COMMISSION OF THE EUROPEAN COMMUNITIES

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2005/0271 (CNS)

Proposal for a

# COUNCIL DECISION

## on the transmission of information resulting from the activities of security and intelligence services with respect to terrorist offences

(presented by the Commission)

# EXPLANATORY MEMORANDUM

## 1. CONTEXT OF THE PROPOSAL

- **General context**

Terrorism has become an international threat which no Member State is able to tackle alone. The EU has been developing a counter-terrorism policy in which Member States fight terrorism together with equal determination, commitment and with respect for human rights and fundamental freedoms. Important legislative measures and policies have been adopted to assist the European Union in preventing and combating terrorism. In particular, the European Council has adopted an EU Plan of Action on combating terrorism. An EU wide peer review of the arrangements in the fight against terrorism in each Member State has also been carried out.

Despite the progress which has been made at EU level in the fight against terrorism much work remains to be done. In particular, the relevant measures set out in the EU Plan of Action on combating terrorism, in the Hague Programme, in the Council and Commission Action Plan implementing The Hague Programme and arising from the Council's Declaration of 13 July 2005[1] must be implemented.

An essential element in the EU's efforts to prevent and combat terrorism is the transmission of all relevant information by Member States to Europol. The transmission of information resulting from the activities of national security and intelligence services is an important element in this process.

Member States must also provide any relevant information to other Member States which will assist them in preventing and combating terrorism. In this regard the security and intelligence services of a Member State have a pivotal role.

- **Grounds for and objectives of the proposal**

Article 29 of the TEU provides that the Union's objective to provide citizens with a high level of safety within an area of freedom, security and justice shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism and other specific forms of crime through:

– closer co-operation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32.

In its Declaration on combating terrorism of 25 March 2004, the European Council underlined the importance of:

– making the optimum and most effective use of EU bodies to promote co-operation in the fight against terrorism;

– further developing the relationship between Europol and intelligence services; and

– improved mechanisms for co-operation and the promotion of effective collaboration between police, intelligence and security services.

The ability of the EU to prevent and combat terrorism requires a focus on the protection of the security of the Union as a whole. This protection is facilitated by the transmission of all relevant law enforcement and security and intelligence service information to Europol. The

[1] 11158/05 JAI 255.

processing of this information assists Europol in its operational and strategic analyses in relation to terrorism.

The Europol Convention already provides a legal framework enabling Member States to share information on terrorism with Europol. Information that originates from the activities of national security and intelligence services is, in principle, not excluded from being transmitted to Europol. However, in its report to the Council on the implementation of the EU Action Plan on combating terrorism[2], Europol illustrates that there is no structured provision of data from the security and intelligence service domain to Europol's analysis work files on terrorism. In the evaluation report on the Second Counter Terrorism Task Force[3] Europol estimates that most of the data contributions from Member States to the relevant analysis work file and projects of the Counter Terrorism Task Force are from law enforcement rather than from security and intelligence services.

Both the European Council and Europol have recognised the need to strengthen the relationship between Europol and national security and intelligence services. In this context there is a clear need to establish a mechanism to ensure the transmission of information resulting from the activities of national security and intelligence services with respect to terrorist offences to Europol. This Council Decision establishes such a mechanism.

Member States must work together and share information in order to prevent and combat terrorism. The exchange of information resulting from the activities of national security and intelligence services is an important element in this process. The European Council has also underlined that Member States should bring immediately to the attention of the competent authorities of other Member States any information available to their services concerning threats to the internal security of these other Member States. This Council Decision makes provision for the transmission of information resulting from the activities of security and intelligence services from one Member State to other Member States in order to assist those Member States in preventing and combating terrorism. This proposal is without prejudice to bilateral mechanisms between the Member States for the transmission of information.

The "Bureau De Liaison" BDL network is an encrypted information technology tool which assists in the transmission of information. Both Member State law enforcement bodies and security and intelligence services and Europol should have access to this network. It could provide a useful mechanism for the transmission of information in accordance with this proposal for a Council Decision.

- **Existing provisions in the area of the proposal**

Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and co-operation concerning terrorist offences provides for the designation of a specialised service within the police services or other law enforcement authorities of each Member State which will have access to and will collect all relevant information concerning and resulting from criminal investigations conducted by its law enforcement authorities with respect to terrorist offences. It also makes provision for the designation of a Eurojust national correspondent for terrorist matters or an appropriate judicial or other competent authority which shall have access to and can collect all relevant information concerning prosecutions and convictions for terrorist offences.

That Decision provides for the transmission of information, collected by a Member State's specialised service and by its Eurojust national correspondent or the appropriate judicial or

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2 9156/05 JAI 178.

3 12992/05 EUROPOL 33.

other competent authority, to Europol and Eurojust respectively. It also provides for a Member State making accessible to other interested Member States information in connection with terrorist offences.

Council Decision 2005/671/JHA does not specifically relate to security and intelligence services. The adoption and implementation of the Council Decision on the transmission of information resulting from the activities of security and intelligence services with respect to terrorist offences and Council Decision 2005/671/JHA will strengthen the provision by Member States of law enforcement and security and intelligence services information to Europol with respect to terrorist offences.

The Europol Convention of 1995. Article 2 states that the objective of Europol is to improve, by means of the measures referred to in the Convention, the effectiveness and co-operation of the competent Member State authorities to prevent and combat terrorism and other serious forms of international and organised crime.

The Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters[4]. This instrument provides for the legal framework for an effective protection of personal data in matters which fall under Title VI of the Treaty on European Union.

- **Consistency with other policies and objectives of the Union**

The Council Decision on the transmission of information resulting from the activities of security and intelligence services with respect to terrorist offences seeks to ensure full respect for the right to liberty and security, the right to respect for private and family life and the right to protection of personal data (Articles 6, 7, and 8 of the Charter of Fundamental Rights of the European Union).

It does so by establishing a mechanism to assist in preventing and combating terrorism, by providing that information shall be transmitted to the national contact points in accordance with national law and by providing that information is transmitted to Europol in accordance with the Europol Convention.

The processing of personal data pursuant to this Council Decision will be done in accordance with Council Framework Decision 2006/XX/JHA on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters and the Europol Convention respectively.

- **Impact assessment**

The following three legislative options were assessed:

– No new or additional legislation

Refraining from action would lead to the continuation of the current situation that does not fully meet the current security challenges. None of the existing instruments or projects brings the improvements that this Council Decision aims to deliver.

– Proposal for a Council Framework Decision

It seems best to allow Member States some flexibility in the designation of contact points and the transmission of information to other Member States. The Europol Convention already provides a legal framework for the transmission of information by Member States to Europol.

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4 COM(2005) 475.

In these circumstances, it is considered contrary to the principle of proportionality to present a proposal for the harmonisation of the relevant national laws of Member States.

– Proposal for a Council Decision

A proposal for a Council Decision is considered as the best option to meet the current need to ensure the transmission of information resulting from the activities of national security and intelligence services with respect to terrorist offences to Europol and to other Member States. It establishes a mechanism for the transmission of such information without requiring the creation of new services or the approximation of national laws.

As regards impacts on fundamental rights, it should be emphasised that the Decision contributes to the implementation of Articles 2 and 3 of the Charter of Fundamental Rights of the European Union that states that everyone has the right to life and physical integrity. Enhanced protection of the privacy of persons whose data are processed under this Decision is achieved by means of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters.

## 2. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

This Council Decision provides for the designation of a contact point within the security and intelligence services of each Member State. These services shall transmit all relevant information resulting from their activities with respect to terrorist offences to the designated contact points. The Council Decision also makes provision for the transmission of information received by the contact points with respect to terrorist offences to Europol.

The Council Decision makes provision for the transmission of information received by the contact point of a Member State to the contact points of other affected Member States with respect to terrorist offences.

- **Legal basis**

Articles 30 (1) (b) and 34 (2) (c) TEU.

- **Subsidiarity principle**

The subsidiarity principle applies to the action by the Union.

The objectives of the proposal cannot be achieved by the Member States acting alone for the following reason:

Terrorism is an international phenomenon and no Member State can effectively tackle it alone. Europol has a pivotal role within the EU with regard to preventing and combating terrorism. It must receive the requisite information from the Member States to enable it to carry out its tasks, in particular, to enable it to develop its analysis work files on terrorism and the projects of its Counter Terrorism Task Force. By transmitting the relevant information to Europol or loading it into the Europol Information System each Member States contributes to an enhancement of the security of the EU as a whole.

Union action will better achieve the objectives of the proposal for the following reason:

The primary objective of the Council Decision is to ensure the transmission of information resulting from the activities of national security and intelligence services with respect to terrorist offences to Europol. As Europol is in a position to receive information from all Member States it is able to develop an EU approach and perspective to the prevention and

combating of terrorism. This cannot be achieved by a Member State acting alone or by information transmission between a limited number of Member States.

The proposal therefore complies with the subsidiarity principle.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons:

The proposal provides for the establishment of a mechanism to ensure the transmission of information, leaving the operational aspects to the discretion of the Member States.

It is envisaged that the implementation of this Council Decision will not impose an excessive burden or costs on the Member States. They will not be required to create new bodies or services. Each Member State will be obliged to transmit information to Europol which it may, in principle, already transmit, in accordance with the provisions of the Europol Convention. Any costs imposed upon the Member States in the implementation of the Council Decision will be proportionate to the contribution of the Decision to preventing and combating terrorism.

- **Choice of instrument**

Proposed Instrument: A Decision based on Article 34 (2) (c) TEU.

The form of a Decision has been taken because it is necessary to adopt an act of general application which is binding on the Member States in its entirety.

## 3. BUDGETARY IMPLICATIONS

The proposal has no implications for the Community budget.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 30(1)(b) and Article 34(2)(c) thereof,

Having regard to the proposal from the Commission[5],

Having regard to the opinion of the European Parliament[6],

Whereas:

(1) The European Union has set itself the objective to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field of police and judicial co-operation in criminal matters.

(2) In the Hague Programme on strengthening freedom, security and justice in the European Union, adopted by the European Council on 4 November 2004, it is underlined that all the elements of the European Council's Declaration of 25 March 2004 and the EU Plan of Action on combating terrorism must continue to be implemented in full, notably that enhanced use of Europol and Eurojust should be made.

(3) The Council and Commission Action Plan implementing the Hague Programme[7] provides for reinforcement of co-operation between the competent authorities to combat terrorism through the development of specialised contact points in Member States, which will have access to all necessary information and intelligence with respect to terrorist activities involving persons, groups or entities.

(4) Council Framework Decision 2002/475/JHA of 13 June 2002[8] on combating terrorism provides for Member States to take the necessary measures to ensure that certain intentional acts, as defined as offences under national law, be deemed to be terrorist offences. That Decision also provides for Member States to take the necessary measures to ensure that certain intentional acts relating to terrorist groups are punishable, that terrorist-linked offences include certain acts linked to terrorist activities and inciting, aiding or abetting and attempting to commit certain offences are punishable.

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5 OJ C […] […], p.
6 OJ C […] […], p.
7 OJ C 198, 12.8.2005, p. 1.
8 OJ L 164, 22.6.2002, p. 3.

(5) The Europol Convention of 26 July 1995[9] states that the objective of Europol is to improve, by means of the measures referred to in the Convention, the effectiveness and co-operation of the competent Member State authorities to prevent and combat terrorism and other serious forms of international and organised crime.

(6) Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and co-operation concerning terrorist offences[10] provides for Member States to transmit to Europol and Eurojust information concerning criminal investigations, prosecutions and convictions with respect to terrorist offences. That Decision also provides for a Member State making accessible to other interested Member States information in connection with terrorist offences but it does not specifically relate to security and intelligence services which also have an essential role in the prevention of terrorism within their activities of gathering and producing intelligence to preserve national security.

(7) It is therefore necessary to strengthen the transmission of information to Europol resulting from the activities of national security and intelligence services with respect to terrorist offences in order to assist Europol in obtaining all the requisite information to enable it to fulfil its tasks.

(8) Member States should work together and share information to prevent and combat terrorism. The exchange of information resulting from the activities of national security and intelligence services is an important element in this process. It is therefore necessary to make provision for the transmission of information resulting from the activities of national security and intelligence services from one Member State to other Member States.

(9) Since the objectives of the proposed action, namely to establish a mechanism to ensure the transmission of information resulting from the activities of national security and intelligence services with respect to terrorist offences to Europol and between Member States, cannot be sufficiently achieved by the Member States acting alone and can therefore, by reason of the scale and effects of the action, be better achieved at the level of the European Union, the Council may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the EC Treaty and referred to in Article 2 of the EU Treaty. In accordance with the principle of proportionality, this Decision does not go beyond what is necessary in order to achieve those objectives.

(10) This Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAS DECIDED AS FOLLOWS:

*Article 1*

**Subject matter and scope**

This Decision establishes a mechanism to ensure the transmission to Europol of information resulting from the activities of Member States' security and intelligence services with respect to terrorist offences. It also establishes a mechanism to ensure the exchange of information

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9 OJ C 316, 27.11.1995, p. 2. Convention as last amended by the Protocol of 27 November 2003, drawn up on the basis of Article 43(1) of the Convention on the Establishment of a European Police Office (Europol Convention), amending that Convention (OJ C 2, 6.1.2004, p. 3).

10 OJ L 253, 29.9.2005, p. 22.

concerning terrorist offences between the security and intelligence services of the Member States.

*Article 2*

**Definitions**

For the purposes of this Decision, the following definitions shall apply:

(a) "terrorist offences" means the offences specified in Articles 1 to 4 of Framework Decision 2002/475/JHA;

(b) "Europol" means the European Police Office as established by the Convention of 26 July 1995 on the Establishment of a European Police Office ("the Europol Convention");

(c) "security and intelligence services" means those authorities of the Member States which are responsible for collecting and producing intelligence for combating threats to the democratic legal order, the security and other essential interests of the State, including terrorism;

(d) "relevant information" means intelligence with respect to terrorist offences which affect or may affect two or more Member States.

*Article 3*

**National contact points**

1. Each Member State shall take the necessary measures to ensure that its security and intelligence services transmit to the national contact point designated in accordance with paragraph 2 all relevant information resulting from their activities with respect to terrorist offences.

2. Each Member State shall designate within three months from the date of entry into force of this Decision a national contact point within its security and intelligence services.

3. Member States shall inform the General Secretariat of the Council and the Commission in writing of the designated contact points and of any subsequent modifications.

*Article 4*

**Transmission of information to Europol**

Each Member State shall take the necessary measures to ensure that the information received by its national contact point is transmitted to Europol, in accordance with the provisions of the Europol Convention.

*Article 5*

**Transmission of information to other Member States**

Each Member State shall take the necessary measures to ensure that the information received by its national contact point is transmitted to the national contact points of other affected Member States in accordance with national law.

*Article 6*

**Monitoring and evaluation**

1. Member States shall report to the General Secretariat of the Council and the Commission on the measures taken to implement the obligations imposed on them by this Council Decision. Member States shall first report on these measures within one year from the date of entry into force of this Decision and every two years thereafter.

2. The Commission shall submit a report to the Council on the implementation of this Decision on the basis of information provided by the Member States and Europol. The Commission shall make its first report within eighteen months from the date of entry into force of this Decision and every two years thereafter.

*Article 7*

**Entry into force**

This Decision shall enter into force on the day following its publication in the *Official Journal of the European Union.*

Done at Brussels,

*For the Council*
*The President*