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NOTE

From:	Presidency/General Secretariat of the Council
To:	Delegations
No. Cion doc.:	8332/22
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, as regards the collection, preservation and analysis of evidence relating to genocide, crimes against humanity and war crimes at Eurojust - Suggestion by the Presidency for the inclusion of two new recitals and rectification of a mistake in Annex II

1. On 25 April 2022, the Commission presented the above-mentioned proposal for a Regulation.
2. In the light of the subject matter, the Commission has asked the European Parliament and the Council to deal with this proposal in an urgent manner. The Presidency aims at examining this proposal at the meeting of the JHA Counsellors on 29 April.
3. When preparing this meeting, the Presidency wondered whether in the proposal for a Regulation two justifications for exceptions to ordinary rules were missing:
 - a) a justification to invoke the exception to the eight-week period provided for in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the Treaties;

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- b) a justification why the Regulation, as an exception to the third indent of Article 297(1) TFEU, should enter into force on the day following that of its publication in the Official Journal of the European Union (see the first indent of Article 2).
6. In order to address these points, the Presidency, in liaison with the Commission services and the Council Legal Service, has drafted two recitals, which have been set out in the attached text as (new) **recitals 15a and 19**.
7. In addition, the Presidency proposes to amend the drafting of **point 2 (f) of Annex II** in order to rectify a mistake in the drafting proposed by the Commission, relating to the order of the words.
8. The Presidency invites the delegations to consider whether it would be appropriate to insert these new recitals in the text and to rectify the drafting of point 2 (f) of Annex II.
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(Draft)

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Regulation (EU) 2018/1727 of the European Parliament and the Council, as regards the collection, preservation and analysis of evidence relating to genocide, crimes against humanity and war crimes at Eurojust

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 85 thereof,

Having regard to the proposal from the European Commission,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Regulation (EU) 2018/1727 of the European Parliament and of the Council established Eurojust and sets out its tasks, competence and functions.
- (2) Eurojust is competent with respect to the forms of serious crime listed in Annex I to Regulation (EU) 2018/1727, which include genocide, crimes against humanity and war crimes. In accordance with Article 3(4) of Regulation (EU) 2018/1727, Eurojust's competence also covers criminal offences related to the criminal offences listed in Annex I to that Regulation.
- (3) On 24 February 2022, Russia began a military aggression against Ukraine. There is a reasonable basis to believe that crimes against humanity and war crimes have been and are being committed in Ukraine in the context of the current hostilities.

- (4) In view of the gravity of the situation, the Union should take all the necessary measures, as a matter of urgency, to ensure that those who committed those crimes in Ukraine are held responsible.
- (5) Prosecution services in several Member States as well as in Ukraine have started investigations concerning the events in Ukraine, when appropriate relying on the support of Eurojust. Eurojust concluded an agreement on cooperation with Ukraine on 27 June 2016. In accordance with this agreement, a Ukrainian liaison prosecutor is posted to Eurojust to facilitate the cooperation between Eurojust and Ukraine.
- (6) In accordance with the Rome Statute, the International Criminal Court has the power to exercise its jurisdiction over individuals responsible for the most serious crimes of international concern, as referred to in the Rome Statute. The jurisdiction of the International Criminal Court is complementary to national criminal jurisdictions. The Office of the Prosecutor of the International Criminal Court announced it has proceeded to open an investigation into the situation in Ukraine.
- (7) Due to the application of the principle of universal jurisdiction in several Member States and the complementary nature of the International Criminal Court's jurisdiction, coordination and exchange of evidence between national investigating and prosecuting authorities in different jurisdictions as well as with the International Criminal Court, or other court, tribunal or mechanism established for that purpose, is important to ensure the effectiveness of investigations and prosecutions of genocide, crimes against humanity and war crimes and related offences, including those that may be committed in Ukraine in the context of the current hostilities.
- (8) To ensure that evidence and best practices relating to the prosecution of genocide, crimes against humanity and war crimes are shared with national and international judicial authorities, Eurojust should enhance its cooperation with criminal courts, tribunals and mechanisms established to address breaches of international law. For that purpose, Eurojust should establish close cooperation with the International Criminal Court and any other court, tribunal or mechanism that aims at addressing crimes affecting the international peace and safety. Accordingly, Eurojust should also facilitate the execution of judicial cooperation requests from the International Criminal Court or special criminal courts, tribunals or mechanisms concerning evidence related to genocide, crimes against humanity, war crimes and related criminal offences.
- (9) Evidence related to genocide, crimes against humanity and war crimes cannot be safely stored on the territory where the hostilities take place, as is the case with the evidence connected with the

ongoing hostilities in Ukraine. Therefore, a central storage is necessary. Evidence collected by Union agencies and bodies and international authorities or third parties such as civil society organisations may also require a central storage place so as to be accessible to competent judicial authorities.

(10) Eurojust has the expertise and experience to support the investigations and prosecutions of cross-border crimes, including genocide, crimes against humanity, war crimes and related criminal offences. This includes preservation, analysis and storage of evidence as far as its admissibility before courts and reliability are concerned.

(11) By collecting, preserving and analysing evidence related to core international crimes, as well as, when necessary and appropriate, enabling its exchange, Eurojust can support case building in national and international investigations and provide additional support to the competent national and international authorities. Such evidence may be especially valuable to ascertain the reliability of witness testimonies.

(12) A new temporary storage facility allowing for such storage, analysis and preservation should be set up. As the need to store such evidence is urgent, it is necessary for Eurojust to store it in an automated data management and storage facility outside the case management system, until the new case management system is fully functional. The general rules of the distinct Chapter of Regulation (EU) 2018/1725 of the European Parliament and of the Council on the processing of operational personal data should apply without prejudice to the specific data protection rules of Regulation (EU) 2018/1727. The automated data management and storage facility should be integrated into the new case management system, which is expected to be established under the proposal for a Regulation on the digital information exchange in terrorism cases.

(13) The storage, analysis and preservation of evidence in relation to genocide, crimes against humanity, war crimes and related criminal offences in the automated data management and storage facility, as well as their accessibility by the competent judicial authorities whenever necessary and appropriate, should comply with the highest standards of cyber security and data protection, in accordance with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

(14) Satellite images, photographs, videos and audio recordings can be useful to demonstrate the commission of genocide, crimes against humanity, war crimes and related criminal offences. Therefore, Eurojust should be able to process and store such data in relation to this purpose.

(15) Eurojust and Europol should closely cooperate in the context of their respective mandates, in particular as regards the processing and analysis of information in the context of Europol's existing and dedicated system (called analysis project) on international crimes, to support competent authorities in investigating and prosecuting genocide, crimes against humanity, war crimes and related criminal offences. Therefore, Eurojust may refer to Europol information that it has received in the performance of its functions in accordance with Article 4(1)(j) of Regulation (EU) 2018/1727. The cooperation should include a regular joint evaluation of operational and technical issues.

(15a) In view of the urgent need to set up an automated data-management and storage facility at Eurojust, available for use by the Member States, third countries and the International Criminal Court to deal with evidence relating to genocide, crimes against humanity and war crimes with a view to ensuring accountability for the atrocities committed in Ukraine, it is considered to be appropriate to invoke the exception to the eight-week period provided for in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community.

(16) [In accordance with Articles 1, 2 and 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, and without prejudice to Article 4 of that Protocol, Ireland is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.] OR [In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Ireland has notified its wish to take part in the adoption and application of this Regulation.]

(17) In accordance with Articles 1 and 2 of Protocol No 22 on the Position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(18) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 and delivered an opinion on XX/XX/20XX,

(19) This Regulation should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union* in order to urgently make available the new automated data-management and storage facility at Eurojust for Member States, third countries and the International Criminal Court to deal with evidence relating to genocide, crimes against humanity and war crimes with a view to ensuring accountability for the atrocities committed in Ukraine,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2018/1727

Regulation (EU) 2018/1727 is amended as follows:

(1) in Article 4(1), the following point (j) is added:

“(j) support Member States’ action in combating genocide, crimes against humanity, war crimes and related criminal offences, including by collecting, preserving and analysing evidence related to these criminal offences, as well as, where necessary and appropriate, enabling its exchange or otherwise making it directly available to the competent national and international judicial authorities, in particular the International Criminal Court”

(2) in Article 80, the following paragraph 8 is added:

“(8) By way of derogation from Article 23(6), Eurojust may process operational personal data for the performance of the tasks referred to in Article 4(1), point (j), in an automated data management and storage facility outside the case management system. The automated data management and storage facility shall comply with the highest standards of cyber security. The operation of the automated data management and storage facility shall be subject to prior consultation of the EDPS. The EDPS shall deliver his or her opinion within two months following the receipt of a notification from the Data Protection Officer.

The notification from the Data Protection Officer shall contain at least the following elements:

- (a) a general description of the envisaged processing operations;
- (b) an assessment of the risks to the rights and freedoms of data subjects;
- (c) the measures envisaged to address those risks;
- (d) safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation, taking into account the rights and legitimate interests of the data subjects and other persons concerned.

The data protection provisions of this Regulation shall apply to the processing of data in the automated data management and storage facility as far as they do not directly relate to the technical set-up of the case management system in accordance with Article 23(1) of this Regulation. Access right and time limits for the data stored in the automated data management and storage facility shall be linked to the access to the temporary work files, in support of which the data is stored.

The derogation provided for in this paragraph shall end at the time when the new case management system is in place. The Commission shall determine the date at which the new case management system is in place by a decision that shall be published in the Official Journal of the European Union.”

(3) Annex II is amended as follows:

(a) point 1(n) is replaced by the following:

“(n) DNA profiles established from the non-coding part of DNA, photographs and fingerprints and, in relation to the criminal offences referred to in Article 4(1)(j), videos and audio recordings.”

(b) point 2(f) is replaced by the following:

“(f) the description and nature of the offences involving the person concerned, the date and location on which the offences were committed, the criminal category of the offences, **the progress of the investigations** and, in relation to the criminal offences referred to in Article 4(1)(j), information relating to criminal conduct, including audio recordings, videos, satellite images and photographs ~~and to the progress of the investigations;~~”

Article 2

Entry into force

This Regulation shall enter into force on the 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.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

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