1) State of play *de jure* and in practice

On the basis of an inter-institutional agreement concluded in 2003, Council and Commission have equivalent security rules with regard to the protection of EU classified information (EUCI).

Five agencies' constituent acts\(^1\) have provisions on the applicable rules for the exchange of EU classified information.

The case of GSA

In the case of GSA, its founding regulation is explicit that it should apply the principles of the Commission Decision on rules on exchange of EUCI, i.e. the same basic principles and minimum common standards as the Commission\(^2\).

The case of FRONTEX

In the case of FRONTEX, although there is no provision in the agency's founding regulation on the rules to be applied, its security regulations take into account the principles and limits of Council Decision 2001/264/EC of 19 March 2001 adopting the Council’s security regulation. FRONTEX has thus rules providing protection on the same level as the rules of the Commission and the Council.

With regard to protecting classified information when the originator is outside FRONTEX the original classification is retained. Classified information is treated as classified information of the equivalent level under the FRONTEX Security Manual.

The case of EUROJUST


The data EUROJUST receives from prosecutorial authorities of Member States and from EUROPOL for its operational work is treated according to the EUROJUST security rules. The data generated by EUROJUST as a result of processing case-related information is not formally marked or classified since prosecutorial authorities of Member States need to use such information in judicial proceedings. To ensure data security as defined in Article 22 of Eurojust Decision, EUROJUST however protects such information at least at the restricted level. The new Council Decision on the security rules for protecting EUCI to be adopted by the Council on the basis of Article 240 (3) of the Treaty on the Functioning of the European

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\(^2\) Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal rules of procedure
Union (ex article 207(3) TEC) will only be legally binding on EUROJUST if the new Decision shall explicitly replace Decision 2001/264/EC. EUROJUST considers however applying the security principles and minimum standards set out in the new Council Decision on the security rules for protecting EUCI and accordingly amend EUROJUST Security rules.

The case of EUROPOL


The legal framework described above establishes appropriate rules on the confidentiality of information which is obtained by or exchanged with EUROPOL on the basis of the Europol Convention and respectively the EUROPOL Decision - and requires that Member States ensure that, within their territory, EUROPOL information receive a level of protection which is equivalent to the level of protection offered by the security measures established by these rules.

All information processed by or through EUROPOL, except information which is expressly marked or is clearly recognisable as being public information, is subject to a basic protection level within EUROPOL, as well as in the Member States and marked as "EUROPOL Unclassified not for public dissemination". Information requiring additional security measures is subject to a EUROPOL classification level, which is indicated by a specific marking. Information shall be assigned such a classification level only where strictly necessary and for the time necessary. The EUROPOL classification levels are as follows:

- "EUROPOL Restricted": information and material which unauthorised disclosure could be disadvantageous to the interests of EUROPOL or of one or more Member States;
- "EUROPOL Confidential": information and material which unauthorised disclosure could harm the essential interests of EUROPOL or of one or more Member States;
- "EUROPOL Secret": information and material which unauthorised disclosure could seriously harm the essential interests of EUROPOL or of one or more Member States;
- "EUROPOL Top Secret": information and material which unauthorised disclosure could cause exceptionally grave prejudice to the essential interests of EUROPOL or of one or more Member States.

Each EUROPOL classification level relates to a specific security package. The security packages offer different levels of protection, depending on the content of the information, and taking account of the detrimental effect, which unauthorised access, dissemination or use of the information, might have on the interests of EUROPOL or the Member States.

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3 This corresponds to the former article 31 of the former Europol Convention.
Access to and possession of information is restricted within EUROPOL to those persons who, by reason of their duties or obligations, need to have access to such information and handle it. Furthermore only those persons who had special training and undergone security screening may be entrusted.

The Rules on confidentiality of EUROPOL information foresee the adoption of a Security Manual, by the Management Board, containing detailed rules on the security measures to be applied within EUROPOL and associated with the different EUROPOL classification levels and corresponding security packages. For all the computer systems employed at EUROPOL to process protectively marked information, the adoption of the System Specific Security Requirement (SSSR) is also required by these Rules.

Former Second pillar agencies

The founding regulations of two former 2nd pillar agencies - EDA and EUSC - have provisions on security which stipulate that the agency applies the Council’s security regulations set out in Decision 2001/264/EC5, defining rules concerning exchange of the classified information, and that the agency ensures appropriate security and speed in its external communications.

Declaration of the Council and the Commission on the protection and handling of EU classified information (EUCI) by Union agencies, bodies or offices

In the course of the revision of the Council's security rules on exchange of EUCI which is under way, the Council Security Committee (CSC) recommended that Union agencies, bodies or offices established pursuant to the Treaties should apply a level of protection equivalent to that provided by the security rules of the Council or the Commission, as appropriate, for creating and handling EUCI. As a result, the Council and the Commission will sign a Declaration on the protection and handling of EU classified information (EUCI) by Union agencies, bodies or offices committing themselves, where appropriate, to take initiatives to the effect that:

- classified information created by such entities is marked as EUCI. It may also bear an additional marking indicating the agency, body or office originating the information;
- the exchange of EUCI originating in the Council or the Commission with any such entity, or between such entities, is contingent on the satisfactory outcome of an inspection visit led by either the GSC Security Office or the Commission Security Directorate, as appropriate, aimed at ascertaining the effectiveness of measures implemented for protecting EUCI.6

In the recent proposal for regulation establishing the Agency for the Operational Management of SIS II, VIS and EURODAC and in the regulation 439/2010 establishing EASO the following text on the security rules on the protection of classified information and non-classified sensitive information was used:

- The Agency/The Support Office shall apply the security principles contained in Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001

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6 This draft declaration will be further discussed within CSC and wording is subject to modifications.
amending its internal rules of procedure. This shall cover, inter alia, provisions for
the exchange, processing and storage of classified information.

- The Agency/The Support Office shall also apply the security principles relating to
  the processing of non-classified sensitive information as adopted and implemented
  by the European Commission.

Administrative arrangements between agencies and the Commission on the exchange of
EUCI

At present the Commission has an administrative arrangement for the exchange of EUCI with
EUROPOL. A similar agreement with GSA has been negotiated successfully and will be
formally concluded soon. Negotiations on such an agreement with FRONTEX are currently
being conducted.

Exchange and handling of sensitive non-classified information

Some agencies (e.g. EMA, ECHA, OHIM) also handle sensitive non-classified information,
I.e. information requiring specific levels of protection against unauthorised disclosure, without
being formally classified (e.g. personal and medical data, business and commercial secrets,
etc.). Currently, there is no harmonisation of the various set of rules.

2) Critical analysis of the issue at hand

Having a provision on the exchange of EUCI in agencies' founding regulations, along with
arrangements on the exchange of classified information concluded with the other EU
Institutions and bodies, is a basic and essential legal requirement for allowing such exchanges
and to ensure that the EUCI exchanged is granted equivalent levels of protection. Such a
provision is also essential for exchanges of classified information with the EU Member States.

Therefore, not having such a provision will make it impossible for the agencies concerned to
exchange EUCI with EU institutions and other EU agencies and bodies, as well as with the
Member States, and hence will hamper the efficiency of their activities and operations, and
may damage financial, reputational and other interests of the agencies concerned. Hence,
while not all agencies deal with EUCI, a provision along the lines of the one included in the
two most recent proposals quoted in part 1 of this fiche can be considered as a measure of
precaution.