



**Council of the
European Union**

**Brussels, 19 September 2017
(OR. en)**

12347/17

RESTREINT UE/EU RESTRICTED

**CT 90
ENFOPOL 416
COTER 91
JAI 803
COSI 204
CIVCOM 173
COPS 287**

NOTE

From:	EU Counter-Terrorism Coordinator
To:	Delegations
No. prev. doc.:	10880/17 + ADD 1
Subject:	Strengthening military, law enforcement and judicial information exchange in counter-terrorism

In line with the tasking by the Joint Home Affairs and Defence Council in Brussels on 18 May 2017, the EU Counter-Terrorism Coordinator has suggested a series of measures to strengthen military, law enforcement and judicial information exchange in counter-terrorism, including with international partners (doc 10880/17 and 10880/17 ADD 1). He thanks Member States, the Commission and the EU JHA agencies for their initial comments in the discussion in COTER/TWP in July 2017 and their written comments.

This cover note sets out recommendations for the way forward, based on the comments received.

In the (military) operations led against terrorist groups, military forces are the first on the ground to come into contact with unique elements that would possibly allow identification of foreign terrorist fighters and the crimes they have committed. Access to these elements for military forces can be a result of advising, training or supporting foreign military forces that would be in a position to collect and share such information; they could also be involved in building up forensics knowledge and capacities of foreign authorities.

RESTREINT UE/EU RESTRICTED

If shared in a properly and timely manner with law enforcement authorities, judicial, financial, border or any other affected competent authorities, this information could have an immediate operational value, because it would enable authorities to stop fighters trying to cross borders (especially re-entering Europe from the battlefield), to dismantle their networks and supply chains in order to weaken their warfare and to prevent attacks in Europe. It may also have judicial value in helping to bring terrorists to justice.

The fight against terrorism is a whole chain that includes the collection of information and evidence as well as the investigation, prosecution and conviction of terrorists. So it is of vital importance to create a strong cooperation among military, law enforcement and judicial authorities, in order to share the knowledge on foreign (and other) terrorist fighters, so as to punish them for their crimes and to repair the damages they caused to people or patrimony. The recent condemnation of Mr. Al Mahdi by the International Criminal Courts for the damages he has caused to Timbuktu's historical and religious buildings has been a reminder that bringing terrorists to justice contributes to the defeat of terrorism.

In their comments, a number of Member States highlighted the need to increase law enforcement and judicial expertise in the military forces to gather the data on the battlefield. Since 9/11, the US has developed a lot of experience in embedding law enforcement personnel (investigators and prosecutors) into military operations, in collecting battlefield information and supporting this collection by partners such as Iraq and making it available for law enforcement purposes, including sharing with international partners. The US and Canada have specifically trained their conventional and/or special forces to the collection of battlefield evidence and created a dedicated framework for the sharing with their national law enforcement agencies in coherence with military rules of engagement. These pieces of evidence could be physical, like identity papers or fingerprints on an IED, or digital like seized computers or cell phones.

RESTREINT UE/EU RESTRICTED

At the EU level, discussions on "strengthening military, law enforcement and judicial information exchange in counter-terrorism" are still at the very beginning. It would be important to deepen our collective understanding and analysis. At the same time, given the high terrorist threat, it is urgent to make practical progress and ensure that information collected by the military is available to law enforcement, judicial and border authorities in Europe, in full respect of the rule of law and human rights. To move forward, it is important to clarify the various strands of this complex and sensitive work, notably the different responsibilities associated with various scenarios of collection of battlefield data:

- Scenario 1: data collected by Member States in the course of their own military operations: The information exchange between the military and law enforcement at national level is a matter of national competence, but the EU can encourage Member States to develop the appropriate national procedures to facilitate the collection of information and its sharing with relevant authorities. A number of Member States highlighted the need for their national assessment on a case-by-case basis whether information collected by the military can be shared with law enforcement. The EU may further facilitate the exchange of best practices and experience in the course of Council meetings (e.g. the French presentation in COSI) or more ad hoc seminars (e.g. the ESDC/Europol workshop), including learning lessons from third parties (e.g. the US practice). It may also include, as appropriate, facilitation of sharing of the information with EU JHA agencies and EU information systems such as the SIS II. In particular, Europol should be provided with relevant information for cross-checking and analysis purposes (EIS and analysis system), to allow for identifying new lines of investigation.
- Scenario 2: data collected by third parties (i.e. neither Member States nor EU directly) such as the Global anti-ISIL Coalition, the US, NATO, Iraq, etc.: The question here is how can the EU facilitate the collection and sharing of this data with EU Agencies and Member States.

Relevant for scenarios 1 and 2: The sharing with and use of battlefield data (either collected by Member States or by third parties) by law enforcement, justice and border security poses many complex legal and practical questions, such as the legal basis for the sharing and the extent to which checking the accuracy and validity of information is possible, or whether it can be used as evidence in court. At EU level, these challenges could be examined and discussed collectively.

RESTREINT UE/EU RESTRICTED

It needs to be further explored how the role of Europol (and potentially other EU JHA agencies such as Eurojust and Frontex¹) and INTERPOL as recipients of the battlefield data in the context of the fight against terrorism can be further strengthened.

- Scenario 3: data collected in the course of EU CSDP missions/operations: Here the EU has of course a key role to play. A number of Member States in their comments have highlighted the importance to progress work in this area and the relevance for the CT context. As this is covered by the EEAS paper on cooperation between CSDP Missions/Operations and EU JHA Agencies (WK 9396/2017/REV 1), it is not covered in this paper. Close cooperation and coordination between the work in the various strands needs to take place.

With regard to battlefield data, it is also important to distinguish between personal and non-personal data, as well as between objects and outcomes of interviews of suspects.

Recommendations for the way forward:

A number of steps could be taken to make progress at a practical level, but also gain a better understanding of the complexity of the topic, to ensure that potential practical measures have the best possible efficiency and usefulness for law enforcement, border guards and the judiciary, and to fully develop the supporting role that EU JHA agencies could play in this context as recipients of information collected by the military.

1. United States: sharing of good practices and availability of the information

Efficient revival of INTERPOL/VENNLIG and full embedment of Europol into the law enforcement part of OGP should be achieved as soon as possible.

It would be important to encourage the US at the political level to share to the maximum extent. A strategy and opportunities in this regard could be discussed.

¹ Currently Frontex would not be able to make use of personal data collected by third parties from the battlefield. But it would be important for Frontex to receive other, non-personal data related to patterns, profiles, routes, modus operandi. Frontex is well positioned to ensure that information related to non-personal data would be brought to the awareness and be acted upon by Member States border control authorities.

RESTREINT UE/EU RESTRICTED

Close cooperation with the US is key. A workshop with the US on military, law enforcement and judicial information exchange in the counter-terrorism context could be organized to learn from the US experience, including how the practical and legal challenges have been addressed, what type of information is being collected, how it is used by national law enforcement, border and judicial authorities, including practical examples, and how it is shared internationally. Opportunities with regard to information collected in particular in Iraq (revival of INTERPOL/VENNLIG, Operation Gallant Phoenix (OGP), training of the Iraqis to collect and share battlefield information) could be discussed. This would allow understanding better and learning from the US approach, as well as encourage the US to share to the maximum extent. Ensuring optimum efficiency of VENNLIG revival for EU Member States law enforcement and judicial authorities (such as quality of the information, contextual information) as well as transmission of information to Europol could be discussed. Possibilities for capacity building of Iraqi authorities in this field could be explored together with the US. It would also be important to explore more broadly whether similar projects could be set up for other conflict areas such as the Sahel and Libya, as well as revival of the INTERPOL/HAMAH project for Afghanistan.

2. EU Military Committee

The EU Military Committee could be consulted on this matter and invited to share national best practices and experiences for information sharing between the military and law enforcement/the judiciary, classification levels/de-classification, embedding of prosecutors, national practice and criteria of sharing of information collected by the military with Europol and SIS II via national law enforcement authorities. Experiences with regard to use of police forces with military status (e.g. gendarmerie) could also be discussed. The possibility and interest of the Member States militarily deployed in relevant conflict areas to fully participate in the revival of the INTERPOL/VENNLIG and INTERPOL/HAMAH projects could also be discussed. It could be explored whether similar projects could be set up for other conflict areas such as the Sahel and Libya. Good practices with regard to the sharing of military information with local law enforcement authorities for local investigations and prosecutions could also be shared. The possibility of seeking Europol access to NATO's Biometric Enhanced Watch list and Network analysis information could also be discussed.

3. Eurojust

To make progress on the legal and practical challenges, Eurojust could be invited to map challenges and best practice in using information collected by the military for investigations and prosecutions, including conditions for admissibility as evidence.

Eurojust could be asked to identify, in consultation with its national correspondents and specialised prosecutors for terrorism matters, challenges and best practice in using information collected by military as evidence in criminal proceedings and/or as the basis for opening criminal investigations or prosecutions, as well as ordering coercive and surveillance measures (such as the interception of a suspect's telecommunications). In 2016 Eurojust has started mapping the practices of the Member States in using intelligence as evidence in criminal proceedings which raise similar issues. Moreover, in its Maritime Piracy Judicial Monitors of 2013 and 2015, Eurojust has also analysed challenges in using military information as evidence in maritime piracy proceedings. The Genocide network hosted by Eurojust could be also invited, together with Eurojust, to contribute to the mapping of challenges in using information collected by the military for investigations and prosecutions of international core crimes, considering that battlefield information could be used, if national legal systems permit, as evidence for both terrorism and/or core international crimes.

It is also important to ensure effective international judicial cooperation and the systematic and timely transmission of information on prosecutions and convictions for terrorist offences to Eurojust.²

4. Europol

Europol's regular rules such as the handling codes apply also in the context of information collected by the military.

Europol could be invited to further reflect on the modalities and opportunities for how best to strengthen its role to support military and law enforcement information exchange.

Full embedment of Europol into the law enforcement part of OGP should be brought forward with US counterparts.

² Based on Council Decision 2005/671/JHA.

RESTREINT UE/EU RESTRICTED

Europol could be invited to report on the state of play in the establishment of access to the *Secure Real-Time Platform (SRTP)* of the US Department of Homeland Security, which includes battlefield information of the US Department of Defense collected by the military and potential modalities for implementation.

Focus of EU-NATO cooperation is on building capacity in third countries, not on exchanging personal data. Nevertheless Europol could be invited to explore informally with NATO the possibilities, feasibility, relevance and benefits of access to NATO's Biometric Enhanced Watch list and Network analysis information and to report back. An assessment is necessary on the actual data contained in the databases/systems, the value of such data, the impact on Europol (including as regards quality of the data and data protection). A potential political agreement at EU level to move forward could be discussed on the basis of Europol's report.

Europol and Frontex could be invited to explore the challenges and opportunities as well as practical requirements for the use of information collected by the military in the context of border controls, including second line checks at the hotspots.

While the Commission for International Justice and Accountability (CIJA) is a civilian actor, they cooperate closely with the local military forces on the ground to collect battlefield information relevant for investigations and prosecutions of Daesh leadership, which can also be relevant in the context of foreign terrorist fighters. The law enforcement and judicial authorities of some Member States have already received such information from CIJA. Europol is exploring access to this information and could be invited to report about progress.

5. INTERPOL

INTERPOL could be invited to provide a detailed paper on VENNLIG and HAMAH revival and suggestions to *establish similar mechanisms for other conflict zones such as Libya and the Sahel*. The transmission of information to Europol should be further specified. In order to increase the opportunities related to INTERPOL notices containing battlefield information collected by the military (*Black, Purple, Blue notices*), INTERPOL could be invited to provide detailed explanations of how these notices function in practice, the state of play/statistics on the use of the instruments, possible shortcoming and what can be done to enhance the use of these notices (by EU Member States or third countries).

INTERPOL could be invited to explore how it can strengthen its cooperation with Europol with regard to information collected by the military.

INTERPOL could be invited to second a liaison officer to Europol (as has been the case in the past).

6. Iraq

In the current counter-terrorism context and given the high number of foreign terrorist fighters on its territory, working with Iraq is a top priority. A number of Member States have highlighted the importance *to support building Iraqi capacity in the field of criminal justice and forensic evidence*, based on the rule of law and human rights. The EU could explore whether and if so how best it can launch capacity building projects in this field.

Good practices of collecting law enforcement relevant information by the military and sharing information collected by the military with law enforcement and INTERPOL could be discussed with Iraq and raised with Iraq at the political level, so that increasingly information collected by Iraq would be made available to law enforcement/INTERPOL and hence eventually Europol.

The EU delegation in Iraq could be invited, together with Member States on the ground, to explore whether and if so how the collection and preservation of forensic evidence from improvised explosive devices in Iraq, which are currently being cleared and destroyed, could be strengthened, while fully respecting the principle of neutrality (non-interference) of the EU's capacity building and humanitarian projects.

7. Workshop with relevant stakeholders in EU Member States and JHA agencies

Given the cross-cutting and multidisciplinary nature of the topic and the necessary involvement of military, law enforcement, prosecutors, policy makers and other competent authorities, no single working group covers all the relevant aspects. Building on the ESDC-Europol workshop, a workshop with all relevant stakeholders could be organized to discuss the various good practices and challenges, based on the inputs by EU Member States, EU JHA agencies and INTERPOL. This could potentially take place back to back with the workshop suggested by the EEAS with JHA and CSDP actors, EEAS CT division, CT experts, EU CTC and the Commission on counter-terrorism information exchange with CSDP operations.