

I

(Legislative acts)

REGULATIONS

REGULATION (EU) 2022/838 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 30 May 2022

amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 85 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure ⁽¹⁾,

Whereas:

- (1) Regulation (EU) 2018/1727 of the European Parliament and of the Council ⁽²⁾ established Eurojust and sets out its tasks, competence and functions.
- (2) Article 3(1) of Regulation (EU) 2018/1727 provides that Eurojust is competent with respect to the forms of serious crime listed in Annex I to that Regulation, which include genocide, crimes against humanity and war crimes. Pursuant to Article 3(4) of Regulation (EU) 2018/1727, Eurojust's competence also covers criminal offences related to the criminal offences listed in Annex I to that Regulation.
- (3) On 24 February 2022, the Russian Federation began a military aggression against Ukraine. There is a reasonable basis to believe that crimes against humanity and war crimes have been and are being committed in Ukraine in the context of the current hostilities.
- (4) In view of the gravity of the situation, the Union should take all the necessary measures, as a matter of urgency, to ensure that those who commit crimes against humanity and war crimes in Ukraine are held responsible.
- (5) Prosecution services in several Member States and in Ukraine have started investigations concerning the events in Ukraine, relying, where appropriate, on the support of Eurojust. On 27 June 2016, Eurojust concluded an agreement on cooperation with Ukraine. In accordance with that agreement, Ukraine has posted a liaison prosecutor to Eurojust to facilitate the cooperation between Eurojust and Ukraine.

⁽¹⁾ Position of the European Parliament of 19 May 2022 (not yet published in the Official Journal) and decision of the Council of 25 May 2022.

⁽²⁾ 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).

- (6) Pursuant to the Rome Statute of the International Criminal Court (ICC) of 17 July 1998, the ICC has the power to exercise its jurisdiction over persons responsible for the most serious crimes of international concern, as referred to therein. The jurisdiction of the ICC is complementary to national criminal jurisdictions. The Office of the Prosecutor of the ICC has announced that it has opened an investigation into the situation in Ukraine.
- (7) Due to the application of the principle of universal jurisdiction in several Member States and the complementary nature of the ICC's jurisdiction, it is important to coordinate and exchange evidence between national investigating and prosecuting authorities in different jurisdictions and with the ICC or any other court, tribunal or mechanism established for that purpose in order to ensure the effectiveness of investigations and prosecutions of genocide, crimes against humanity, war crimes and related criminal offences, including those that might be committed in Ukraine in the context of the current hostilities.
- (8) To ensure that evidence and best practices relating to the prosecution of genocide, crimes against humanity, war crimes and related criminal offences are shared with competent national authorities and international judicial authorities, Eurojust should enhance its cooperation with criminal courts, tribunals and mechanisms established to address breaches of international law. For that purpose, Eurojust should establish close cooperation with the ICC and any other court, tribunal or mechanism that aims to address crimes that affect international peace and safety. Accordingly, Eurojust should facilitate the execution of requests for judicial cooperation from the ICC or special criminal courts, tribunals or mechanisms concerning evidence related to genocide, crimes against humanity, war crimes and related criminal offences.
- (9) There is a risk that evidence related to genocide, crimes against humanity, war crimes and related criminal offences cannot be safely stored on the territory where the hostilities take place. That is also the case with evidence connected with the ongoing hostilities in Ukraine. Therefore, it is appropriate to establish a central storage facility at a safe place. A central storage facility might also be necessary for evidence collected by Union bodies, offices and agencies, international authorities or third parties such as civil society organisations so that evidence is accessible to competent national authorities and international judicial authorities.
- (10) Eurojust has the expertise and experience to support investigations and prosecutions of cross-border crimes, including genocide, crimes against humanity, war crimes and related criminal offences. Such support includes the preservation, analysis and storage of evidence as far as its admissibility before courts and its reliability are concerned.
- (11) By preserving, analysing and storing evidence related to genocide, crimes against humanity, war crimes and related criminal offences and, when necessary and appropriate, by enabling its exchange in accordance with the applicable Union data protection rules, Eurojust can support case building in national and international investigations and provide additional support to the competent national authorities and international judicial authorities. Such analysis might be especially valuable for the purposes of ascertaining the reliability of witness testimonies or to establish any relevant links. However, this Regulation does not introduce any obligation on national authorities to share evidence with Eurojust.
- (12) A new temporary storage facility allowing for the preservation, analysis and storage of evidence related to genocide, crimes against humanity, war crimes and related criminal offences should be established. As the need to store such evidence is urgent, it is necessary for Eurojust to store it in an automated data management and storage facility separate from the case management system established under Article 23 of Regulation (EU) 2018/1727 ('automated data management and storage facility'). The proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 of the European Parliament and the Council and Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases contains provisions concerning the establishment of a new case management system. Once that new case management system is established, the operational data temporarily processed in the automated data management and storage facility should be integrated into it. The general rules set out in Chapter IX of Regulation (EU) 2018/1725 of the European Parliament and of the Council^(?) should apply without prejudice to the specific data protection rules set out in Regulation (EU) 2018/1727.

^(?) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

- (13) The preservation, analysis and storage of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences in the automated data management and storage facility, and the accessibility of that evidence, whenever necessary and appropriate, by the competent national authorities and international judicial authorities, should comply with the highest standards of cyber security and data protection, in accordance with Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, Regulation (EU) 2018/1725, in particular Article 91 thereof, and the specific data protection rules set out in Regulation (EU) 2018/1727.
- (14) Satellite images, photographs, videos and audio recordings can be useful for demonstrating the commission of genocide, crimes against humanity, war crimes and related criminal offences. Therefore, Eurojust should be able to process and store satellite images, photographs, videos and audio recordings for that purpose.
- (15) Eurojust and Europol should closely cooperate in the context of their respective mandates, taking into account the need to avoid duplication of effort and their respective operational capacity, in particular as regards the processing and analysis of information in the context of Europol's existing dedicated system on international crimes, referred to as 'Analysis Project Core International Crimes', to support competent authorities in investigating and prosecuting genocide, crimes against humanity, war crimes and related criminal offences. Therefore, Eurojust should be able to transmit to Europol information that it receives in the performance of its operational function, under Regulation (EU) 2018/1727, of supporting Member States' action in combating genocide, crimes against humanity, war crimes and related criminal offences. Such cooperation should include a regular joint evaluation of operational and technical issues.
- (16) In view of the urgent need to set up an automated data management and storage facility at Eurojust to deal with evidence relating to genocide, crimes against humanity, war crimes and related criminal offences with a view to ensuring accountability for such crimes committed in Ukraine, it is considered to be appropriate to invoke the exception to the eight-week period provided for in Article 4 of Protocol No 1 on the role of national Parliaments in the European Union, annexed to the Treaty on European Union (TEU), to the Treaty on the Functioning of the European Union (TFEU) and to the Treaty establishing the European Atomic Energy Community.
- (17) In accordance with Article 3 and Article 4a(1) of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TEU and to the TFEU, Ireland has notified its wish to take part in the adoption and application of this Regulation.
- (18) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
- (19) Since the objectives of this Regulation, namely to allow Eurojust to preserve, analyse and store evidence relating to genocide, crimes against humanity, war crimes and related criminal offences, to enable the exchange of such evidence and to establish an automated data management and storage facility separate from Eurojust's existing case management system, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (20) The European Data Protection Supervisor was consulted in accordance with Article 42 of Regulation (EU) 2018/1725 and delivered an opinion on 13 May 2022.
- (21) This Regulation should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union* in order to urgently make available a new automated data management and storage facility at Eurojust allowing for the preservation, analysis and storage of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences with a view to ensuring accountability for such crimes committed in Ukraine,

HAVE ADOPTED THIS REGULATION:

Article 1

Amendments to Regulation (EU) 2018/1727

Regulation (EU) 2018/1727 is amended as follows:

(1) in Article 4(1), the following point is added:

'(j) support Member States' action in combating genocide, crimes against humanity, war crimes and related criminal offences, including by preserving, analysing and storing evidence related to those crimes and related criminal offences and enabling the exchange of such evidence with, or otherwise making it directly available to, competent national authorities and international judicial authorities, in particular the International Criminal Court.';

(2) in Article 80, the following paragraph is added:

'8. By way of derogation from Article 23(6), Eurojust may establish an automated data management and storage facility separate from the case management system referred to in Article 23 for the purposes of processing operational personal data for the performance of the operational function referred to in Article 4(1), point (j) ('automated data management and storage facility').

The automated data management and storage facility shall comply with the highest standards of cyber security.

Notwithstanding Article 90 of Regulation (EU) 2018/1725, Eurojust shall consult the EDPS prior to the operation of the automated data management and storage facility. The EDPS shall deliver an opinion within two months of the receipt of a notification from the Data Protection Officer.

The notification from the Data Protection Officer referred to in the third subparagraph shall contain at least the following elements:

- (a) a general description of the processing operations envisaged;
- (b) an assessment of the risks to the rights and freedoms of data subjects;
- (c) the measures envisaged to address the risks referred to in point (b);
- (d) safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation, taking into account the rights and legitimate interests of the data subjects and other persons concerned.

The provisions on data protection laid down in this Regulation and in Regulation (EU) 2018/1725 shall apply to the processing of data in the automated data management and storage facility insofar as they do not directly relate to the technical set-up of the case management system. Access rights and time limits for the data stored in the automated data management and storage facility shall be in accordance with the applicable rules on access to the temporary work files in support of which the data are stored, and with the respective time limits, in particular those set out in Article 29 of this Regulation.

The derogation provided for in this paragraph shall apply as long as the case management system composed of temporary work files and of an index remains in place.';

(3) Annex II is amended as follows:

(a) point 1(n) is replaced by the following:

'(n) DNA profiles established from the non-coding part of DNA, photographs and fingerprints and, in relation to the crimes and related criminal offences referred to in Article 4(1), point (j), videos and audio recordings.';

(b) point 2(f) is replaced by the following:

'(f) the description and nature of the offences involving the person concerned, the date on which and location at which the offences were committed, the criminal category of the offences, the progress of the investigations and, in relation to the crimes and related criminal offences referred to in Article 4(1), point (j), information relating to criminal conduct, including audio recordings, videos, satellite images and photographs.';

*Article 2***Entry into force**

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

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels, 30 May 2022.

For the European Parliament
The President
R. METSOLA

For the Council
The President
B. LE MAIRE
