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COVER NOTE

from: The General Secretariat of the Council
to: Working Party on Cooperation in Criminal Matters
Subject: Comments on Articles 38-68 of the Draft Regulation on the European Union
Agency for Criminal Justice Cooperation (Eurojust)

On the 7th April 2014, the Working Party on Cooperation in Criminal Matters (COPEN) completed its first examination of the Proposal for a Regulation on the European Union Agency for Criminal Justice Cooperation (Eurojust)¹.

Delegations were invited to provide written comments on the remaining articles to the General Secretariat of the Council by 23 May 2014. Three delegations; Austria, Sweden and the United Kingdom submitted comments which have been included in the Annex to this document.

¹ Doc 12566/13

Austria

Article 38

With regard to para 4 lit a Austria shares the concerns of many Member States, initially presented by Belgium and Germany during the last COPEN working group. (Explicit) Consent of the law enforcement authority concerned should be obligatory prior to transmission of data by Eurojust to a third country, international organisation or Interpol.

The Austrian Delegation would like to stress that in this regard it should be the law enforcement authority, which submitted the respective data, and not only the Member State who will have to be asked for the consent to transmission. This should be made clear in the recitals at least.

Concerning the question, who within Eurojust should be competent for the transmission of data, the Austrian delegation would like to point out that this power seems to be referred to the National Member according to Art 8 para 1 lit c (and no other organisational unit within Eurojust, such as the College, Executive Board etc.). It is therefore not subject to the Rules of Procedure. Art. 8 para 1 lit c furthermore states that an exchange of information is subject to “the international commitments of their Member State”. The Austrian Delegation would like to seek confirmation of this interpretation on this point of the Commission.

As the Netherlands pointed out during the last COPEN working group, Art 45 seems to be a better place for Art 38 para 4 for the sake of consistency as both provisions deal with transmission of personal data to third countries and international organisations.

Finally, the Austrian Delegation would like to point out that, according to Art 2 (tasks), prevention of crime is not explicitly mentioned as a task of Eurojust. Therefore Eurojust would not be able to process any data, aiming at preventing crime, according to Art 27 para 1 and 2.

Art 2 should therefore be adapted.

Article 41

In general it seems that the negotiations regarding the Regulation on Eurojust could be closed a long time before the negotiations regarding the Regulation on the EPPO. The Austrian Delegation would therefore be ready to delete all the references to the EPPO for the time being and have the Regulation on Eurojust enter into force at an earlier stage. It seems more efficient to come back to the provisions dealing with the relationship between Eurojust and the EPPO at the moment when EPPO's structure and tasks have gained clear shape.

With regard to para 5, it seems worth thinking about copying Art 40 para 1 to clarify that the same way of matching data applies in relation to both, the EPPO and Europol. At least para 5 should mention the word hit/no-hit system, e.g. “[...] Eurojust shall put in place a mechanism for automatic cross-checking of data entered into its Case Management System on the basis of a hit/no-hit system.”

In principle Austria shares the view of the Spanish Delegation that cross-checking of data will have an added value to investigations of national law enforcement authorities as well as of the EPPO and should therefore be maintained.

Finally, the Austrian Delegation would be grateful if either the Eurojust or the EPPO Regulation could explicitly clarify in some way that the support of the EPPO by Eurojust will not have negative effects on Eurojust's budget.

Article 44

The provision is highly problematic for the Austrian Delegation with regard to national provisions on the right of access to the case file. Additionally, there are provisions according to national law that evidence collected in criminal proceedings cannot automatically be used in other (such as administrative etc.) proceedings. Full access to data of Eurojust for any other body or agency of the EU without any further stipulations seems disproportionate and not in line with national and European data protection provisions.

Article 45

The Austrian Delegation would like to come back to the issue whether the National Member shall be allowed to submit data to third countries apart from the provisions stated in Art 45 as a national authority and would like to express its sympathy for the idea of clarifying this further in the recitals as this seems to be a delicate issue and crucial for the practical work of the National Member.

With regard to Art 45 itself the Austrian Delegation would like to point out that the same arguments as stated above concerning Art 44 apply here as well. Furthermore the provision seems to neglect that multilateral or bilateral agreements on mutual legal assistance apply in relation with third countries.

Moreover, the Austrian Delegation shares the concerns of the Estonian Delegation that the current adequacy decisions mentioned in para 1 don't seem to take account of the specificities of judicial proceedings.

The Austrian Delegation would like to point out that the word "objectives" in para 2 lit a should be changed into "tasks", as there is no provision in the proposal dealing with the "objectives" (this is only the case in the current Eurojust Decision) but only with the "tasks" of Eurojust (Art 2).

In addition, some of the terms used in para 2 should be clarified, e.g. “essential interests” (lit a), “important public interest” (lit b) or “vital interests” (lit d). With regard to para 2 it seems not clear who within Eurojust should be in charge of establishing whether essential interests of a Member State etc. are affected or not. Moreover it seems quite strange that Eurojust is in charge to establish these situations with regard to Member States.

Concerning para 3 Austria would like to mention that the German text seems to be incorrect.

Article 47

Austria shares the view of other Delegations expressed during the last COPEN working group that coordination with regard to third countries should not be obligatory for Eurojust. The wording of the current Eurojust Decision should be maintained.

Article 49

For the Austrian Delegation it seems that the proposal refers to Art 35 of the current Eurojust-Decision. Currently the EJM is informed of the draft budget according to the last sentence of para 1 which states: “The European Judicial Network and networks referred to in Art 25a (2) shall be informed on the parts related to the activities of their secretariat in due time before the forwarding of the estimate of the Commission”. Therefore we would suggest adding this stipulation to Art 49 of the Regulation on Eurojust.

Additionally to what was said during the last COPEN meeting it seems worth thinking of informing the EPPO, as well, as it will be interlinked with Eurojust and therefore the budget might have major impacts on the functioning of the EPPO.

Article 58

As many other delegations have pointed out at the last COPEN meeting Austria agrees that the problems raised by Eurojust concerning translation costs and services should be taken into consideration in order to find a flexible and cost efficient solution.

Article 59

With regard to confidentiality it seems necessary to include rules on how it could be lifted in case a National Member or another member of the staff of Eurojust is to be summoned as a witness.

Article 62

Austria would like to reiterate the question why the Commission's security rules were referred to and not the Council's security rules.

Article 68

Austria supports the idea of a longer transitional period as several arrangements have to be made with regard to national legislation, i.e. adjusting the provisions which are in force to the new Regulation (repeal some provisions, change others into implementing provisions etc.).

Sweden

Article 54

Seconded national experts and other staff

- 1. Eurojust may make use of seconded national experts or other staff not employed by Eurojust.**
- 2. The College shall adopt a decision laying down rules on the secondment to Eurojust of national experts.**

1. COMMENTS

1.1.1.1. The regulation on Eurojust should contain a provision that enables the Member States to combine the roles of Assistant to the National Member and Seconded National Expert.

1.1.1.2. Being one of the four Member States who combined these functions until the College took a policy decision on this matter in April 2013, Sweden established several benefits with this combination. For example, it led to a more effective use of the resources at the national desk. It furthermore increased the flexibility and led to a more even distribution of the workload at the desk. We also believe that this arrangement was beneficial for Eurojust's efficiency in a wider context since Sweden could be represented in the College and thus creating quorum even when the National Member was out of office.

Based on the very positive experience Sweden has on this matter, we strongly advocate creating a clear legal basis for combining the two roles. For the time being, we have no preference whether such provision should be placed in article 7, 54 or elsewhere in the regulation.

Article 58

Language arrangements

- 1. Regulation No 1² shall apply to Eurojust.**
- 2. The translation services required for the functioning of Eurojust shall be provided by the Translation Centre of the bodies of the European Union.**

2. COMMENTS

2.1.1.1. Paragraph 1

Sweden questions the application of Regulation No 1 to Eurojust. Ever since the setup of Eurojust, the organisation has presupposed that the regulation does not apply to its activities. The speed and efficiency that characterise Eurojust could be affected in a negative way if the regulation is used on Eurojust. It could furthermore have negative implications on Eurojust's budget.

² OJ L 17, 6.10.1958, p.385.

2.1.1.2. Paragraph 2

According to information provided by Eurojust, Eurojust is currently using external translation and interpretation services. An obligation to use the Translation Centre of the European Union can only be accepted as long as it provides the same flexible and rapid service as the current arrangements.

Article 59

Confidentiality

- 1. The national members, their deputies and their Assistants referred to in Article 7, Eurojust staff, national correspondents and the Data Protection Officer shall be bound by an obligation of confidentiality with respect to any information which has come to their knowledge in the course of the performance of their tasks.**
- 2. The obligation of confidentiality shall apply to all persons and to all bodies called upon to work with Eurojust.**
- 3. The obligation of confidentiality shall also apply after leaving office or employment or after the termination of the activities of the persons referred to in paragraphs 1 and 2.**
- 4. The obligation of confidentiality shall apply to all information received by Eurojust, unless that information has already been made public or is accessible to the public.**
- 5. Members and the staff of the European Data Protection Supervisor shall be subject to the obligation of confidentiality with respect to any information which has come to their knowledge in the course of the performance of their tasks.**

3. COMMENTS

Paragraph 1 seems to impose a regime of absolute confidentiality (except for the situation mentioned in paragraph 4) for everybody within Eurojust. In paragraph 2, this obligation is extended to also encompass all persons and bodies called upon to work with Eurojust. The exact meaning of paragraph 2 is unclear and needs to be clarified, especially in relation to whether it also targets national authorities and their officials.

We believe that this article requires a thorough analysis. The motives for and consequences of such strict and wide provision must be reflected upon (e.g. in relation to the right of access to the materials of a case and in relation to court proceedings).

According to article 7, the national members, their deputies and assistants shall be seconded by the Member States in accordance with their legal system. Article 7 also outlines their status as prosecutors, judges or police officers of equivalent competence in the Member States. We believe that these important links to the Member States and their legal systems creates strong arguments for allowing the national systems on confidentiality to apply to the national members, their deputies and assistants. The same arguments apply to the national correspondents who, according to article 20.3 shall maintain their position and status under national law.

We strongly believe that the article needs to be redrafted in order to accommodate our concerns. Please find our *preliminary* redrafting of the text below.

Article 59

Confidentiality

1. ~~The national members, their deputies and their Assistants referred to in Article 7, Eurojust staff, national correspondents and the Data Protection Officer shall be bound by an obligation of confidentiality with respect to any information which has come to their knowledge in the course of the performance of their tasks.~~

- [2. The obligation of confidentiality shall apply to all persons and to all bodies called upon to work with Eurojust.]
3. The obligation of confidentiality shall also apply after leaving office or employment or after the termination of the activities of the persons referred to in paragraphs 1 and 2.
4. The obligation of confidentiality shall apply to all information received by Eurojust, unless that information has already been made public or is accessible to the public.
5. Members and the staff of the European Data Protection Supervisor shall be subject to the obligation of confidentiality with respect to any information which has come to their knowledge in the course of the performance of their tasks.
6. **The national members, their deputies and their Assistants referred to in Article 7 as well as the national correspondents shall, in accordance with the legislation in their respective Member States, be bound by an obligation of confidentiality with respect to any information which has come to their knowledge in the course of the performance of their tasks.**

Article 60

Transparency

1. **Regulation (EC) No 1049/2001 shall apply to documents which relate to Eurojust's administrative tasks.**
2. **The College shall, within six months of the date of its first meeting, adopt the detailed rules for applying Regulation (EC) No 1049/2001.**
3. **Decisions taken by Eurojust under Article 8 of Regulation (EC) No 1049/2001 may form the subject of a complaint to the Ombudsman or of an action before the Court of Justice of the European Union, under the conditions laid down in Articles 228 and 263 of the Treaty respectively.**

4. COMMENTS

Regulation 1049/2001 should be *fully* applicable on Eurojust and not only, as suggested in the current article, on documents which relate to Eurojust's administrative tasks.

Sweden would like to present the following arguments for this position.

- According to art. 15 in the Treaty on the functioning of the EU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices or agencies. The institutions, bodies etc. are thereby under obligation to follow the rules set out in the Regulation of public access to documents (1049/2001). The only exemptions from this rule are given to The Court of Justice of the European Union, the European Central Bank and the European Investment Bank when exercising their administrative tasks.
- Excluding Eurojust from the Regulation 1049/2001 could risk sending a signal that openness is not important for a judicial organization. If exemptions are accepted, other EU-bodies could do the same. The important principle of openness set out in TFEU would be damaged.
- Regulation 1049/2001 contains provisions giving Eurojust ground to refuse access to documents in specific cases, i.e. if access would undermine the protection of public security or the privacy and the integrity of the individual (art. 4). Operative data will still be protected from public access. Sweden believes this to be an effective and sufficient tool for protection.
- According to the Presidency's compromise text containing a preparation of a General Approach on the proposal for Regulation on Europol (9511/14), Regulation 1049/2001 should be fully applicable to Europol. Sweden strongly believes that it is important to, as much as possible, strive towards conformity between Europol and Eurojust in this field.

Article 66

Transitional arrangements

- 1. Eurojust shall be the general legal successor in respect of all contracts concluded by, liabilities incumbent on, and properties acquired by Eurojust as established by Council Decision 2002/187/JHA.**
- 2. The national members of Eurojust who were seconded by each Member State under Decision 2002/187/JHA shall take the role of national members of Eurojust under Section II of this Regulation. The term of their office may be extended once under Article 10(2) of this Regulation after the entry into force of this Regulation, irrespective of a previous extension.**
- 3. The President and Vice-Presidents of Eurojust at the time of the entry into force of this Regulation shall take the role of the President and Vice-Presidents of Eurojust under Article 11, until their term in accordance with Decision 2002/187/JHA expires. They may be re-elected once after the entry into force of this Regulation under Article 11(3) of this Regulation, irrespective of a previous re-election.**
- 4. The Administrative Director who was lastly appointed under Article 29 of Decision 2002/187/JHA shall take the role of the Administrative Director under Article 17 until his or her term as decided under Decision 2002/187/JHA expires.. The term of the Administrative Director may be extended once after the entry into force of this Regulation.**
- 5. This Regulation shall not affect the legal force of agreements concluded by Eurojust as established by Decision 2002/187/JHA. In particular, all international agreements concluded by Eurojust which have entered into force before the entry into force of this Regulation shall remain legally valid.**

5. COMMENTS

5.1.1.1. Paragraph 2

Sweden believes that it should be up to the Member States to decide on how many times the term of office for the national members should be extended.

Article 68

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

6. COMMENTS

Due to the fact that there might be a need for complementary legislation on national level in order for the regulation to have the intended effect, the regulation cannot be directly applicable from the time it enters into force. Sweden suggests the following changes in 68:

Article 68

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

~~This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.~~

It shall apply from xx date.

United Kingdom

Article 38

This Article relates to Eurojust establishing working arrangements with competent authorities in third States, it should be cross-referenced to Articles 42 and 43. We also note that provisions in Article 38 (4) and Article 45 on transferring personal data to third States relates to the same issue. The separation of the texts is not helpful. It would be beneficial if they were discussed together, particularly on transmission of personal data.

Article 39

Article 39 states that the network set up by 2002/494/JHA shall form part of the staff of Eurojust. This measure states that MSs shall designate a contact point which shall act as a point for information exchange regarding the investigation of genocide, crimes against humanity and war crimes. Has consideration been given on the impact for non-participating MS since the draft Art 39(2) states that the Secretariat of the Network shall form part of the staff of Eurojust?

Article 40

Whilst we are keen to support cooperation between Eurojust and other Agencies, we want to ensure that those providing information know where it is going as it may make some parties wary about sharing information to the extent. The UK would like in addition to the text a provision indicating that an explicit consent of the Member State concerned is required.

We suggest that Article 40 (3) should be amended to read “ and shall initiate the procedure for sharing information with the agreement of the MSs concerned” rather than in accordance with the decision of the Member State providing the information.

Article 41: Relations with the European Public Prosecutor's Office

It is also very important for us for there to be clarity on what impact this will have for Member States who do not participate in the EPPO but are in Eurojust.

We would like to highlight that this is particularly important issue for the UK. The UK believes that relations between the EPPO and Eurojust can only be settled once the structure and responsibilities of the EPPO have been fully established. Attempting to define now, relations with a body that does not yet exist and whose composition, powers and mandate are not known could cause real problems.

Article 42

No comments yet.

Article 43

The UK is seeking clarity on whether Eurojust can still negotiate its own agreements? We do not agree that Article 216 of the Treaty prevents individual agencies with legal personality from negotiating such agreements.

Another wider point that needs to be considered is the lack of business case in some of these co-operation agreements. This is particularly important in times of austerity.

Article 44

We have noted, there are no apparent restrictions against Eurojust (the entity) passing personal data to the Commission without the express permission of Member States which provided the data.

If there is a restriction it must be in another clause.

Article 45

Please see our comments under Article 38.

Article 46

We note that Council permission is missing as in current Article 27a before negotiations are entered into with a third State. We suggest maintaining current Article 27a language. We should also be mindful of the implications and financial costs. Further, Article 46 must be read in conjunction with Articles 43 & A38 (1). Article 46 refers to posting to ‘third countries’, which must be a country with which Eurojust has ‘working arrangements’ (Article 43), which in turn must be with the ‘entities’ stated in Article 38(1), i.e. ‘competent authorities’ of third countries.

It is not clear if the competent authorities are administrative and / or judicial; so it’s not clear the process via which Eurojust sets about either ‘working arrangements’ or posting LMs.

The composition of the College is defined in Article 10 via reference to Article 4 operational and Article 14 management matters. The posting of LMs in Article 46 does not fall under either Articles 4 or 14. This raises two questions:

1) What is the composition of the College when deciding to post an LM? 2) What ‘majority’ of College is required in order to decide to post an LM, and are the Commission involved?

Article 47

We have serious concerns relating to inconsistencies in the drafting of provisions in this Article that are not compatible with the competence of Eurojust relating to 3rd States under Article 3 (3). For example, current 47(1) requirement could arise in circumstances where Eurojust has no competence, and yet it is now a mandatory clause. As drafted, it cannot even be a ‘may’ clause. The wording is very unclear: what is the reference to ‘same investigation’? Is it to the at least 2 MLA requests issued to 2 MSs by the third country?

If so, under A3(3), Eurojust has no competence to act, unless (a) it is at the request of a MS's competent authority, and (b) there must be an investigation or prosecution that affects that MS. Even if Eurojust had competence, 'shall' is impossible to fulfil. It imposes a mandatory requirement on Eurojust even if Eurojust has not received the MLA requests.

Under 47(2) - The experience of OCC must be taken into consideration. Do we have evidence that a 3rd country request for MLA has ever come via the OCC. Also, same issues as 47(1) relating to competence.

We also have issues with the drafting of 47(3). What does 'same investigation' refer to? Again, we have 'shall' even though Eurojust may not even be aware of the MLA request.

The clauses in this Article should be amended to: (a) accord with Eurojust's competence; (b) be 'may' clauses, and in relation incoming MLA requests to the MS – as is 47(1) - should be as per current A27b, i.e. 'with the agreement of the MSs concerned', otherwise Eurojust usurps national authorities in executing MLA requests.

Article 48

No comments yet.

Article 50

No comments yet.

Articles 53 and 54

No comments yet.

Articles 55 and 56

It is important that the provisions in the Regulation do not seek to bind national Parliaments. Therefore, the text should not go into detail but very high level. Also, there should be read across to the Europol text.

Articles 57-60

No comments yet.

Articles 61-63

EPPO is currently being negotiated and as such there may be an impact on what OLAF will look like and do. Therefore, at this stage it may be premature to discuss the role of OLAF in this Regulation.

Article 64

No comments yet.

Articles 65-68

On Article 65, the seat of an Agency is ordinarily determined by common accord of the Member States. It is important to reconcile that with the fact that this is a co-decision dossier. The UK view is that there should not be an explicit reference to the seat of the Agency in the text. This is a matter of principle and is not about the practical location in The Hague.

On Article 67, there are some complex consequences here in light of JHA protocols, which need to be looked at carefully. As a starting point, Article 2 of Protocol 21 states that, subject to the remainder of the Protocol, no Title V measure adopted post-Lisbon is binding upon the UK and no such measure shall in any way affect the Community or Union acquis as they apply to the UK. Relying on that, the UK's view is that the starting point is that a post-Lisbon Title V measure cannot alter the rights or obligations of the UK unless the UK participates in that measure. Therefore, Article 67 of the new Eurojust Regulation, which states that the Regulation replaces and repeals the previous Decisions, cannot apply to the UK (unless the UK opts in to the new Regulation).
