COUNCIL OF THE EUROPEAN UNION

Brussels, 5 June 2014 (OR. en)

10622/14

Interinstitutional File: 2013/0256 (COD)

EUROJUST 112
EPPO 27
CATS 84
COPEN 169
CODEC 1412

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Eurojust Regulation Eurojust's replies to COPEN: Further questions on Data Protection Regime

Delegates will find Eurojust's response to the additional questions raised at the COPEN Working Party attached in the Annex.

ANNEX

At the COPEN meeting on 7 April 2014, the Austrian delegation raised the following questions in relation to the current data protection provisions in Articles 15 and 21 of the Eurojust Decision – which are to a large extent reproduced in Articles 27 and 28 of the draft Eurojust Regulation:

1) **Does the current regime create any difficulty in practice? Are the categories of personal data listed in Article 15 of the Eurojust Decision sufficient? If not, what does Eurojust need?**

The current regime of Article 15 of the Eurojust Decision on the processing of personal data poses some practical challenges to the operational work of the National Desks at Eurojust. As a consequence, Eurojust suggested, on previous occasions, in the context of the revision of the Eurojust Decision, to amend the current rules in order to align them with the operational reality at Eurojust. Article 27 of the draft Eurojust Regulation mirrors to a large extent the current wording of Article 15 of the Eurojust Decision. For this reason, Eurojust would like to reiterate its concerns and proposes to use the new Eurojust Regulation as an opportunity to improve the currently applicable system concerning the processing of personal data:

Article 15 of the Eurojust Decision currently imposes restrictions on data categories that may be "processed" by Eurojust, differentiating between personal data on suspects or persons who have been convicted of an offence (paragraph 1) and personal data of witnesses and victims (paragraph 2). Personal data other than the types listed in paragraphs 1 and 2 may only be processed (received, stored, used, forwarded) under strict exceptional conditions and procedures (by agreement of two National Members (paragraph 3) or even the full College (paragraph 4).

Procedural codes of the Member States naturally do not contain such limitations on the type of personal data that may be "processed" by prosecutors or courts. When competent authorities transmit such data to Eurojust (in letters/e-mails from prosecutors or courts, in MLA requests, police reports, etc.), the transmitting authority is to determine whether transferring the data to Eurojust meets the requirements of proportionality and subsidiarity before sending the data. Once received, Eurojust should be allowed to store and, where required, forward documents in the course of its operational work even if they contain data categories other than those listed in Article 15 paragraphs 1 and 2.

Frequently, mutual legal assistance requests or other documents received from national judicial authorities include personal data other than the data categories provided for in paragraphs 1 and 2. This is inherent in the exchange of information in the course of mutual legal assistance between national authorities. These documents are often large in size. To distinguish in each document between the four categories of data listed in Article 15 would impose a serious impediment to the work of the National Desks.

- **This issue becomes even more critical with the proposal for the new Eurojust Regulation which, in substance, no longer differentiates between acts conducted and powers exercised by national members acting as Eurojust or as national authorities.**

The proposal no longer refers to the National Members acting in their capacity as competent national authorities in accordance with national law. The distinction between powers exercised by National Members as competent national authorities in accordance with their national law or as Eurojust National Members is abolished (*see in particular* Articles 4, 5 and 8). As a consequence, under the new Regulation, Eurojust National Members will – as a general rule – receive, follow up or execute MLA requests in their capacity as Eurojust National Members and not as competent national authorities. Therefore, the Eurojust data protection regime will fully apply, meaning that National Members will not be able to process any MLA requests including personal data of any category other than those mentioned in Annex 2 of the draft Eurojust Regulation (which outlines the categories of personal data that can be processed) without the use of the strict exceptional conditions and procedures as provided in Article 15(3) and (4) of the Eurojust Decision and Article 27(3) and (4) of the draft Eurojust Regulation (by agreement of two National Members or even the College and involvement of the DPO), respectively.

- **This situation seems incompatible with the operational reality of National Desks at Eurojust.**

MLA requests relating to financial crimes will regularly contain information on bank accounts of victims of the crime which is not included in point 2 of Annex 2 of the draft Eurojust Regulation. For instance, in order to prove the financial damage to the victim in a financial fraud case, it is necessary to show that money was transferred out from the victim's account to another account. For this reason, MLA requests in the context of financial crime proceedings will regularly include the account number of the victim(s) in addition to the account number(s) of the accused.

Similarly, telephone numbers of witnesses and victims will often be included in MLA requests whenever the investigation includes the use of telecommunication intercepts when necessary to prove the link between the suspect and the victim or witness.

In order to address this important issue, Eurojust suggests including additional data categories under Annex 2 of the draft Eurojust Regulation, in particular:

> *2. […]*
> *g) social security numbers, driving licences, identification documents and passport data, customs and Tax Identification Numbers;*
> *h) bank accounts and accounts with other financial institutions;*
> *i) telephone numbers, e-mail addresses, traffic data and location data, as well as the related data necessary to identify the subscriber or user;*
> *j) vehicle registration data.*
> *k) […]*

2) Are the time limits for the storage of personal data provided for in Article 21 of the Eurojust Decision sufficiently generous? Also in light of Article 13 of the Eurojust Decision, they seem to be tight: the information should be available for a longer period.

The current regime on the time limits for the storage of personal data provided for in Article 21 of the Eurojust Decision is reproduced in Article 28 of the draft Eurojust Regulation and made more stringent. In fact, Article 28(3) of the draft Eurojust Regulation states even more specifically that, ***"The reasons for the continued storage must be justified and recorded. If no decision is taken on the continued storage of personal data, those data shall be deleted automatically after three years"*** (emphasis added).

On the basis of Eurojust's practical experience, it is considered useful, and in some cases even necessary, to extend the time limits for the storage of personal data beyond the current three-year period. Considering the specific judicial nature of personal data processed by Eurojust, a more flexible regime would allow Eurojust and the national authorities to make the best possible use of Articles 21 and 22 of the draft Eurojust Regulation (current Articles 13 and 13a of the Eurojust Decision) on the exchange of information including personal data. Moreover, it would make it possible to use documents and decisions containing personal data processed by Eurojust to be used at a later stage (e.g. in court some years later). Finally, an extension of the time limits would be beneficial for the further development of Eurojust as a centre of expertise in judicial cooperation: the current time limits, and consequent deletion of files, do not enable Eurojust to examine and take into account files older than three years unless a derogation was applicable and the file is still stored or unless personal data has been deleted manually (which is a cumbersome and resource-consuming procedure).

In this regard, similar concerns were expressed by the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the EU Member States which, in relation to the data protection regime at Eurojust, recently considered that: **"*The provisions on the allowed period of storage of data should be reconsidered thoroughly taking into account that a record of criminal activities is vital for Eurojust's tasks and purpose*"**[1].

In addition, Eurojust would like to submit the following comments and proposals related to Article 28 of the draft Eurojust Regulation.

[1] Conclusions of the meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the EU Member States held at Eurojust on 13 December 2013 (Council doc. 8617/14 of 8 April 2014).

Article 28 (1)

The provision requires Eurojust to delete personal data as soon as any one of the conditions set out in paragraph 1 applies. With regard to the provisions of paragraphs 1(a), (b) and (c), Eurojust can do so, however, only if it is informed by the national authorities that the described condition is met (e.g. in case of subparagraph (c), that Eurojust is informed about the "date on which the judicial decision .... became final").

It is thus proposed to make the provisions of paragraphs 1(a), (b) and (c) conditional upon Eurojust being informed by the respective Member State(s) that any of the events/time limits have occurred. This could be done either by adding respective language in paragraph 1 or by inserting a new paragraph between paragraphs 1 and 2.

Article 28(2)

The text should be amended to read as follows:

> *"Observance of the storage deadlines referred to in points (a), (b), (c) and (d) of paragraph 1 shall be reviewed constantly by appropriate automatic processing, particularly from the moment in which the case is closed by Eurojust. Nevertheless, a review of the need to store the data shall be carried out every three years after they were entered; such a review shall then apply to the case as a whole".*

The additional text proposed for the end of that subparagraph is intended to clarify that the review should extend to all data stored in respect of a case and should not be done separately in respect of each individual piece of data that may have been received by Eurojust at different times.

It should also be clarified whether the reference to points (a), (b), (c) and (d) of paragraph 1 in Article 28(2) is correct or if points (a), (c), (d) and (e) of paragraph 1 should be rather mentioned instead.

Finally, it has to be noted that the phrase "*If data concerning persons referred to in Article 27(4) are stored for a period exceeding five years, the European Data Protection Supervisor shall be informed accordingly*" has been added to this paragraph.

Article 28(5)

This provision assumes that Eurojust holds "original files" that have been sent to Eurojust by the Member State. In practice, however, most of the documents held by Eurojust (copies, faxes or prints from electronically transmitted documents) are also available in the Member State and Eurojust therefore has no reason to return documents to the national authorities.

The text should be amended to read as follows: *"~~Where a file contains non-automated data and unstructured data,~~ Once the deadline for storage of the last item of automated data from the file has elapsed, all documents in the file shall be ~~returned to the authority which supplied them and any copies shall be~~ destroyed, with the exception of any original documents which Eurojust has received from national authorities and which need to be returned to their originator".*

Article 28(6)

The text should be amended to read as follows: *"Where Eurojust has coordinated an investigation or prosecutions, the National Members concerned shall inform* ***the other National Members concerned whenever they receive information that the case has been dismissed or on any final judicial decision related to the case*** *in order, inter alia, that points* ***(a),*** *(b)* ***and (c)*** *of paragraph 1 may be applied."*

These amendments would clarify that National Members are obliged to provide information only if they receive the necessary information from the national authorities.