to search information* provided to Europol for cross-checking and analyses.

The recent amendments to the Frontex Regulation allow Frontex to process the following limited categories of personal data<sup>5</sup>. Furthermore, Frontex's powers only extend to transmitting that data to Europol or other EU law-enforcement organisations, and then deleting it. (Article 11(c)(3)) Depersonalised data can also be used in the results of risk analysis.

Analyses of Frontex, both strategic and operational, do not contain personal data. All the strategic analysis are shared with Europol. Operational products/reports are shared with Europol whenever it participates in the specific joint operation, pilot project or rapid intervention or those products concern matters within Europol's mandate.

The cooperation between Frontex and Europol will acquire a new dimension with the entry into force of the Eurosur Regulation and implementation of the Eurosur system. Eurosur will act as new cooperation framework where relevant Europol information/ products could reach via Frontex the border management community. Eurosur in return could also serve as valuable new source of information for Europol not only on illegal immigration but also on forms of organised crime which are of relevance to border control.

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<sup>5</sup> Data collected during joint operations, pilot projects and rapid interventions and data collected by Member States of persons suspected on reasonable grounds by the competent authority of involvement in cross-border criminal activities, in illegal migration activities or in THB activities

**c) *Europol - OLAF***

The draft Europol Regulation sets out exactly the same kind of *access to Europol data* as for Eurojust, as described above and within its respective mandate. For the *exchange of information*, including personal data, between OLAF and Europol, the same provisions apply as described above for Eurojust and Frontex.

There is currently no arrangement to provide Europol access to the Customs Information System held by OLAF.

The draft OLAF Regulation sets out in its Article 13 that [OLAF] shall agree with Eurojust and Europol on administrative arrangements and that such working arrangements may concern exchange of operational, strategic or technical information, including personal data and classified information and, on request, progress reports.

OLAF carries out risk assessments in its area of competence. These are shared with Europol on a need-to-know basis.

**d) *Eurojust - Frontex***

The recent amendments to the Frontex Regulation set out new provisions about information exchange systems and personal data processing, setting out that personal data may be transmitted on a case-by-case basis to "*Europol and other law enforcement agencies*". (Article 11(c)(3)(a) Eurojust is not strictly speaking a law enforcement agency in itself, rather a body to support judicial authorities *and* law enforcement authorities. Thus, the exchange of information should be possible. The draft Eurojust Regulation does not contain any specific provisions about cooperation between Eurojust and Frontex but the more general Articles 38 and 44 would apply (see above).

The draft Memorandum of Understanding on cooperation between Frontex and Eurojust will be signed soon (doc. 12823/13). It provides for the exchange of strategic and technical information, however, explicitly excludes the exchange of personal data, including data relating to an identified or identifiable person even though such exchange would be allowed under the current legal framework of both organisations.



***e) Eurojust - OLAF***

The general provisions of Articles 38 and 44 of the draft Eurojust Regulation would apply to the cooperation between Eurojust and OLAF. In addition, Article 42 specifies that "OLAF may contribute to Eurojust's coordination work" within OLAF's mandate and that "for the purposes of the receipt and transmission of information between Eurojust and OLAF", national members of Eurojust should be regarded as competent authorities of the Member States.

Article 13 of the draft OLAF Regulation applies to Eurojust as to Europol (see above) but specifies also that OLAF "shall transmit relevant information to Eurojust", "where this may support and strengthen coordination and cooperation between national investigating and prosecuting authorities".

Furthermore, pursuant to Council Decision 2009/917/JHA of 30 November 2009 on the use of information technology for customs purposes, Eurojust has access to the databases of CIS and FIDE. In practice, this means that in each Eurojust National Desk, one person is the owner of the account granting access to CIS and FIDE. This person is responsible for checking this account regularly.

***f) Frontex - OLAF***

The recent amendments to the Frontex Regulation set out new provisions about information exchange systems and personal data processing, setting out that personal data may be transmitted on a case-by-case basis to "Europol and other law enforcement agencies". (Article 11(c)(3)(a). It is unclear whether OLAF would fall under the latter category. There is to date no precedents and no specific arrangement for this purpose.

There is potential for closer coordination or even joint efforts between Frontex and Customs Authorities, including OLAF, when customs law enforcement actions are aimed at the external borders securing financial interests of the EU, taking into account OLAF's role in Joint Customs Operations. There is also potential for cooperation at EU level in the fields of risk analysis.

**EUROPOL/EUROJUST**  
**EXCHANGE OF INFORMATION ACCORDING TO THE PROPOSED DRAFT REGULATIONS**

Europol	Eurojust
<p style="text-align: center;"><b>TASKS (implying information exchange with other agencies)</b></p> <p><b>Article 4 (Tasks)</b></p> <p>1. Europol is the European Union agency that shall perform the following tasks in accordance with this Regulation:</p> <p>(c) to coordinate, organise and implement investigative and operational action</p> <p style="padding-left: 40px;">(i) carried out jointly with the Member States' competent authorities; or</p> <p style="padding-left: 40px;">(ii) in the context of joint investigative teams, in accordance with Article 5, <u>where appropriate in liaison with Eurojust;</u></p> <p>(j) <u>to provide the Union bodies established on the basis of Title V of the Treaty and the European Anti-Fraud Office (OLAF) with criminal intelligence and analytical support</u> in the areas that fall under their competence"</p> <p><b>Article 6 (Requests by Europol for the initiation of criminal investigations)</b></p> <p>1. In specific cases where Europol considers that a <u>criminal investigation should be initiated</u> into a crime that falls under its objectives, <u>it shall inform Eurojust.</u></p> <p>5. Europol <u>shall inform Eurojust of the decision of a competent authority of a Member State to initiate or refuse to initiate an investigation.</u></p>	<p style="text-align: center;"><b>TASKS (implying information exchange with other agencies)</b></p> <p><b>Article 2 (Tasks)</b></p> <p>1. Eurojust shall support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States, or requiring a prosecution on common bases, <u>on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.</u></p> <p><b>Article 4 (Operational functions of Eurojust)</b></p> <p>1. Eurojust shall:</p> <p>[...]</p> <p>c)give assistance in order to improve cooperation between the competent authorities of the Member States, in particular <u>on the basis of Europol's analyses;</u></p> <p>[...]</p> <p>3. Eurojust may also:</p> <p>a) <u>provide Europol with opinions based on analyses carried out by Europol;</u></p>

GENERAL PROVISIONS	GENERAL PROVISIONS
<p><b>Article 29 (<i>Common provisions</i>)</b></p> <p>1. In so far as necessary for the performance of its tasks, Europol may establish and maintain cooperative relations with the Union bodies in accordance with the objectives of those bodies, the law enforcement authorities of third countries, law enforcement training institutes of third countries, international organisations and private parties.</p> <p>2. In so far as relevant to the performance of its tasks and subject to any restriction stipulated pursuant to Article 25(2), Europol may directly exchange all information, with the exception of personal data, with entities referred to in paragraph 1.</p> <p>3. Europol may receive and process personal data from entities referred to in paragraph 1 except from private parties, in so far as necessary for the performance of its tasks and subject to the provisions of this Chapter.</p> <p>4. Without prejudice to Article 36(4), personal data shall only be transferred by Europol to Union bodies, third countries and international organisations, if this is necessary for preventing and combating crime that falls under Europol's objectives and in accordance with this Chapter. If the data to be transferred have been provided by a Member State, Europol shall seek that Member State's consent, unless:</p> <p>(a) the authorisation can be assumed as the Member State has not expressly limited the possibility of onward transfers; or</p>	<p><b>Article 38 (<i>Common provisions</i>)</b></p> <p>1. In so far as necessary for the performance of its tasks, Eurojust may establish and maintain cooperative relations with Union bodies and agencies in accordance with the objectives of those bodies or agencies, the competent authorities of third countries, international organisations and the International Criminal Police Organisation (Interpol).</p> <p>2. In so far as relevant to the performance of its tasks and subject to any restriction stipulated pursuant to Article 21(8), Eurojust may directly exchange all information, with the exception of personal data, with the entities referred to in paragraph 1.</p> <p>3. Eurojust may, in accordance with Article 4 of Regulation (EC) No 45/2001, receive and process personal data received from the entities referred to in paragraph 1 in so far as necessary for the performance of its tasks and subject to the provisions of Section IV.</p> <p>4. Personal data shall only be transferred by Eurojust to third countries, international organisations, and Interpol if this is necessary for preventing and combating crime that falls under Eurojust's competence and in accordance with this Regulation. If the data to be transferred have been provided by a Member State, Eurojust shall seek that Member State's consent, unless:</p> <p>a) the authorisation can be assumed as the Member State has not expressly limited the possibility of onward transfers; or</p>

<p>(b) the Member State has granted its prior authorisation to such onward transfer, either in general terms or subject to specific conditions. Such consent may be withdrawn any moment.</p> <p>5. Onward transfers of personal data by Member States, Union bodies, third countries and international organizations shall be prohibited unless Europol has given its explicit consent.</p> <p><b>Article 30 (<i>Transfer of personal data to Union bodies</i>)</b></p> <p>Subject to any possible restrictions stipulated pursuant to Article 25(2) or (3) Europol may directly transfer personal data to Union bodies in so far as it is necessary for the performance of its tasks or those of the recipient Union body.</p>	<p>b) the Member State has granted its prior authorisation to such onward transfer, either in general terms or subject to specific conditions. Such consent may be withdrawn any moment.</p> <p><b>Article 44 (<i>Transfer of personal data to Union bodies or agencies</i>)</b></p> <p>Subject to any possible restrictions pursuant to Article 21(8) Eurojust may directly transfer personal data to Union bodies or agencies in so far as it is necessary for the performance of its tasks or those of the recipient Union body or agency.</p>
<p style="text-align: center;"><b>SPECIFIC BILATERAL PROVISIONS</b></p> <p><b>Article 27 (<i>Access to Europol information for Eurojust and OLAF</i>)</b></p> <p>1. Europol shall take all appropriate measures to enable Eurojust and the European Anti-Fraud Office (OLAF) within their respective mandates, to have access to and be able to search all information that has been provided for the purposes of Article 24(1)(a) and (b), without prejudice to the right for Member States, Union bodies and third countries and international organisations to indicate restrictions to the access and use of such data. Europol shall be informed where a search by Eurojust or OLAF reveals the existence of a match with information processed by Europol.</p> <p>2. Europol shall take all appropriate measures to enable Eurojust and OLAF,</p>	<p style="text-align: center;"><b>SPECIFIC BILATERAL PROVISIONS</b></p> <p><b>Article 40 (<i>Relations with Europol</i>)</b></p> <p>1. Eurojust shall take all appropriate measures to enable Europol, within its mandate, to have indirect access on the basis of a hit/no hit system to information provided to Eurojust, without prejudice to any restrictions indicated by the providing Member States, Union bodies, third countries, international organisations or Interpol. In case of a hit, Eurojust shall initiate the procedure by which the information that generated the hit may be shared, in accordance with the decision of the Member State, Union body, third country, international organisation or Interpol that provided the information to Eurojust.</p> <p>2. Searches of information in accordance with paragraph 1 shall be made only for</p>

<p>within their respective mandates, to have indirect access on the basis of a hit/no hit system to information provided for the purposes under Article 24(1)(c), without prejudice to any restrictions indicated by the providing Member States, Union bodies and third countries or international organisations, in accordance with Article 25(2). In case of a hit, Europol shall initiate the procedure by which the information that generated the hit may be shared, in accordance with the decision of the Member State, Union body, third country or international organisation that provided the information to Europol.</p> <p>3. Searches of information in accordance with paragraphs 1 and 2 shall be made only for the purpose of identifying whether information available at Eurojust or OLAF, respectively, matches with information processed at Europol.</p> <p>4. Europol shall allow searches in accordance with paragraphs 1 and 2 only after obtaining from Eurojust information about which National Members, Deputies, Assistants, as well as Eurojust staff members, and from OLAF information about which staff members, have been designated as authorised to perform such searches.</p> <p>5. If during Europol's information processing activities in respect of an individual investigation, Europol or a Member State identifies the necessity for coordination, cooperation or support in accordance with the mandate of Eurojust or OLAF, Europol shall notify them thereof and shall initiate the procedure for sharing the information, in accordance with the decision of the Member State providing the information. In such a case Eurojust or OLAF shall consult with Europol.</p> <p>6. Eurojust, including the College, the National Members, Deputies, Assistants, as well as Eurojust staff members, and OLAF, shall respect any restriction to access or</p>	<p>the purpose of identifying whether information available at Eurojust matches with information processed at Europol.</p> <p>3. Eurojust shall allow searches in accordance with paragraph 1 only after obtaining from Europol information about which staff members have been designated as authorised to perform such searches.</p> <p>4. If during Eurojust's information processing activities in respect of an individual investigation, Eurojust or a Member State identifies the necessity for coordination, cooperation or support in accordance with the mandate of Europol, Eurojust shall notify them thereof and shall initiate the procedure for sharing the information, in accordance with the decision of the Member State providing the information. In such a case Europol shall consult with Eurojust.</p> <p>5. Europol shall respect any restriction to access or use, in general or specific terms, indicated by Member States, Union bodies or agencies, third countries, international organisations or Interpol.</p>
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<p>use, in general or specific terms, indicated by Member States, Union bodies, third countries and international organisations in accordance with Article 25(2).</p>	
<p style="text-align: center;"><b>RESTRICTIONS TO INFORMATION EXCHANGE</b></p> <p><b>Article 25 (<i>Determination of the purpose of information processing activities</i>)</b></p> <p>1. A Member State, a Union body, a third country or an international organisation providing information to Europol determines the purpose for which it shall be processed as referred to in Article 24. If it has not done so, Europol shall determine relevance of such information as well as the purpose for which it shall be processed. Europol may process information for a different purpose than the one for which information has been provided only if authorised by the data provider.</p> <p>2. <u>Member States, Union bodies, third countries and international organisations may indicate, at the moment of transferring information, any restriction on access or use</u>, in general or specific terms, including as regards erasure or destruction. Where the need for such restrictions becomes apparent after the transfer, they shall inform Europol accordingly. Europol shall comply with such restrictions.</p> <p>3. Europol may assign any restriction to access or use by Member States, Union bodies, third countries and international organisations of information retrieved from publicly-available sources.</p>	<p style="text-align: center;"><b>RESTRICTIONS TO INFORMATION EXCHANGE</b></p> <p><b>Article 21 (Exchanges of information with the Member States and between national members)</b></p> <p>[...]</p> <p>8. This Article shall be without prejudice to <u>conditions set in bilateral or multilateral agreements or arrangements between Member States and third countries including any conditions set by third countries concerning the use of information once supplied.</u></p>