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Delegations will find attached the third Opinion of the Joint Supervisory Body of Europol (Opinion 14/39) with respect to the proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol).



JOINT SUPERVISORY BODY OF EUROPOL

Mr. Rafael Fernández-Pita y González
Director General
Council of the European Union
175, Rue de la Loi
B-1048 Brussels

Ref. 14-47-46

Brussels, 2 October 2014

Subject: JSB's third opinion on the Europol Regulation

Dear Mr. Pita y González,

The JSB adopted today its third opinion on the European Commission's proposal for a Europol Regulation. Please find a copy enclosed.

In this third opinion, the JSB focuses on some important changes in the proposed draft introducing new data protection provisions and hopes that this opinion might contribute to the upcoming discussions on the draft Europol Regulation.

The JSB is always prepared to give further advice and assistance.

Yours sincerely,

Vanna Palumbo

Chair

(Signed by the Data Protection Secretary)

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Rue de la Loi 175 - Bureau : 0070FL59 - B-1048 Brussels
Phone : +32(0)2281 50 26 - Fax : +32(0)2281 51 26



Third Opinion of the Joint Supervisory Body of Europol

Opinion 14-39

with respect to the General Approach adopted by the Council of the European Union for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol)

1. Introduction

In its meeting of 5 and 6 June 2014, the Justice and Home Affairs Council reached a general approach on the draft Europol Regulation. The European Parliament adopted its position on the draft Europol Regulation at first reading on 25 February 2014.

In view of some important changes in the proposed draft introducing new data protection provisions, the Europol Joint Supervisory Body (JSB) would like to contribute to the upcoming discussions with a third opinion on the draft Europol Regulation¹. This opinion will focus on two issues which are newly introduced in the general approach and on a change in policy on the processing of sensitive data.

Article 36, Processing of special categories of personal data and of different categories of data subjects.

The proposed draft regulation included in Article 36 a prohibition to process sensitive data and data on specific categories of data subjects such as minors. Processing should only be allowed if it is strictly necessary. With these wordings, the proposal follows the concern expressed in the various applicable data protection instruments² that the processing of particular categories of data should be restricted. The text as now agreed in the general approach deviates considerably from what is to be considered as an accepted data protection principle: sensitive data should not be processed unless there is a clear and

¹ See previous opinions 13/31 of 10 June 2013 and 13/56 of 9 October 2013.

² See Article 6, Council of Europe Convention (ETS No 108) of 28 January 1981: sensitive data may not be processed unless appropriate safeguards.

Recommendation of the Committee of Ministers, No R(87) 15, principle 2: processing should be prohibited unless absolutely necessary.

Council Framework Decision 2008/977/JHA, Article 6, processing shall be permitted only when strictly necessary.

compelling reason for that. Such principle also applies when processing data on specific categories of persons³. The text now only states that processing will be allowed if necessary. By regulating the processing in this way, there is no difference anymore in the rules of processing "general" personal data and sensitive data. Since no justification can be found to deviate from the general data protection approach of sensitive data and the need to have stricter rules for processing these data and for specific categories of data subjects, the JSB urges to maintain the general rule in Article 36 that the processing of sensitive data is prohibited unless it is strictly necessary for preventing or combatting crime.

The JSB also noted that in Article 36(2) the wordings "„ revealing racial or ethnic..." is replaced by „ on racial or ethnic..." Since the new wording deviates from the wordings generally used (revealing), this might lead to an unwanted limitation of what is considered as sensitive personal data. The JSB urges to stay in line with other legal instruments by using the "revealing" instead of "on".

Article 39, Right of access for the data subject

The JSB noticed that many of its suggestions are used to improve Article 39. These improvements are very important: the right of access is a crucial corner stone for the fundamental right of data protection. However, the JSB has also noted that the text as agreed in the general approach contains a new element that raises serious concerns. The JSB refers to the introduction in Article 39(4) of the last sentence:

"Europol shall comply with any such objections".

The background for the JSB comments is rooted in the practice of Europol's execution of this right by over the past decade.

Article 19(4), last sentence of the first legal basis for Europol, the Europol Convention⁴, obliged Europol following a request for access not to reveal to a data subject whether he is known by Europol when one or more Member States or Europol objected to this communication. This provision, in combination with the applicability of the national law of the Member State where a request for access was made, created a situation in which requests were always answered in a way as referred to in Article 19(4). The decisions of the Appeals Committee⁵ on appeals to such Europol decisions demonstrated in identical cases great differences between national laws and practices. It also demonstrated that in most cases, Member States provided Europol with no or insufficiently motivated objections.

³ See Preamble 34 of the draft Europol Regulation

⁴ O.J.C 316, 27.11.1995, ..1.

⁵ The decisions of the Appeals Committee are published in <http://europoljsb.consilium.europa.eu/appeals-committee/appeals-committee---decisions.aspx?lang=en>

On initiative of Europol and the JSB, the present text of Article 30 was introduced in the Europol Decision. The most important change was that it is always Europol that has to make a final decision and consequently is accountable for that. Member States involved may raise objections to a proposed Europol decision but Europol still has its own responsibility to decide on the request for access.

Europol has to decide whether to grant access on request or, when it considers that one of the exemptions of Article 30(5) applies, to take responsibility for refusing access. According to Article 30(4), when assessing a request, Europol has to consult competent authorities of the Member States concerned. Europol's decision shall be taken in close cooperation with the Member States directly concerned. When a Member State objects to Europol's proposed response, it shall notify Europol of its reason(s) for objection. Europol's responsibility for deciding on a request for access includes taking into account the interests of the person concerned as well as any information given by Member States concerned.

These exemptions can only be applied if, and to the extent to which⁶, the interests of police or third parties outweigh the interest in exercising the right of access. The principle of proportionality implies that a decision on the right of access requires an assessment on a case by case basis.

Refusing access is only possible when necessary for the purposes referred to in the exemptions. The word "necessary" implies that Europol is obliged to explain why an exemption is used. Simply referring to a more general fear is not sufficient for demonstrating the necessity of using an exemption. Europol should determine, and be able to explain, that the communication could specifically and effectively undermine the protected interest. The risk of the protected interest being undermined with the communication should be reasonably foreseeable and not purely hypothetical.

Although Europol has to take into account Member States objections in its assessment, a mere objection of a Member State does not justify the application of the exemptions of Article 30(5). The application of the fundamental right of access to data processed by Europol may not be set aside by a mere or not sufficiently motivated objection presented by a Member State. Europol is responsible for assessing whether an exemption is applicable and in that assessment Europol has to assess whether any reasons provided by a Member State are as such that an exemption is applicable or not, in each specific case.⁷

⁶ See in this respect the second JSB opinion 13/56 on the draft regulation. In that opinion, the JSB urges to align Article 39(5) with the present Europol Decision and the draft Directive on the protection of individuals with regard to the processing in the area of law enforcement by introducing in Article 39(5) "*shall be refused to the extent that such partial or complete refusal is ...*" Published in <http://europoljsb.consilium.europa.eu/opinions/others.aspx?lang=en>

⁷ See in this respect also the decision of the Appeals Committee nr. 10/02 of 14 March 2012, published in <http://europoljsb.consilium.europa.eu/appeals-committee/appeals-committee---decisions.aspx?lang=en>

Since any data subject may lodge a complaint with the European Data Protection Supervisor and ultimately start an action before the Court of Justice of the European Union⁸, Europol must be able to make its own assessment without being forced to make a certain decision which might not be in compliance with Article 39.

In summary, the JSB urges the deletion of the last sentence of Article 39(4) : "Europol shall comply with any such objection".

Article 47, Cooperation between the European Data Protection Supervisor and national supervisory authorities.

As already stated in the two JSB opinions on the draft Regulation⁹, the involvement of national data protection authorities when supervising Europol is essential due to the fact that a very large majority of the data collected and processed by Europol originates from the Member States and will, at a certain point, also be sent back to the Member States for further use in national investigations. The extensive national experience of how to deal with law enforcement information is thus required.

The JSB also stressed in its second opinion that consistency in the data protection supervision of Europol is best served by the creation of an independent and effective joint supervision structure with the equal participation of each national data protection authority and the European Data Protection Supervisor. Again, the extensive national experience of how to deal with law enforcement information is essential.

Actually, the functioning of Europol's information systems, the sharing of responsibilities for the data by Europol and the Member States, the possibilities for data subjects to exercise the right of access and the role of Europol as a service provider for Member States, requires the close and direct involvement of the national supervisory authorities. All this demands an integrated and active supervision that goes beyond a coordinated model to reflect the unique situation of Europol. In this respect the JSB reiterates its comments in the first two opinions on other forms of cooperation.

The general approach of the Council introduces in Article 47 new and very important elements for cooperation between the various supervisors involved with Europol. According to Article 47 (2), the European Data Protection Supervisor shall use the expertise and experience of national supervisory authorities in carrying out his/her duties. The JSB can only support this obligation since it ensures that the extensive national experience of how to deal with law enforcement information is used when supervising Europol.

⁸ See Article 49 and 50, draft regulation.

⁹ See previous opinions 13/31 of 10 June 2013 and 13/56 of 9 October 2013.

The JSB welcomes the step forward with the introduction of a new model for a joint supervision structure: the Cooperation Board. The composition of the Board and its tasks as described in Article 47(6) is crucial for the equal (structural and non-hierarchical) participation of all actors involved and thus ensures consistency in supervision and effective data protection supervision of Europol. The JSB underlines the importance of determining the competences and tasks of the Cooperation Board as such that it ensures the coordination of activities between its members.

An essential feature of the Cooperation Board is that it creates an independent structure in which the national data protection supervisors together with the European Data Protection Supervisor contribute to carefully balance law enforcement and data protection interests in the daily work of Europol. The details of how the Cooperation Board should carry out its tasks in practice shall be determined at a later stage when the Board's rules of procedure will be drafted.

The JSB also notes that the proposed Cooperation Board, in view of the similar needs when supervising other law enforcement cooperation structures, may serve as a model for the future. As already stated, this model ensures consistent and effective supervision.

A last remark concerns the composition of the Cooperation Board. Article 47(4) regulates that the Board shall be composed of a representative of a national supervisory authority. The legal basis of the JSB allows a maximum of two members or representatives of the national supervisory authority¹⁰. This way, participation of sub-national supervisory authorities can be ensured where such authorities are (also) competent to supervise law enforcement data processing in a Member State.

The JSB suggests amending Article 47(4) in this way.

The JSB hopes that this opinion will contribute to the discussions of the draft Europol Regulation. The JSB is of course always prepared to give further advice and assistance.

Brussels, 2 October 2014



Vanna Palumbo
Chair

¹⁰ See Article 34(1) Europol Decision.