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NOTE

From: Presidency

To: Delegations

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Subject: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 of the European Parliament and the Council and Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases
- Discussion paper

(Courtesy translation)

During the COPEN meeting of 14 January 2022, the Presidency invited delegations to examine the provisions of the proposal for a regulation amending Regulation (EU) 2018/1727 and Decision 2005/671/JHA relating to the counter-terrorism register. The discussions and the written contributions received subsequently brought out the points of view of the delegations, even if several of them entered scrutiny reservations.

With a view to drafting a revised text, and in order to have a more precise vision of the expectations of the working group on the provisions relating to the counter-terrorism register, the Presidency invites the delegations to make known their positions and observations on the subjects raised below.

1. The cases concerned by the obligation to transmit information

- a. The obligation to transmit information even in the absence of a known link of the case with another Member State (*Article 1 (4) – Article 21a §2*)

The Commission proposes to transmit the information to Eurojust, even in the absence of a known link of the case with another Member State. However, an exception is made where the case, due to its specific circumstances, clearly affects only one Member State.

According to the Council's Legal Service, this provision does not pose any difficulty in relation to Article 85 of the TFEU and to the mission of Eurojust as defined by the regulation.

As a reminder, Article 2§1 of Regulation 2018/1727 provides that "*Eurojust shall support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime which Eurojust is competent to deal with in accordance with Article 3(1) and (3), where that crime affects two or more Member States, or requires prosecution on common bases*".

In the light of these details, does the Commission's proposal, aimed at transmitting the information to Eurojust even in the absence of a known link in the case with another Member State, with some exceptions, appear acceptable to the delegations?

- b. Exceptions to the obligation to transmit information (*Article 1 (4) – Article 21a §2 and §5*)

The Commission proposes to restrict the obligation to transmit information in cases relating either to the nature of the case or to the consequences of sharing the information.

The exceptions proposed by the Commission are as follows:

- When the case, due to its specific circumstances, clearly affects only one Member State;
- When the sharing of information would jeopardise current investigations or the safety of an individual;

- When the sharing of information would be contrary to the essential interests of the security of the Member State concerned.

Furthermore, it was suggested that, for the sake of clarification, the exception provided for in Article 21a §2 when "*the case, due to its specific circumstances, clearly affects only one Member State*", is mentioned with the other exceptions, in §5.

Do the delegations have any objections:

- To the exceptions to the obligation to transmit information proposed by the Commission;
- To their grouping;
- To their grouping, not within paragraph 5 of Article 21a but within a 2nd sub-paragraph of §1?

2. Time of transmission of information (*Article 1 (4) – article 21a §1*)

The Commission proposes a transmission of information "*as soon as the judicial authorities are involved*"¹ in "*any ongoing or concluded criminal investigations supervised by judicial authorities*".

Delegations asked for this provision to be clarified in order to both determine precisely when the information should be transmitted, while allowing enough flexibility to adapt to national procedural specificities.

Pursuing this objective, the Presidency invites the delegations to decide on the following alternative draft:

*The competent national authorities shall inform their national members of any ongoing or concluded criminal investigations supervised by judicial authorities, prosecutions, court proceedings and court decisions on terrorist offences as soon as **[judicial authorities are involved] or [the case is referred to the judicial authorities]**.*

¹ The French version of the draft regulation retains the term "*concernées*" but it would be more accurate, with regard to the initial wording in English, to retain the term "*impliquées*".

In the mind of the Presidency, the legal notion of "*referral*" is more precise in that it designates the moment when the judicial authority is informed of an investigation and is in a position to take decisions relating to it, in accordance with its national law.

Regardless of the wording chosen in Article 21a §1, it could be useful to illustrate in recital 13 the moment in which the information must be transmitted:

*"As information about existing cross-links to other judicial proceedings is most useful at an early stage of the investigation, it is necessary that the competent authorities provide information to Eurojust as soon as judicial authorities are involved. **Depending on the applicable national provisions, this may for example correspond to the moment when they are informed of an ongoing investigation, when they authorize or order an investigation or when they decide on the follow-up to be given to an investigation.** If the competent national authorities are already aware of cross-links, they should inform Eurojust accordingly".*

These drafting proposals could have the effect of delaying the transmission of information to Eurojust compared to the Commission's initial proposal. Indeed, the latter could be interpreted as obliging the judicial authority to transmit the information as soon as it was involved, even informally, without any particular procedural provision being applied.

Delegations are invited to comment on:

- the drafting alternative proposed in Article 21a §1;
- the usefulness of explaining this provision in recital 13;
- the wording proposed in recital 13.

3. Updating of the information transmitted (*Article 1 (4) – article 21a §4*)

The Commission proposes an update without delay in the event of a useful change being made to national procedures. It adds, to the second paragraph, and without prejudice to the first paragraph, an obligation to update at least every three months.

Several delegations were opposed to this obligation of quarterly updating and, for some, proposed its abolition.

The Presidency invites delegations to decide on the following options:

- Maintaining paragraph 2 as drafted by the Commission.
- Deleting paragraph 2.

4. Transmission of biometric data (*Article 1 (4) – Article 21a §3 and Article 1 (11) – Annex III and recital 12*)

Annex III sets out the list of data to be transmitted to Eurojust. This is information relating to the identity of the person concerned, the nature of the offence and the state of the national proceedings. Annex III also provides for the transmission of biometric data (fingerprints and photographs), “where available”.

Recital 12 of the Commission proposal specifies, however, that “*Due to the sensitive nature of biometric data and the impact processing of biometric data has on the respect for private and family life and the protection of personal data, as enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, a **strict necessity test** should be applied by the competent authorities and Eurojust in each case*”.

The main point of attention of the delegations relates to the relevance and feasibility of the transmission of biometric data. Some delegations questioned the Commission on the possibility of providing access to this data by Eurojust by other means, others mentioned the deletion of this provision and some considered providing for optional transmission.

According to the Commission, the transmission of biometric data meets the need for identification of suspects, the reliability of which is one of the main difficulties in terrorism cases, due to their frequent transnational character. These data could also be cross-checked with other data such as information from the ECRIS-TCN system or data received from third countries (for example, evidence collected on the battle field of terrorist organisations). Their transmission would make it possible to establish links with cases concerning Member States or third countries which would not otherwise have been known.

According to the Commission, the transmission of biometric data would be subject in each case to a necessity test under the Charter of Fundamental Rights of the European Union, which would be generally met in view of the need for reliable identity data. However, in exceptional cases linked to specific circumstances, it would be ruled out on the grounds that it would be disproportionate.

As discussions stand, two options should be considered:

- The elimination of the transmission of biometric data (option 1)
- Maintaining the transmission of biometric data (option 2)

In the assumption of option 2, it should then be determined whether the transmission of biometric data, which is compulsory, must be subject to conditions.

Several delegations expressed reservations in this regard on the transmission of “*available*” biometric data, considering this term insufficiently precise. The fear was also expressed that the Regulation would oblige the Member States to make this data accessible to the judicial authorities, even though national law does not provide for it.

The Presidency is of the opinion that what is at stake is to determine whether, for the purposes of the transmission of this biometric data, the judicial authorities or the National Correspondents for Eurojust for Terrorism Matters must be able to obtain communication of it from the investigation services, in the event that they do not possess this data directly.

Delegations are invited to express their views on the principle of transmission of biometric data as well as on its conditions (availability of data and necessity test).

5. Transmission, processing and storage of data of acquitted persons (*Article 1 (7) (b) - Article 27 §5 and Article 1 (8) (a) - Article 29 §1a (b) and recital 22*)

a. Transmission and processing of data of acquitted persons

Annex III, which sets out the list of information to be transmitted to Eurojust, includes in its point *a)* a list of personal data to be transmitted for the identification of suspect, accused, convicted or **acquitted persons**. More specifically, it concerns surname, first names, date and place of birth, nationality, gender and identification document.

The amended Article 27 §5 of the Eurojust Regulation authorizes the processing of data of acquitted persons for the purpose of detecting links with other ongoing or closed investigations and prosecutions.

According to the Commission, Article 27(5) does not allow transmission of information after acquittal, but only allows for the continued processing of data previously received, even in case of acquittal. Furthermore, only data relating to defendants, excluding witnesses or victims, would be retained, for a strictly limited purpose.

Several delegations were opposed to the transmission of the data of acquitted persons, considering that it was of no interest, and that for reasons related to the protection of personal data, there was no reason to keep or process this data.

Other delegations shared their doubts on the inclusion of such data concerning acquitted persons.

Lastly, others have recognized the usefulness of transmitting and processing this data.

The European Data Protection Supervisor (EDPS), in its opinion of 26 January 2022, does not raise any difficulty as to the very principle of the processing of data relating to acquitted persons, insofar as it is accompanied by a specific rule providing for a shorter retention period.

The delegations are invited to comment on the very principle of transmitting and processing the personal data of acquitted persons.

b. The specific (shorter) data retention time in case of acquittal

Article 29 §1 *a* (b) provides for a shorter retention period for the data of acquitted persons than of others. Some delegations said that the retention period, of three years instead of five, of the data of acquitted persons seemed to them **excessive**.

Two options could therefore be worth considering:

- Further reduce the shorter retention period for the data of acquitted persons in consideration of their specific nature: in this case, the delegations are invited to indicate what period seems to them to be the most appropriate.
- Keep the text as it is.

Delegations are invited to give their views on these options.
