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Committee on Civil Liberties, Justice and Home Affairs

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DRAFT REPORT

on the proposal by the Kingdom of Sweden for a Draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts
(10215/2004 – C6-0153/2004 – 2004/0812(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Antoine Duquesne

Symbols for procedures

*	Consultation procedure *majority of the votes cast*
**I	Cooperation procedure (first reading) *majority of the votes cast*
**II	Cooperation procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***	Assent procedure *majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
***I	Codecision procedure (first reading) *majority of the votes cast*
***II	Codecision procedure (second reading) *majority of the votes cast, to approve the common position* *majority of Parliament's component Members, to reject or amend the common position*
***III	Codecision procedure (third reading) *majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal by the Kingdom of Sweden for a Draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in particular as regards serious offences including terrorist acts
(10215/2004 – C6-0153/2004 – 2004/0812(CNS))

(Consultation procedure)

The European Parliament,

– having regard to the proposal by the Kingdom of Sweden (10215/2004)[1],

– having regard to Article 34(2)(b) of the Treaty on European Union,

– having regard to Article 39(1) of the Treaty on European Union, pursuant to which the Council consulted Parliament (C6-0153/2004),

– having regard to Rules 93 and 51 of its Rules of Procedure,

– having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2005),

1. Approves the proposal by the Kingdom of Sweden as amended;

2. Calls on the Council to alter the proposal accordingly;

3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;

4. Asks the Council to consult Parliament again if it intends to amend the proposal by the Kingdom of Sweden substantially;

5. Instructs its President to forward its position to the Council, the Commission and the Government of the Kingdom of Sweden.

Text proposed by the Kingdom of Sweden	Amendments by Parliament
	Amendment 1 Article 1, paragraph 1
1. The purpose of this Framework Decision is to establish the rules under which Member States' law enforcement authorities effectively and expeditiously	1. The purpose of this Framework Decision is to establish the rules under which Member States' law enforcement authorities effectively and expeditiously

[1] Not yet published in OJ.

can exchange existing information and intelligence for the purpose of conducting crime investigations or crime intelligence operations and in particular as regards serious offences, including terrorist acts. It shall not affect more favourable provisions in national law, bilateral or multilateral agreements or arrangements between the Member States or between Member States and third countries and shall be without prejudice to instruments of the European Union on mutual legal assistance or mutual recognition of decisions regarding criminal matters.	can exchange existing information and intelligence for the purpose of conducting crime investigations or crime intelligence operations and in particular as regards serious offences, including terrorist acts. It shall not affect more favourable provisions in national law, bilateral or multilateral agreements or arrangements between the Member States or between Member States and third countries and shall be without prejudice to instruments of the European Union on mutual legal assistance or mutual recognition of decisions regarding criminal matters ***and to the provisions and instruments relating to the provision of information and intelligence to Europol and Eurojust***.

Amendment 2
Article 3

Exchange of information and intelligence under this Framework Decision may take place concerning offences punishable by the law of the requesting Member State by a custodial sentence or a detention order for a maximum period of at least 12 months. Member States may agree on a bilateral basis to make the procedures applicable under this Framework Decision applicable on a broader basis.	Exchange of information and intelligence under this Framework Decision may take place concerning offences punishable by the law of the requesting Member State by a custodial sentence or a detention order for a maximum period of at least 12 months ***and concerning all the offences referred to in Articles 1 to 3 of Council Framework Decision 2002/475/JAI of 13 June 2002 on combating terrorism***[1]. Member States may agree on a bilateral basis to make the procedures applicable under this Framework Decision applicable on a broader basis. ***[1] OJ L 164, 22.6.2002, p. 3.***

Amendment 3
Article 4, paragraph 3 a (new)

	3a. Member States shall ensure that the information or intelligence provided to the law enforcement authorities of the other Member States pursuant to paragraph 1 is

	also provided to Europol and Eurojust if the exchange relates to an offence or criminal activity within the Europol or Eurojust mandate.

Justification

A policy geared to providing information efficiently between Member States requires provision for swift bilateral exchange of information between specialised agencies, ensuring that such exchanges are not paralysed by problems arising from the specific characteristics of the internal judicial organisation of the individual Member States, while at the same time such a policy must also enable the most significant information to be forwarded systematically to Europol and/or Eurojust.

Amendment 4
Article 4 a, paragraph 1

1. ***Information and intelligence shall be provided without delay and to the furthest possible extent within the timeframe requested. If information or intelligence cannot be provided within the requested timeframe, the competent law enforcement authority having received a request for information or intelligence shall indicate the timeframe within which it can be provided. Such an indication shall be made immediately.***	1. ***Each Member State shall ensure that any relevant information or intelligence is immediately provided to the competent law enforcement authorities of the other Member States which request it.***

Amendment 5
Article 4 a, paragraph 1 a (new)

	1a. If information or intelligence cannot be provided immediately, the competent law enforcement authority having received a request for information or intelligence shall indicate immediately the timeframe within which it can be provided.

Amendment 6
Article 4 a, paragraph 2, introductory part

2. Member States shall ensure that they have procedures in place so that they may respond within at most 12 hours to requests for information and intelligence where the requesting State indicates that it is carrying out a crime investigation or a criminal intelligence operation as regards the following offences, as defined by the law of the requesting State:	2. Member States shall ensure that they have procedures in place so that they may respond within at most 12 hours***, or, in the case of information or intelligence which requires formalities or prior contacts with other authorities, 48 hours if the matter is urgent and otherwise 10 working days,*** to requests for information and intelligence where the requesting State indicates that it is carrying out a crime investigation or a criminal intelligence operation as regards the following offences, as defined by the law of the requesting State:

Amendment 7
Article 4 a, paragraph 2 a (new)

	2a. The time limits laid down in paragraph 3 shall run from the time when the requested competent law enforcement authority receives the request for information or intelligence.

Justification

The effectiveness of the proposal under consideration is vitally dependent on the periods within which the information requested is exchanged. When it comes to fighting serious crime, and more particularly combating terrorism, speed is of the essence: information which is provided too late often ceases to be of any use. Short but realistic deadlines must therefore be set. In this context it is worth distinguishing between information which is immediately available within the competent law enforcement authority, for the provision of which a time limit of 12 hours seems sufficient, and information which cannot be obtained without completing administrative or other formalities or contacting other agencies or authorities in advance (e.g. information which needs to be extracted from criminal records), for which it seems appropriate to set a time limit of 48 hours in urgent cases and otherwise 10 working days.

EXPLANATORY STATEMENT

1. Introduction

In the aftermath of the tragic events of 11 September 2001 in the United States, fighting terrorism has become one of the priorities of the European Union. Yet the bombings which cruelly afflicted the Kingdom of Spain on 11 March 2004 showed that the threat of acts of terrorism on European soil or against European interests is ever present.

The events in Spain regrettably showed that the approach which the European Union had pursued since 2001, which was basically an empirical one, had reached its limits. A change of approach is therefore urgently needed. The European Union must now be proactive and not merely react to developments. It must also adopt a more systematic approach and constantly ensure that the legislation it adopts is consistent. In particular, this means acting in accordance with a genuine and unwavering policy based on clear concepts.

This being so, three principles may be adduced which should guide the thinking and the actions of the Council and Commission.

Firstly, the resources and the capacity must be acquired to identify precisely each of the targets which are to be combated. Terrorism is not a monolithic phenomenon: different types exist. In order to combat them appropriately, it is necessary to distinguish among them and to know them.

Secondly, an effective response requires a modern and realistic approach to terrorism, i.e. an approach which takes account of the very close links which often exist among the various terrorist organisations, and also between terrorism and serious organised crime.

Thirdly, the objective of consistency makes it necessary to avoid duplicating legal instruments for combating terrorism but rather to make the existing rules more uniform and simpler.

The proliferation of provisions in this field is a source of confusion and inefficiency. It is known, for example, that the interconnection and multiplicity of the instruments available at European level make life very complicated for the police, who on the ground, exchange information.

In this context a systematic assessment of the policies which had been conducted and the resulted achieved would make it possible to ascertain both the shortcomings and the measures which have been effective.

An analysis of the work performed by Europol and Eurojust since their establishment is undoubtedly a good starting point for this. It is well known that their performance has not been entirely satisfactory so far. The European Council of 4 and 5 November 2004 clearly underlined the need for this analysis and expressed its hope that more use would be made of Eurojust and Europol, instructing the EU coordinator of measures against terrorism - whose exact role and powers ought, incidentally, in the view of the rapporteur, to be defined - to promote all possible progress in this field and calling on Member States to cooperate fully with Europol and Eurojust.

Lastly, better involvement of those on the ground in defining the action strategy will certainly make it possible to calibrate more effectively the measures to be taken in future. It is essential to understand the needs of the police properly and to take account of their expectations in order to achieve satisfactory cooperation between police authorities, particularly through Europol. Experience shows that, all too often, if national police authorities fail to provide Europol with the information they should, it is because they do not appreciate what this could contribute to their work.

In view of this attitude, it is vital to devise specific and convincing responses. With a view to doing so, it would certainly be worth considering adopting at the outset general principles governing exchanges of information (principles relating to purpose, proportionality and, in the near future, availability) and also, in the light of the needs of police authorities, a code or manual of good practice for use by the police, explaining to them in very simple and practical terms the framework within which they must act, particularly with regard to data protection.

2. The proposal for a Council decision and the draft framework decision proposed by the Kingdom of Sweden

(a) Scope of the proposals under consideration

The Commission's proposal is based on the idea that the persistence of the terrorist threat makes it necessary to try to improve effectiveness. The battle against terrorism therefore on the one hand requires the Member States to provide Europol and/or Eurojust systematically with intelligence about everybody with links to terrorist activities and on the other hand requires the Member States to exchange information in this field amongst themselves, 'in accordance with national law and relevant legal instruments'.

The Kingdom of Sweden's draft takes as its starting point the observation that fighting crime is very often seen vertically, with measures being taken only in relation to the type of offence, without considering whether or not it is the work of organised criminals. This approach may lead to a situation in which differing fields of responsibility, different mandates for cooperation, and different national legislation or procedures become real obstacles to the gathering and exchange of information within the Union.

The Kingdom of Sweden therefore wishes to assign priority to a horizontal approach, emphasising measures against crime as such and according less importance to the specific remits of the national crime-fighting authorities. The aim envisaged is to create a common simplified legal framework for exchanging information, applicable to all national authorities which have a law enforcement function. Under this system the powers assigned to an authority by national legislation with regard to detecting and preventing crime and carrying out inquiries must be recognised by the other Member States, and an authority must be able to request and obtain information and intelligence from the other Member States without having to meet any formal requirements other than those laid down by the framework decision. This common legal framework, it should be emphasised, would relate only to exchanges of information on police matters: it would not apply to judicial cooperation at all.

(b) Complementarity of the proposals by the Commission and the Swedish Government

From the technical point of view, the Commission proposal assigns priority to centralising information at Europol and Eurojust, while the proposal by the Kingdom of Sweden ignores the subject of centralisation but seeks to speed up significantly exchanges of information.

The Commission proposal certainly has the advantage of expanding the scope of exchanges of information to include all terrorist offences as referred to in Framework Decision 2002/475/JAI, without limiting them to the list of persons and bodies which appears in the annex to common position 2001/931/PESC. However, it is open to question whether the proposal has any other added value. The procedure which the Commission seeks to establish largely reproduces obligations which already exist on other grounds, particularly under the Europol Convention and the Council Decision setting up Eurojust.

For example, Article 4 of the Europol Convention already requires Member States to designate a national unit within their police authorities to act as a liaison body between the national authorities and Europol. The national unit must have access to all 'relevant national data', which it must keep up to date with a view, in particular, to forwarding them to Europol. The 'relevant national data' referred to in Article 4 do cover the terrorist offences to which the Commission proposal refers, as Article 2 of the Europol Convention expressly lays down that Europol is to deal with 'crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property'.

Similarly, Article 12 of the Council Decision setting up Eurojust already lays down that each Member State may put in place or appoint one or more national correspondents for Eurojust, stipulating that 'it shall be a matter of high priority to put in place or appoint such a correspondent for terrorism matters.' Like the Commission proposal, Articles 9 and 12 of the Eurojust Statute refer to domestic law for the definition of the nature and scope of the judicial powers entrusted to its national members within national territory.

A priori, the proposal by the Kingdom of Sweden definitely seems to be of interest in comparison with the systems provided for by the Europol Convention, the Eurojust Statute and the Commission proposal, because, by providing for direct contact between specialised authorities without imposing conditions additional to those which exist internally for contacts between law enforcement authorities, it would make it possible to overcome a number of difficulties relating to the specific judicial organisation of each Member State. Thus information could circulate more quickly, which is clearly essential for the purpose of fighting any crime.

Questions could undoubtedly also be asked about the added value of Sweden's proposal on the grounds that the Convention Implementing the Schengen Agreement already lays down arrangements for police cooperation which are broadly based on the same ideas.

Article 39 of the Convention requires the Contracting Parties to undertake to ensure 'that their police authorities shall, in compliance with national legislation and within the limits of their responsibilities, assist each other for the purposes of preventing and detecting criminal offences'. Article 46 permits each Contracting Party, in particular cases, in compliance with its national legislation and without being asked, to send another Contracting Party concerned

'any information which may be of interest to it in helping prevent future crime and to prevent offences against or threats to public order and security.'

However, a study of the provisions reveals differences which are not without importance. Article 39 limits cooperation between police authorities to cases in which 'national law does not stipulate that the request [for information] is to be made to the legal authorities', a restriction which does not appear in Sweden's proposal, Article 4 of which merely stipulates that 'Member States shall ensure that information and intelligence, held by or accessible without the use of coercive means to competent law enforcement agencies, can be provided to the competent law enforcement authorities of other Member States'.

Article 46(2), meanwhile, lays down that, where information is provided spontaneously to a party concerned, the information is to be exchanged 'through a central body to be designated'. The direct exchange of information, i.e. between one authority and another, which is in principle the system proposed by the Kingdom of Sweden, is here permitted only on a strictly exceptional basis, 'in particularly urgent cases', and on condition that the central body is informed of it as soon as possible.

Thus the system provided for by Articles 39 and 46 of the Convention Implementing the Schengen Agreement does not allow the same flexibility as Sweden's proposal when it comes to providing data, and above all does nothing to eliminate the risk of obstacles arising from the Contracting Parties' internal judicial systems: even in urgent cases, these articles do not permit direct communication 'where national provisions provide otherwise'.

Thus the proposal by the Kingdom of Sweden seems to entail genuine added value in comparison with the law as it stands. Another advantage of the proposed system is that it sets a deadline to be observed in principle (12 hours) for the provision of the information requested. The excessive length of the procedure is one of the obstacles currently encountered in practice, particularly in Europol.

Lastly, even if the innovations proposed in the Kingdom of Sweden's draft are not considered significant enough in comparison with the system provided for in Articles 39 and 46 of the Convention Implementing the Schengen Agreement, it may be noted that it at least has the advantage of extending the principle of cooperation between law enforcement authorities to the 25 Member States, not all of which are parties to the Schengen Agreement.

In view of the above considerations and the importance of what is at stake, it seems worth pursuing the cumulative advantages afforded by the two systems proposed by the Commission and the Kingdom of Sweden. A policy geared to providing information efficiently between Member States requires provision for swift bilateral exchange of information between specialised agencies, ensuring that such exchanges are not paralysed by problems arising from the specific characteristics of the internal judicial organisation of the individual Member States, while at the same time such a policy must also enable the most significant information to be forwarded systematically to Europol and/or Eurojust.

It may be noted that the cumulative approach advocated here accords with the statements made by the European Council on 4 and 5 November 2004, when it expressly mentioned its desire for exchanges of information for the purpose of fighting terrorism to be based, as from

1 January 2008, on the principle of availability, whereby, within the Union, any officer of the law enforcement authorities of a Member State who needed certain information in order to carry out his duties could obtain it from another Member State, and the law enforcement authorities of the other Member State which held the information would be required to provide it for the purposes stated and taking account of the requirements of the inquiries under way in the other State.

The European Council also called on the Commission to submit by the end of 2005 proposals for applying the principle of availability. This will be a suitable occasion on which to begin the vital work of harmonising the existing rules.

(c) Obligation to provide information

The text of the proposal by the Kingdom of Sweden explicitly states the grounds on which a law enforcement authority is permitted to refuse to provide information. The Commission proposal, on the other hand, says nothing about this.

If the provisions are not to include an obligation to provide information to Europol, it would certainly be sufficient - for the purpose of ensuring that the information exchange system established is effective enough - to include a provision, as the proposal by the Kingdom of Sweden does, placing the emphasis on the obligation for Member States to justify any refusal to supply information.

(d) The distinction between information and intelligence

As they stand, and in view of the arguments on which they are based, the proposals both of the Commission and of the Kingdom of Sweden expressly confine themselves to the provision of police and judicial information, i.e. existing information. However, it is necessary to consider the issue of seeking out information, i.e. intelligence-gathering. Gathering and exchanging intelligence is of fundamental importance to efforts to control terrorism: information arising from judicial procedures or police inquiries often comes too late.

In addition to exchanges of police information, therefore, it is absolutely necessary to insist that arrangements should also be made to facilitate the communication of intelligence, particularly as part of an early warning system.

(e) Protection of personal data

As our positive law currently stands, there are numerous data protection provisions which could be applied, particularly the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981, which may be regarded as laying down minimum provisions. Attention may also be drawn to a set of provisions on this subject in the Europol Convention or, for those Member States which are parties to the Schengen Agreement, the provisions on data protection in the Schengen Implementing Convention.

The proposal for a Council decision does not provide for any specific measure in this field. The proposal by the Swedish Government calls on States, primarily, to 'ensure that the

established rules and standards on data protection … are applied also within the procedure on exchange of information'.

The general objective of consistency requires the Commission's attention to be particularly drawn to the need to make a proposal for harmonising the existing rules on data protection.

3. European register of convictions

Both in its communication and in the Explanatory Memorandum on the proposal for a Council decision, the Commission mentions the desirability of establishing a European register of convictions and disqualifications. However, all that the Commission says about this is that it 'will continue analysing this horizontal issue and will seek out the most appropriate solutions before presenting a proposal for the establishment of a register' and that it will sound out the Member States in 2004. It did not take the matter up in the four communications on fighting terrorism which it published on 20 October 2004, nor did the European Council raise the matter on 4 and 5 November 2004.

Everybody is aware, and events regularly remind us, of the fundamental importance of a European register of convictions, to assist the fight both against terrorism and against all forms of serious crime. Regrettably, it must be concluded that the practical progress which has been made in this regard has been extremely timid, although it is certainly to be applauded that political agreement has just been reached within Coreper on a draft intended to facilitate exchanges of information between criminal records departments, a text on which the Luxembourgish Presidency has recently (at the Justice and Home Affairs Council of 25 February 2005) asked the Member States to waive their parliamentary reservations so that it can be adopted swiftly.

At all events it is vital that the Commission should assign real priority to attaining this objective, and should adopt a precise and tight timetable for doing so. Apart from the obvious strategic importance of this, it may also be noted that the citizens of the Union legitimately expect this measure.

4. Transparency of bank accounts and of legal persons

The Commission communication states that it is important both to adopt legal provisions which make it possible for the Member States to register bank accounts so as to identify their holders, and to develop measures to improve the transparency of legal persons, both measures being vital in order to counter infiltration by criminal groups and terrorist organisations. The Commission reiterated this concern in its communication of 20 October 2004 on combating the financing of terrorism. In this context the Commission suggests giving financial intelligence authorities free access to banks' databases. The information would remain encrypted except where it concerned a person or group of persons suspected of having links with a terrorist movement.

Apart from the important questions raised by these proposals in terms of protection of personal data, it should be noted that, as in the case of the problem of the European register of convictions, neither precise procedures nor a timetable have yet been decided. Here too, the Commission should assign real priority to this matter and adopt precise deadlines.