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NOTE

From:	Presidency
To:	Working Party on Information Exchange and Data Protection (DAPIX)
No. prev. doc.:	9512/10
Subject:	Guidelines on the implementation of Council Framework Decision 2006/960/JHA ("Swedish Framework Decision" - SFD) - Update of national fact sheets

1. Introduction

At the DAPIX meeting on 11 April 2014, delegations were reminded by the Presidency to check and where necessary update the annexes contained in the Guidelines on the implementation of Council Framework Decision 2006/960/JHA (see doc. 9512/1/10 REV 1 DAPIX 59 CRIMORG 90 ENFOPOL 125 ENFOCUSTOM 36 COMIX 346+ COR 1; 9512/3/10 REV 3 (fr,de,it,el,pt,sv,lv,pl,sk,ro). Since the Guidelines for implementing the "Swedish Framework Decision" - SFD) date from 2010, nearly all delegations complied with the request.

Annex III, in particular, which comprises the national factsheets needed a refreshment. A synopsis of the replies received shows that the topics of the factsheets have been interpreted differently in different Member States. This reduces the usefulness of the four lists on "information available" set out in the national factsheets.

In order to finalise the update of the SFD national factsheets and to improve their use, in particular by the Single Point of Contacts (SPOCs) for international law enforcement information exchange, delegations should agree on a coherent reading of the terminology and, subsequently, check and where necessary refresh their factsheets.

The Presidency invites DAPIX to discuss the below.

2. "Information available"

The purpose of the SFD is to establish common rules on procedures, time limits and standard forms in line with which law enforcement authorities may exchange existing information and intelligence. Art. 2(d) of the SFD defines information and/or intelligence as

"(i) any type of information or data which is held by law enforcement authorities;

(ii) any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the taking of coercive measures in accordance with Art 1(5)."

The definition, on the one hand, makes a distinction between data owners and, on the other hand, limits cross border information exchange in the case of data not held by law enforcement authorities in the sense that the requested Member State cannot be obliged to obtain these data by means of coercive measures.

2.1 Distinction between data owners

The existing lists of the factsheet regarding information available to law enforcement authorities (see Annex 1) set out three different cases with regard to the data owners, namely information/databases managed by (a) law enforcement authorities, (b) other authorities or (c) private entities.

However, a further distinction is added in the case of information held by either law enforcement or other authorities, namely whether the information indicated is "directly accessible" by law enforcement authorities.

The criterion "directly accessible" refers to Art. 4(1) and (3) of the SFD which set out the time limits for the provisions of information and intelligence¹, i.e. either within eight hours in urgent cases or within a week in non-urgent cases² if information and intelligence "is held in a database directly accessible by a law enforcement authority". Replies of delegations show that "directly accessible" seems to have been understood in different ways.

If it can be commonly understood that the term "direct" excludes an intervention by other data owners than law enforcement authorities and thus means "autonomous", the criterion is self-evident with regard to the first list. From the second list, it excludes information types which are only available to law enforcement authorities upon (written) requests sent to other authorities or upon prior judicial authorisation.

Delegations should therefore check whether information indicated in the lists corresponds both to the criterion of "directly accessible" and the above mentioned time limits.

Moreover, a weakness of the factsheets is that no list is provided for information which is held by other authorities and in-directly accessible by law enforcement agencies, and no lists as to the direct or not direct accessibility of databases managed by private entities. Therefore, it is proposed to introduce new lists in the future factsheets as set out in Annex 2 to close that gap.

2.2 "Coercive measures"

The limitation provided for by Art. 2(d)(ii) is to be understood in accordance with Art. 1(5), which says that the SFD "does not impose any obligation to obtain any information or intelligence by means of coercive measures, defined in accordance with national law, in the Member State receiving the request for information or intelligence". This means that for the purposes of information exchange under SFD Member States cannot oblige each other to take coercive measures to obtain information not held by law enforcement authorities. However, according to Art. 1(6), Member States shall, where permitted by and in accordance with their national law, provide information or intelligence previously obtained by means of coercive measures.

¹ Information and intelligence regarding offences referred to in Art. 2(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant

² In all other cases, Member States shall ensure that information sought is communicated within 14 days (see SFD, Art. 4 (4)).

The question completing each of the lists of the existing factsheets about whether information available provided by the different data owners "is always considered as non-coercive according to national law" is misleading. The proof is that Member States did either not reply to the question at all or in an often confusing way.

If the requested information needs to be obtained by means of coercive measures from another authority or private entity, the SFD is not applicable and the information requested is not "information available" in the sense of the SFD. Therefore, it should not appear in any list. If, however, such kind of information has previously been obtained by means of coercive measures and Member States are allowed, according to national law, to share this information, Member States shall provide this kind of information and it should be included and specified under one of the proposed lists of "information available" (see Annex 2).

For the purpose of clarity, the question whether the respective information "is always considered as non-coercive according to national law" as well as indications regarding the issue of coercive measures could then be deleted from the factsheets. (see Annex 2)

3. Judicial authorisation

The fourth list on "information available" in the existing factsheet refers to information that always require a judicial authorisation to be accessed by law enforcement authorities. This topic refers to Art. 3 (3) and (4) SFD, setting out that Member States shall ensure that conditions not stricter than those applicable at national level for providing and requesting information and intelligence are provided for cross-border information exchange, in particular with regard to prior judicial agreement or authorisations.

A lot of Member States did not indicate any information category at all or replied that the question was not applicable. Others replied in an unclear way.

However, for the sake of the coherence, completeness and clarity of the fact sheets, Member States are invited to reconsider their replies in this regard or to discuss the purpose of this topic.

4. Preferred channels

A lot of Member States did not indicate any channel at all, other indicated the existing channels for international information exchange.

The question is whether, in the light of evolution over the past five years, it is still relevant to indicate the preferred information channels used by law enforcement authorities. If not, it should be deleted and may be replaced by the contact details of the SPOC.

1. INFORMATION AVAILABLE

Information/databases managed and directly accessible by law enforcement authorities

Is this information always considered as non-coercive according to national law ?

Information/databases directly accessible by law enforcement authorities but managed by other authorities

Is this information always considered as non-coercive according to national law ?

Information/databases accessible by law enforcement authorities but managed by private entities

Is this information always considered as non-coercive according to national law ?

Information/databases that always require a judicial authorisation to be accessed by law enforcement authorities

Is this information always considered as non-coercive according to national law ?

2. LANGUAGES USED IN CASE OF URGENCY

For incoming requests/replies:

For outgoing replies/requests:

3. PREFERRED CHANNEL

ANNEX 2: Proposal for modified fact sheet

1. **INFORMATION AVAILABLE**

- Information/databases managed and directly accessible by law enforcement authorities:³
- Information/databases managed by other authorities and directly accessible by law enforcement authorities⁴
- Information/databases managed by other authorities and not directly accessible by law enforcement authorities⁵
- Information/databases managed by private entities and directly accessible by law enforcement authorities⁶
- Information/databases managed by private entities and not directly accessible by law enforcement authorities⁷
- Information/databases that always require a judicial authorisation to be accessed by law enforcement authorities

2. **LANGUAGES USED IN CASE OF URGENCY**

For incoming requests/replies / For outgoing replies/requests:

3. **SINGLE POINT OF CONTACT (SPOC)**

FOR INTERNATIONAL LAW ENFORCEMENT INFORMATION EXCHANGE

Contact details

³ Information and intelligence regarding offences referred to in Art. 2(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant are to be provided either within at most eight hours in urgent cases or within a week in non-urgent cases (see SFD, Art. 4(1))

⁴ Information and intelligence regarding offences referred to in Art. 2(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant are to be provided either within at most eight hours in urgent cases or within a week in non-urgent cases ((see SFD, Art. 4(3)).

⁵ Information sought is to be communicated within 14 days (see SFD, Art. 4 (4)).

⁶ Information and intelligence regarding offences referred to in Art. 2(2) of Framework Decision 2002/584/JHA on the European Arrest Warrant are to be provided either within at most eight hours in urgent cases or within a week in non-urgent cases ((see SFD, Art. 4(3)).

⁷ Information sought is to be communicated within 14 days (see SFD, Art. 4 (4)).