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NOTE

From:	Mr Carlos Campos Lobo, Chair Joint Supervisory Body of Eurojust
On:	15 January 2015
To:	Ms Vineta Krutko, Chair of COPEN Committee, Council of the European Union
No. prev. doc.:	17045/14 EUROJUST 223 EPPO 79 CATS 210 COPEN 322 CODEC 2543
Subject:	Draft Eurojust Regulation: Data Protection

Dear Ms Krutko,

The Joint Supervisory Body of Eurojust (JSB) has been made aware of the outcome of the COPEN Working Party meeting of 13 January 2015, which was devoted to the draft Eurojust Regulation, focusing on Data Protection provisions (Chapter IV). We understand that during the meeting the issue of the supervision of Eurojust was discussed.

The JSB Eurojust regrets that it has not been given the possibility to present and explain its position at the COPEN meeting, especially on the point related to the envisaged supervisory mechanism. In view of the ongoing discussions, the JSB Eurojust respectfully requests to be given the opportunity to present its position on this important subject at the next COPEN Working Party meeting.

At this occasion, the JSB kindly asks the Presidency to circulate the Second Opinion of the JSB Eurojust about the data protection regime in the proposed Eurojust Regulation to the COPEN delegations (attached).

At Eurojust's supervisory body, the JSB is ready to provide further advice and explanation with regard to the Data Protection provisions in the draft Eurojust Regulation and looks forward to participating in the upcoming discussions.

(Complimentary close)

(s.) Carlos Campos Lobo



Second Opinion of the Joint Supervisory Body of Eurojust about the data protection regime in the proposed Eurojust Regulation

In view of the updated revised proposal on the draft Eurojust Regulation¹, the Joint Supervisory Body of Eurojust (JSB) provides its second opinion on Chapter IV concerning data protection².

Without prejudice to the possibility of further opinions regarding other aspects of the proposal on the draft Eurojust Regulation, this JSB Opinion elaborates four main issues that could have an impact on Eurojust's activities and its data protection regime.

The JSB welcomes the fact that the Italian Presidency has taken on board some of the proposals made in the previous opinion. The JSB considers however that certain aspects contained in the initial draft proposal for a Eurojust Regulation and newly introduced changes should be reconsidered, in particular those related to the proposed supervisory model, specific tailor-made data protection rules and rights of the data subject. At the same time, the JSB regrets that the Italian Presidency has decided to postpone the discussions on the data protection part, which will be left aside and dealt with under the incoming Presidency.

1. Supervision

The JSB welcomes the latest updated version of Chapter IV of the draft Eurojust Regulation which contains references to the EDPS and the JSB between brackets, implying therefore that this point remains open to discussion. However, as the Italian Presidency indicated that the provisions relating to the Data Protection supervision mechanism will not form part of the partial approach and will be dealt with under a future Presidency, the JSB regrets that Chapter IV is excluded from the text of the Partial General Approach and will be further negotiated by COPEN in the context of developments with the draft Regulations on Europol and EPPO as well as the data

¹ Eurojust Regulation, Chapter IV, 15260/14 of 13 November 2014

² In this regard, see previous opinion of the JSB regarding data protection in the proposed new Eurojust legal framework of 14 November 2013:

http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/jsb/opinions/Opinion%20on%20the%20new%20Eurojust%20Regulation%2c%202013/OpinionJSB_new_Eurojust_Regulation_2013-11-14_EN.pdf

protection package. This could be already seen as a missed opportunity. The comments of some Member States call for alignment of this matter with the draft Europol Regulation³, where the EDPS is foreseen for the time being as the responsible supervisor of the processing of personal data by Europol, which shall cooperate with the national supervisory authorities in a Cooperation Board. In this respect, the JSB Eurojust endorses the wish to ensure consistency between both instruments, but stresses the judicial nature of the work carried out by Eurojust and considers therefore that some differences are necessary and justified.

The JSB underscores that the supervision by the EDPS would take no account of the judicial nature of the work carried out by Eurojust. Supervision of Eurojust's activities requires a judicial component and specific expertise, which is presently safeguarded by the composition of the JSB Eurojust, comprising a judicial emphasis and the proper involvement of Member States. Members of the JSB are either judges or members of an equal level of independence and, regarding its secretariat and financial resources, they have been given all the necessary resources to guarantee the independence of their work.

Furthermore, most of the information received by Eurojust comes from the Member States. This is due to the specific dual nature of Eurojust and its way of working through coordination and cooperation with the competent national authorities. The fact that information comes from and returns to Member States and that Eurojust is a judicial cooperation organisation, impacts on the requirements for effective supervision at Eurojust. Both elements are properly ensured in the current supervisory system. Therefore, the JSB respectfully requests both the present and upcoming Presidencies, on the basis of the arguments provided above, to keep the Joint Supervisory Body of Eurojust as responsible supervisor of the personal data processing carried out by Eurojust, providing an emphasis on the close cooperation with the national supervisory authorities.

2. Tailor-made data protection regime at Eurojust

The JSB has always emphasised that Eurojust has presently a very comprehensive data protection regime in place, in the Eurojust Decision itself and reinforced and further developed through the adoption of tailor-made Data Protection Rules. It regrets

³ Europol Regulation Doc. 10033/14 of 28 May 2014 (Council General Approach)

however that the proposed draft Eurojust Regulation no longer contains a reference to the Data Protection Rules. The JSB drew attention to this legal vacuum in its first Opinion; regrettably this point has not been taken on board yet.

The revised text of the draft Eurojust Regulation does not and cannot possibly regulate all data processing aspects at the same level of detail that the presently existing Data Protection Rules do. Eurojust adopted a number of legal instruments, including the Eurojust Security Rules, the Additional rules of procedure on the processing and protection of non-case-related personal data and many other internal rules and procedures, which are based on the Eurojust Decision and the Data Protection Rules. These legal instruments regulate in detail the processing of case-related data in the CMS and manual files. They also cover the non-case-related information processing (processing of administrative data).

The scope of the current data protection rules covers key elements such as definitions; entering data in the CMS; the procedure for exercising the rights of the data subjects; data management in the temporary work files and index; the procedure for granting authorised access to personal data; the implementation of the time limits for the storage of personal data in the CMS and manual files. The existence of such detailed and well developed rules creates a greater legal clarity and certainty not only for the organisation itself, but more importantly for the data subjects. These rules are also necessary for the proper management of data processing operations, which is the prime objective of the regular inspections carried out by the JSB.

Maintaining the existing Data Protection Rules, with any necessary revisions in the light of the new legal framework, would be of significant added value for the organisation and would enable a much swifter transition between the presently well-established regime and the future one. To avoid causing legal uncertainty and creating difficulties in the application of the provisions of the new Regulation in practice, the JSB calls for maintaining the Data Protection Rules and making them subject to a revision clause in a certain timeframe to ensure any necessary alignment with the future Eurojust Regulation and any other applicable EU legal instruments in the area of data protection.

A so-called sunset clause could be added to the Eurojust Regulation providing for the obligation for Eurojust to review all existing rules and procedures to the new legal framework within a given period of time, for instance two years, preserving the existing *acquis* of rules and procedures in place and allowing therefore the organisation to adapt the existing rules to the new regime without creating a legal gap in practice.

3. Appointment of the Data Protection Officer

The Data Protection Officer (DPO) plays a fundamental role in ensuring compliance with the data protection requirements within the organisation. The key role of the DPO and the underlying synergy between the DPO and the JSB contributes to ensuring effective compliance with the data protection principles at Eurojust. The JSB is accordingly concerned about important aspects related to the appointment procedure of the DPO.

Article 31(1b) of the revised text of the draft Eurojust Regulation refers to a term of four years and eligibility for a single renewal of four years. The present Eurojust Decision does not impose any time limitation. In its previous opinion, the JSB stressed that the function requires a high level of expertise and continuity. It consequently objected to a possible limitation of 10 years if Regulation 45/2001 were to apply. The revised text of the draft Eurojust Regulation however further reduces the limit set in Regulation 45/2001 from a term of 5 years which may be renewed once only, *i.e.* a maximum duration of 10 years, to a term of 4 years which may be renewed once only, *i.e.* a maximum duration of 8 years. In the context of the reform of Regulation 45/2001, proposals are made to delete the 10 year limit as it only creates limitations to the organisation not allowing it to keep very necessary and scarce knowledge and expertise in house. The JSB urges to delete such unjustified and unnecessary time limit.

As mentioned above, one of the significant parts of the DPO's work is to act as a link with the JSB to ensure that the JSB members are sufficiently informed about the activities of Eurojust regarding data protection matters and the implementation of rules. However, comparing Article 31(2) of the revised draft Regulation with the

current Article 17 of the Eurojust Decision, this essential element is omitted. The JSB proposes to add the following DPO task in Article 31(2): "*cooperating with the JSB*".

The JSB highlights another point related to the foreseen escalation procedure in Article 31(5) of the draft Regulation. The escalation procedure is a remedy tool for the DPO to resolve non-compliance with the legal provisions related to the processing of personal data. The same procedure is used in non-compliance cases for processing both operational and administrative data. In view of the fact that in operational matters and the processing of operational data the role of the Administrative Director is limited, a clear distinction in the escalation procedures, especially when it comes to the operational data, should be made. It is proposed to maintain the present escalation procedure in cases of operational data processing where the College is the first instance, the DPO would seek to redress the non-compliance. Only when the matter is not resolved within the specified time, the DPO would then refer the matter to the JSB.

4. Rights of data subjects: right of access

Article 32 of the revised text does not explicitly provide a data subject with a right of access to his/her personal data, but directly touches upon the procedural steps how to exercise such right. The JSB is of the opinion that it is essential to expressly provide for such right in the body of the draft Regulation. Moreover, Article 39(1) of the draft Europol Regulation already contains explicit provision regarding the right of access. Therefore, the JSB proposes to insert at the beginning of para. 1 of Article 32 the following sentence: "*Any data subject shall be entitled to have access to personal data concerning him processed by Eurojust under the conditions laid down in this Article*".

Article 32(1) of the draft Eurojust Regulation foresees that data subjects will no longer be able to address Eurojust directly with their requests, but will have to do that via the authority appointed for this purpose in the Member State of their choice. The JSB considers that the current system, where a data subject can choose to apply directly to Eurojust or via the appointed authority, addresses the interests and needs of the data subjects and is more effective and less time-consuming for them.

Therefore, the JSB proposes to reintroduce in the revised text the possibility for a data subject to address Eurojust directly with the requests for access.

The most worrying and unacceptable provision from the data protection point of view is the newly inserted provision in Article 32(3), setting out that Eurojust shall comply with any objection received from the Member State in any case of request for access. The same provision appears in Article 39(4) of the draft Europol Regulation. In its work over the last 10 years, which is reflected in the JSB's appeal decisions, the JSB has ruled on cases where no or insufficient reasons were provided to justify why the applicant was not granted access to his/her personal data. In the appeal decision of 2007, the JSB concluded that a systematic application of Article 19(7) of the Eurojust Decision⁴ without further examination of the specific details of the individual cases might lead in practice to a systematic denial of the rights of the individuals. The JSB found that "[...] *in all cases where an individual seeks access to personal data concerning him processed by Eurojust, including those cases where there are no data processed, the College of Eurojust shall decide whether in the specific case the disclosure of the data or of the non-existence of data concerning the applicant processed by Eurojust may contravene any interests of Eurojust or of one of the Member States.*"⁵ In the appeal decision of 2011, the JSB concluded that "It is regrettable however that the decision of Eurojust does not seem to take account of the interests at stake in this case or of the impact for the data subject of the mere provision of a standard answer. Neither the reply of Eurojust to the data subject nor the written observations submitted to the JSB contain any consideration as to how the disclosure of the data or of the non-existence of data concerning the applicant processed by Eurojust may contravene any interests of Eurojust or of one of the Member States."⁶ In the present context, the JSB reiterates that Eurojust must be able to prove that the use of one of the exemptions refusing or restricting the right of access is indeed a "necessary measure" to protect any interest of Eurojust or of one of the Member States, and in every case to provide substantially grounded motivation.

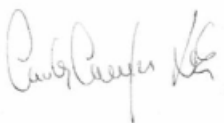
⁴ Article 19(7) of the Eurojust Decision: "If access is denied or if no personal data concerning the applicant are processed by Eurojust, the latter shall notify the applicant that it has carried out checks, without giving any information which could reveal whether or not the applicant is known."

⁵ <http://www.eurojust.europa.eu/about/structure/jsb/Pages/appeals.aspx>

⁶ <http://www.eurojust.europa.eu/about/structure/jsb/Pages/appeals.aspx>

The provision that a decision on access to data shall be made in close cooperation between Eurojust and the Member States directly concerned is logical and ensures the correct balance between the interests of the Member State(s) and the interests of the person concerned. However, the decision in such cases must be taken individually, on a case by case basis. This statement is supported by the provision in Article 32(2a) explicitly requesting individual assessment: *"When the applicability of an exemption is assessed, the interests of the person concerned shall be taken into account"*. A systematic standard approach would be unacceptable which is the position consistently underscored by the JSB in its appeal decisions. Article 37 of the revised draft Eurojust Regulation provides that *"Eurojust shall be liable, in accordance with Article 340 of the Treaty, for any damage caused to an individual which results from unauthorised or incorrect processing of data carried out by it."* Hence, it will always be for Eurojust to take a final decision and it shall always be accountable for the decisions taken. With reference to Article 37 of the draft Regulation foreseeing the possibility to launch the action before the Court of Justice, the JSB advises to delete the newly inserted provision in Article 32(3) of the draft Regulation *"Eurojust shall comply with any such objection"*. The JSB is aware that the same provision is included in Article 39(4) of the draft Europol Regulation and the JSB Europol in its Third Opinion⁷ also requested the deletion of the provision from the draft text of the Europol Regulation.

The JSB Eurojust is eager to constructively contribute to the discussions about the proposed data protection regime in the draft Eurojust Regulation and offers its full assistance and expertise in future discussions regarding this matter.



Done in Lisbon,
1 December 2014
Carlos Campos Lobo
Chair of the Joint Supervisory Body

⁷ 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), 2 October, 2014
<http://europoljsb.consilium.europa.eu/media/266369/14-39%20third%20opinion%20of%20the%20jsb%20europol%20regulation.pdf>

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