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'I/A' ITEM NOTE

From:	Presidency
To:	Permanent Representatives Committee (Part 2)/Council
No. prev. doc.:	5685/21
No. Cion doc.:	13165/20 + ADD 1
Subject:	Draft Council Decision authorising the opening of negotiations for Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States
	- Adoption

On 19 November 2020, the Commission presented a recommendation for a Council Decision authorising the opening of negotiations for Agreements between the EU and 10 third States on cooperation Eurojust and the competent authorities for judicial cooperation in criminal matters of those third States (13165/20 + ADD 1).

The Working Party on Cooperation in Criminal Matters (COPEN) discussed the draft Decision, as well as the accompanying negotiation directives, at meetings on 4 December 2020 and on 22 January 2021. As a result of these discussions, the draft Decision and negotiation directives were modified on several points, including on the following:

- Argentina, Brazil and Colombia were added to the list of third States with which negotiations should start;
- Articles 16(2) and 85 TFEU were added as legal basis in the preamble;
- an additional chapter in the negotiating directives was added, in the light of the CJEU judgment of 16 July 2015 in Case C-425/13, *Commission v. Council*, points 59 to 93 (see WK 13956/20).

Following consultations on the basis of 5685/21, it appeared that the texts of the draft Council Decision and the negotiating directives, as they stand in 5685/21, are acceptable to all Member States, except Cyprus. The latter Member State indicated that it cannot consent to the inclusion of Turkey in the list of countries with which negotiations should start.

A declaration by Cyprus for the minutes of Coreper is set out in ADD 1 to this note.

The Commission indicated that it agrees with the inclusion of Argentina, Brazil and Colombia to the list of third States with which negotiations should start. However, the Commission indicated that it contests the addition of Articles 16(2) and 85 TFEU to the legal basis.

A declaration by the Commission for the minutes of Coreper is set out in ADD 2 to this note.

In accordance with Article 218(8) TFEU, the Council shall act by a qualified majority throughout the procedure.

In the light of the above, and subject to approval by Coreper, the Council is invited:

- to adopt the Decision as set out in Annex I, together with the negotiation directives as set out in Annex II.

(DRAFT)

COUNCIL DECISION

authorising the opening of negotiations for Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular Articles 16(2) and 85, in conjunction with Article 218(3) and (4) thereof,

Having regard to the four years cooperation strategy prepared by Eurojust in consultation with the Commission,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) Regulation (EU) 2018/1727 of the European Parliament and of the Council¹ was adopted on 14 November 2018 and is applicable as of 12 December 2019.

¹ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (OJ L 295, 21.11.2018, p. 138).

- (2) According to Article 52 of this Regulation, Eurojust may establish and maintain cooperation with authorities of third countries and international organisations. To that end, Eurojust shall prepare a cooperation strategy every four years in consultation with the Commission, which specifies the third countries and international organisations with which there is an operational need for cooperation.
- (3) This Regulation, in particular its Article 56, sets out the general principles for the transfer of personal data from the European Union Agency for Criminal Justice Cooperation (Eurojust) to third countries and international organisations. Eurojust may transfer personal data to a third country on the basis of an international agreement concluded between the Union and that third country pursuant to Article 218 TFEU that provides for adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals.
- (4) Negotiations should be opened with a view to concluding such Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey.
- (5) Where necessary, the Commission should be able to consult the European Data Protection Supervisor (EDPS) also during the negotiation of the Agreements and in any event, before the Agreements are concluded.
- (6) The Agreements should respect the fundamental rights and observe the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right to private and family life, recognised in Article 7 of the Charter, the right to the protection of personal data, recognised in Article 8 of the Charter and the right to an effective remedy and fair trial recognised in Article 47 of the Charter. The Agreements should be applied in accordance with those rights and principles.

- (7) The Agreements should not affect, and should be without prejudice to the transfer of personal data or other forms of cooperation between the authorities responsible for safeguarding national security.
- (8) Ireland is bound by Regulation (EU) 2018/1727 and therefore takes part in the adoption of this Decision.
- (9) In accordance with Articles 1 and 2 of Protocol No. 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part of the adoption this Decision and is not bound by it or subject to its application.
- (10) The EDPS has been consulted on this Decision and the Annex thereto and issued an opinion on 17 December 2020,²

² Opinion 10/2020 of the European Data Protection Supervisor on the negotiating mandate to conclude ten agreements allowing the exchange of data between Eurojust and the competent authorities for judicial cooperation in criminal matters in certain third countries (14215/20).

HAS ADOPTED THIS DECISION:

Article 1

- (1) The Commission is hereby authorised to open negotiations for Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States.
- (2) The negotiations shall be conducted on the basis of the negotiation directives of the Council set out in the Annex to this Decision.

Article 2

The Commission is hereby nominated as the Union negotiator.

Article 3

The negotiations shall be conducted in consultation with the Council Working Party on Cooperation in Criminal Matters (COPEN) and in accordance with the directives contained in the Annex, subject to any directives which the Council may subsequently issue to the Commission.

The Commission shall regularly report to the COPEN Working Party on the progress of the negotiations and shall forward all negotiating documents to it without delay.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President

Directives for the negotiation of Agreements between the European Union and Algeria, Argentina, Armenia, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States for judicial cooperation in criminal matters

In the course of the negotiations the Commission should aim to achieve the objectives set out in detail below.

- (1) The objective of the Agreements shall be to provide the legal basis for the cooperation between Eurojust and the competent authorities of the third countries concerned respectively, including the exchange of operational personal data, in order to support and strengthen the action by the competent authorities of these countries and the Member States as well as their mutual cooperation in investigating and prosecuting the forms of crime for which Eurojust is competent in accordance with the Eurojust Regulation, while ensuring appropriate safeguards with respect to the protection of privacy, personal data and the fundamental rights and freedoms of individuals.

To guarantee purpose limitation, cooperation and exchange of personal data under the Agreements shall only relate to crimes and related offences falling within Eurojust's competence in accordance with Article 3 of Regulation (EU) 2018/1727 (together 'criminal offences'). In particular, cooperation should be aimed at investigating and prosecuting serious crime, notably terrorism, organised crime, illicit trafficking of firearms, drug trafficking, trafficking in human beings and migrant smuggling, and cybercrime. The Agreements shall specify their scope and the purposes for which Eurojust may transfer data to the competent authorities of the third countries concerned.

- (2) The Agreements shall spell out clearly and precisely the necessary safeguards and controls with respect to the protection of personal data, fundamental rights and freedoms of individuals, irrespective of nationality and place of residence, in the exchange of personal data between Eurojust and the competent authorities of the third countries involved. In addition to the safeguards set out below, these shall include requiring that the transfer of personal data will be subject to confidentiality obligations and that the personal data will not be used to request, hand down or execute a death penalty or any form of cruel and inhuman treatment, without prejudice to additional safeguards that may be required.

In particular:

- (a) The Agreements shall contain definitions of key terms, including a definition of personal data compliant with Article 3(1) of Directive (EU) 2016/680.
- (b) The Agreements shall respect the principle of specificity, ensuring that the data will not be processed for other purpose than for the purposes of the transfer. To this end, the purposes of the processing of personal data by the Parties in the context of the Agreements shall be spelt out clearly and precisely, and shall be no wider than what is necessary in individual cases for the purpose of preventing and combating the criminal offences to which the Agreements relate.

- (c) Personal data transferred by Eurojust in accordance with the Agreements shall be processed fairly, on a legitimate basis and only for the purposes for which they have been transferred. The Agreements shall provide the obligation for Eurojust to indicate, at the moment of transferring the data, any restrictions on access of use, including as regards its transfer, erasure, destruction or further processing. The Agreements shall oblige the competent authorities of the third countries concerned to respect these restrictions and specify how compliance with these restrictions will be enforced in practice. Personal data shall be adequate, relevant and limited to what is necessary in relation to that purpose. It shall be accurate and kept up to date. It shall not be retained for longer than is necessary for the purposes for which it has been transferred. The Agreements shall provide for the periodic review of the need for further retention of the transferred personal data. The Agreements shall be accompanied by an annex containing an exhaustive list of the competent authorities of the third States concerned to which Eurojust may transfer data as well as a short description of their competences.
- (d) The transfer of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, genetic data, biometric data for the purpose of uniquely identifying a natural person, and data concerning a person's health and sex life by Eurojust shall be allowed, only where it is strictly necessary and proportionate in individual cases for preventing or combating criminal offences covered by the Agreements and subject to appropriate safeguards. The Agreements should also contain specific safeguards relating to the transfer of personal data on victims of criminal offences, witnesses or other persons who can provide information concerning criminal offences, as well as minors.

- (e) The Agreements shall ensure enforceable rights of individuals whose personal data are processed by laying down rules on the right of access, rectification and erasure, including the specific grounds which may allow any necessary and proportionate restrictions. The Agreements shall also ensure enforceable rights of administrative and judicial redress for any person whose data are processed under the Agreements and guaranteeing effective remedies.
- (f) The Agreements shall lay down the rules on storage, review, correction and deletion of personal data as well as on keeping records for the purposes of logging and documentation as well as on information to be made available to individuals. They should also provide for safeguards in respect to automated processing of personal data. The Agreements should also specify the criteria on the basis of which the accuracy of the data should be assessed.
- (g) The Agreements shall include the obligation to ensure the security of personal data through appropriate technical and organisational measures, including by allowing only authorised persons to have access to personal data. The Agreements shall also include the obligation of notification in the event of a personal data breach affecting data transferred under the Agreement.
- (h) Onwards transfers of information from the competent authorities of the third countries concerned to other authorities within their own country, including for use in judicial procedures, shall only be allowed for the original purposes of the transfer by Eurojust and shall be made subject to appropriate conditions and safeguards, including prior authorisation by Eurojust.

- (i) The same conditions as indicated under point (h) shall apply to onward transfers of information from the competent authorities of the third country concerned to authorities in another third country, with the additional requirement that such onward transfers shall be allowed only with to third countries to which Eurojust is entitled to transfer personal data on the basis of Article 56(2) of Regulation (EU) 2018/1727.
 - (j) The Agreements shall ensure a system of oversight by one or more independent public authorities responsible for data protection with effective powers of investigation and intervention to exercise oversight over the public authorities of the third countries concerned that use personal data and other information exchanged under the Agreements, and to engage in legal proceedings. In particular, the independent authorities shall have the powers to hear complaints from individuals about the use of their personal data. Public authorities that use personal data shall be accountable for complying with the rules on the protection of personal data under the Agreement.
- (3) The Agreements shall provide for an effective dispute settlement mechanism with respect to its interpretation and application to ensure that the parties observe mutually agreed rules.
- (4) The Agreements shall include provisions on the monitoring and periodic evaluation of the Agreements.
- (5) The Agreements shall include a provision on their entry into force and validity and a provision whereby a Party may terminate or suspend it, in particular where the third country concerned no longer effectively ensures the level of protection of fundamental rights and freedoms required under the Agreement. The Agreements shall also specify whether personal data falling within its scope and transferred prior to its suspension or termination may continue to be processed. Continued processing of personal data, if permitted, shall in any case be in accordance with the provisions of the Agreement at the time of suspension or termination.

- (6) The Agreements shall include a clause addressing its territorial application, if necessary.
- (7) The procedure for negotiations shall be as follows:
- a) The negotiations must be prepared for well in advance. To this end, the Commission shall inform the Council of the schedule anticipated and the issues to be negotiated and shall share the relevant information as early as possible.
 - b) Where necessary, or upon request of the Council, the negotiating sessions shall be preceded by a meeting of the COPEN Working Party in order to identify the key issues, formulate opinions and provide guidance, as appropriate.
 - c) The Commission shall report to the COPEN Working Party on the outcome of the negotiations after each negotiating session or, when a number of negotiations are conducted in parallel, after a series of negotiation sessions.
 - d) The Commission shall inform the Council and consult the COPEN Working Party on any important issue that may arise during the negotiations.
- (8) The Agreements shall be equally authentic in the Bulgarian, Czech, Croatian, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages and shall include a language clause to that effect.
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