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NOTE

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Subject:	Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA - Data protection supervisory bodies for Europol

INTRODUCTION

One of the main discussion points that emerged during the ongoing examination of the proposed Regulation on Europol by the Law Enforcement Working Party (LEWP), in particular at its meeting of 9-10 October 2013 focusing inter alia on Chapters VII-VIII relating to data protection, was the choice of the data protection supervisory body to monitor the processing of personal data by Europol.

Under the current Council Decision on Europol¹, the supervisory role is played by:

- national supervisory bodies, which "monitor the permissibility of the input, the retrieval and any communication to Europol of personal data by the Member State concerned" and "examine whether such input, retrieval or communication violates the rights of the data subject" (Art. 33, also see Annex 1); and
- the Joint Supervisory Body (JSB) "composed of a maximum of two members or representatives of each of the independent national supervisory bodies, having the necessary abilities and appointed for five years by each Member State" with a task to review "the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and use of the data held by Europol. In addition, the Joint Supervisory Body shall monitor the permissibility of the transmission of data originating from Europol".

In the draft Regulation on Europol² it is proposed that the supervisory role is played by:

- the national supervisory authority "with the task of monitoring independently, in accordance with its national law, the permissibility of the transfer, the retrieval and any communication to Europol of personal data by the Member State concerned and to examine whether such transfer, retrieval or communication violates the rights of the data subject." (Art. 45);
- the European Data Protection Supervisor (EDPS) which "shall be responsible for monitoring and ensuring the application of the provisions of this Regulation relating to the protection of fundamental rights and freedoms of natural persons with regard to processing personal data by Europol, and for advising Europol and data subjects on all matters concerning the processing of personal data" (Art. 46, also see Annex 2).

¹ Council Decision of 6 April 2009 establishing the European Police Office (Europol) (OJ L 121, 15.5.2009, p. 37).

² 8229/13.

In the Commission proposal for Regulation on Europol, Regulation (EC) No 45/2001 on the protection of individual with regard to processing of personal data by the Community institutions and bodies and on the free movement of such data³ only applies to administrative personal data (Art. 48, also see Annex 2) and Chapter VII of the draft Europol Regulation contains a specific data protection regime for operational personal data which draw on the principles underpinning Regulation (EC) No 45/2001 (Recital 32, also see Annex 2).

STATE OF PLAY

As set out in the explanatory memorandum to the proposed draft Regulation on Europol, one of the objectives of the proposal is to ensure a robust data protection regime for Europol, in particular to guarantee that the data protection supervisor of Europol has full independence, can act effectively and has sufficient powers of intervention. Thus, it is proposed that the role of Europol's external data protection supervisory authority is strengthened by making EDPS competent for the supervision of processing of personal data by Europol. This is to ensure full compliance with the criteria of independence required by the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights and interpreted by the case-law of the Court of Justice and, due to the EDPS' enforcement powers, effectiveness of data protection supervision.

At the LEWP meeting on 9-10 October 2013 focusing inter alia on Chapters VII-VIII relating to data processing and its supervision the following opinions were voiced:

- Some delegations were in favour of the choice of EDPS because of the implications of the entry into force of the Treaty of Lisbon and the abolishment of the pillar structure, resulting in the need for coherent supervision of the processing of personal data by EDPS for all EU agencies.
- Quite a few delegations were in favour of maintaining JSB underlining that it had functioned well so far, has the necessary experience, the enforcement powers and the overview of the situation in the Member States.
- One delegation was in favour of associating EDPS with JSB, while one delegation was strongly against having two different bodies supervising Europol.

³ OJ L 8, 12.1.2001, p. 1-22.

- The Commission reiterated that the choice of EDPS was based on:

- the general provisions as resulting from the Treaty of Lisbon abolishing the pillar structure and therefore making Regulation (EC) No 45/2001 applicable to all EU agencies, and also Art. 16 of TFEU stating that compliance with rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies shall be subject to the control of independent authorities;
- Declaration 21 by the IGC on the Treaty of Lisbon acknowledging the specific nature of the field of police cooperation;
- the case law of the Court of Justice which underlines the need of an independent supervision of data protection, both from the functional and budgetary point of view;
- the need for consistency among all EU agencies, including those in the JHA area.

The opinion of EDPS⁴ on this subject in relation to the proposed draft Regulation on Europol is the following: as a result of the entry into force of the Lisbon Treaty, Regulation (EC) No 45/2001 applies to the processing of personal data by all Union institutions, bodies, offices and agencies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Union law, except where Union law has clearly and specifically provided otherwise. The EDPS therefore welcomes the proposal to clarify that Regulation (EC) No 45/2001 should be fully applicable to administrative personal and staff data at Europol but regrets that the Commission has not chosen to apply Regulation (EC) No 45/2001 to [operational personal data of] Europol, and limit the draft proposal to additional specific rules and derogations, which duly take account of the specificities of the law enforcement sector. However, the EDPS notes that Recital (32) of the draft Regulation on Europol explicitly mentions that data protection rules at Europol should draw on the principles underpinning Regulation (EC) No 45/2001. As a consequence the proposal includes most of the substantive elements of Regulation (EC) No 45/2001. The EDPS underlines that Art. 46 of the draft Regulation on Europol provides for streamlined and consistent data protection supervision at EU level by the EDPS. The EDPS supervises the 60 plus institutions, bodies and agencies active over the whole range of EU policy, with solid experience in supervising EU bodies and agencies that process data in the law enforcement area.

⁴ 10468/13.

The opinion of the JSB⁵ on this subject in relation to the proposed draft Regulation on Europol is the following: the JSB does not support the Commission's idea of making the EDPS solely responsible for the supervision of Europol. It is the view of the JSB that the best way forward could be to create an independent and effective joint supervision structure with equal participation of each national data protection authority and the EDPS.

Delegations in the LEWP asked whether there was a legal obligation to opt for the EDPS in this draft Regulation on Europol. This legal issue will be addressed during the CATS meeting. Even if there was no such a legal obligation, as a matter of policy due account should be taken of the need to ensure a coherent and independent supervision of the processing of personal data.

In this context, it should also be noted that in other EU agencies EPDS has been appointed as data protection supervisory authority, including:

- Frontex: Regulation (EU) No 1168/2011⁶ states (in Recital 25 and in Art. 11a) that Regulation (EC) No 45/2001 applies to the processing of personal data by the Agency. The EDPS should therefore monitor the processing of personal data by the Agency and have the power to obtain from the Agency access to all information necessary for his or her enquiries.
- Eurojust : the proposed draft Regulation on Eurojust⁷ provides the following as regards data protection supervisory bodies: "The European Data Protection Supervisor shall act in close cooperation with national authorities competent for data protection supervision with respect to **specific issues requiring national involvement**" (Art. 35, also see Annex 3).

It should also be noted that in the context of the "data protection package" which is currently under discussion, the Commission has promised that it would submit a proposal to update Regulation (EC) No 45/2001.

⁵ 10988/13, 15005/13.

⁶ OJ L 304, 22.11.2011, p. 1

⁷ 12566/13.

ISSUE FOR DEBATE

Taking into account the above elements, do delegations take the view that the EDPS should be the data protection supervisory authority for all categories of personal data processed by Europol, as proposed by the Commission?

Council Decision of 6 April 2009 establishing the European Police Office (Europol)

Article 34

Joint Supervisory Body

1. An independent Joint Supervisory Body shall be set up to review, in accordance with this Decision, the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and use of the data held by Europol. In addition, the Joint Supervisory Body shall monitor the permissibility of the transmission of data originating from Europol. The Joint Supervisory Body shall be composed of a maximum of two members or representatives, where appropriate assisted by alternates, of each of the independent national supervisory bodies, having the necessary abilities and appointed for five years by each Member State. Each delegation shall be entitled to one vote.

The Joint Supervisory Body shall choose a chairman from among its members. In the performance of their duties, the members of the Joint Supervisory Body shall not receive instructions from any other body.

2. Europol shall assist the Joint Supervisory Body in the performance of the latter's tasks. In doing so, it shall in particular:

(a) supply the information the Joint Supervisory Body requests and give it access to all documents and paper files as well as to the data stored in its data files;

(b) allow the Joint Supervisory Body free access at all times to all its premises;

(c) implement the Joint Supervisory Body's decisions on appeals.

3. The Joint Supervisory Body shall be competent to examine questions relating to implementation and interpretation in connection with Europol's activities as regards the processing and use of personal data, to examine questions relating to checks carried out independently by the national supervisory bodies of the Member States or relating to the exercise of the right of access, and to draw up harmonised proposals for common solutions to existing problems.

4. If the Joint Supervisory Body identifies any violations of the provisions of this Decision in the storage, processing or use of personal data, it shall make any complaints it deems necessary to the Director and shall request him to reply within a specified time limit. The Director shall keep the Management Board informed of the entire procedure. If it is not satisfied with the response given by the Director to its request, the Joint Supervisory Body shall refer the matter to the Management Board.

5. For the fulfilment of its tasks and to contribute to the improvement of consistency in the application of the rules and procedures for data processing, the Joint Supervisory Body shall cooperate as necessary with other supervisory authorities.

6. The Joint Supervisory Body shall draw up activity reports at regular intervals. Such reports shall be forwarded to the European Parliament and to the Council. The Management Board shall have the opportunity to make comments, which shall be attached to the reports.

The Joint Supervisory Body shall decide whether or not to publish its activity report, and, if it decides to do so, shall determine how it should be published.

7. The Joint Supervisory Body shall adopt its rules of procedure by a majority of two thirds of its members and shall submit them to the Council for approval. The Council shall act by qualified majority.

8. The Joint Supervisory Body shall set up an internal committee comprising one qualified representative from each Member State with the right to vote. The committee shall have the task of examining the appeals provided for in Article 32 by all appropriate means. Should they so request, the parties, assisted by their advisers if they so wish, shall be heard by the committee. The decisions taken in this context shall be final as regards all the parties concerned.

9. The Joint Supervisory Body may set up one or more other committees in addition to the one referred to in paragraph 8.

10. The Joint Supervisory Body shall be consulted on that part of Europol's budget which concerns it. Its opinion shall be annexed to the draft budget in question.

11. The Joint Supervisory Body shall be assisted by a secretariat, the tasks of which shall be defined in the rules of procedure.

Proposal for a Regulation on Europol

Recitals:

(32) Data protection rules at Europol should be strengthened and draw on the principles underpinning Regulation (EC) No 45/2001⁸ to ensure a high level of protection of individuals with regard to processing of personal data. As Declaration 21 attached to the Treaty recognizes the specificity of personal data processing in the law enforcement context, the data protection rules of Europol should be autonomous and aligned with other relevant data protection instruments applicable in the area of police cooperation in the Union, in particular Convention No. 108⁹ and Recommendation No R(87) of the Council of Europe¹⁰ and Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters¹¹ [*to be replaced by the relevant Directive in force at the moment of adoption*].

(43) As Europol is processing also non-operational personal data, not related to any criminal investigations, processing of such data should be subject to Regulation (EC) No 45/2001.

Article 46

Supervision by the European Data Protection Supervisor

1. The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation relating to the protection of fundamental rights and freedoms of natural persons with regard to processing personal data by Europol, and for advising Europol and data subjects on all matters concerning the processing of personal data. To this end, he/ she shall fulfil the duties set out in paragraph 2 and shall exercise the powers granted in paragraph 3.

⁸ OJ L 8, 12.1.2001, p. 1.

⁹ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.1.1981.

¹⁰ Council of Europe Committee of Ministers Recommendation No. R(87) 15 to the Member States on regulating the use of personal data in the police sector, 17.9.1987.

¹¹ OJ L 350, 30.12.2008, p. 60.

2. The European Data Protection Supervisor shall have the following duties under this Regulation:
 - (a) hear and investigate complaints, and inform the data subject of the outcome within a reasonable period;
 - (b) conduct inquiries either on his/her own initiative or on the basis of a complaint, and inform the data subjects of the outcome within a reasonable period;
 - (c) monitor and ensure the application of the provisions of this Regulation and any other Union act relating to the protection of natural persons with regard to the processing of personal data by Europol;
 - (d) advise Europol, either on his/her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data;
 - (e) determine, give reasons for and make public the exemptions, safeguards, authorisations and conditions mentioned in Article 36(4).
 - (f) keep a register of processing operations notified to him/her by virtue of Article 42(1) and registered in accordance with 42(4),
 - (g) carry out a prior check of processing notified to him/her.
3. The European Data Protection Supervisor may under this Regulation:
 - (a) give advice to data subjects in the exercise of their rights;
 - (b) refer the matter to Europol in the event of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, make proposals for remedying that breach and for improving the protection of the data subjects;
 - (c) order that requests to exercise certain rights in relation to data be complied with where such requests have been refused in breach of Articles 39 and 40;
 - (d) warn or admonish Europol;
 - (e) order the rectification, blocking, erasure or destruction of all data when they have been processed in breach of the provisions governing the processing of personal data and the notification of such actions to third parties to whom the data have been disclosed;
 - (f) impose a temporary or definitive ban on processing;
 - (g) refer the matter to Europol and, if necessary, to the European Parliament, the Council and the Commission;

- (h) refer the matter to the Court of Justice of the European Union under the conditions provided for in the Treaty;
- (i) intervene in actions brought before the Court of Justice of the European Union.

4. The European Data Protection Supervisor shall have the power:

- (a) to obtain from Europol access to all personal data and to all information necessary for his/her enquiries;
- (b) to obtain access to any premises in which Europol carries on its activities when there are reasonable grounds for presuming that an activity covered by this Regulation is being carried out there.

Article 48

Administrative personal data and Staff data

Regulation (EC) No 45/2001 shall apply to all personal data of Europol staff members as well as administrative personal data held by Europol.

Proposal for a Regulation on Eurojust

Article 35

Cooperation between the European Data Protection Supervisor and national data protection authorities

1. The European Data Protection Supervisor shall act in close cooperation with national authorities competent for data protection supervision with respect to specific issues requiring national involvement, in particular if the European Data Protection Supervisor or a national authority competent for data protection supervision finds major discrepancies between practices of the Member States or potentially unlawful transfers using Eurojust's communication channels, or in the context of questions raised by one or more national supervisory authorities on the implementation and interpretation of this Regulation.
2. In cases referred to under paragraph 1 the European Data Protection Supervisor and the national authorities competent for data protection supervision may, each acting within the scope of their respective competences, exchange relevant information, assist each other in carrying out audits and inspections, examine difficulties of interpretation or application of this Regulation, study problems related to the exercise of independent supervision or to the exercise of the rights of data subjects, draw up harmonised proposals for joint solutions to any problems and promote awareness of data protection rights, as necessary.
3. The National Supervisory Authorities and the European Data Protection Supervisor shall meet for the purposes outlined in this Article, as needed. The costs and servicing of these meetings shall be for the account of the European Data Protection Supervisor. Rules of procedure shall be adopted at the first meeting. Further working methods shall be developed jointly as necessary.
