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From: Mr Wojciech Rafal WIEWIÓROWSKI, European Data Protection Supervisor

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject: Formal comments of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol

Delegations will find attached the formal comments of the European Data Protection Supervisor on the above-mentioned subject.



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WOJCIECH RAFAL WIEWIÓROWSKI
SUPERVISOR

H.E. Nuno BRITO
Permanent Representative of Portugal
to the European Union
Presidency of the Council of the
European Union

Mr Jeppe TRANHOLM-MIKKELSEN
Secretary General
Council of the European Union

1048 Brussels

Brussels, 10 March 2021
WRW/PA/mt/D(2021)0541 C2021-0041
Please use edps@edps.europa.eu for all
correspondence

**Subject: Formal Comments¹ of the European Data Protection Supervisor on the
Proposal for amendment of Regulation (EU) 2018/1862 on the use of SIS within
the field of police and judicial cooperation as regards entry of alerts by Europol**

Your Excellency,
Mr Secretary-General,

Having regard to Article 42(1) of 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, please find enclosed Formal Comments on the Proposal for amendment of
Regulation (EU) 2018/1862 on the use of SIS within the field of police and judicial
cooperation as regards entry of alerts by Europol.

We have sent a copy of these Formal Comments to the President of the European
Commission and the President of the European Parliament.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI
[e-signed]

Encl.: Formal Comments

Cc: Mr Ralph KAESSNER, Secretariat General of the Council

Contact person: *Plamen Angelov (tel: 02 2831885)*

¹Article 20(1) of the EDPS Rules of Procedure provide that "In response to requests from the Commission pursuant to Article 42(1) of the Regulation, the EDPS shall issue opinions or formal comments."

Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 30
E-mail : edps@edps.europa.eu - Website: www.edps.europa.eu
Tel.: 02-283 19 00 - Fax : 02-283 19 50

EDPS Formal comments on the Proposal for amendment of Regulation (EU) 2018/1862 on the use of SIS within the field of police and judicial cooperation as regards entry of alerts by Europol

1. Introduction and background

1. The Schengen Information System (“SIS”) contains alerts on persons and objects entered by national competent authorities with the purpose of locating those persons or objects in another Member State and taking a specific action. It supports operational cooperation between national competent authorities, in particular border guards, the police, customs authorities, immigration authorities, and authorities responsible for the prevention, detection, investigation or prosecution of criminal offences or execution of criminal penalties.
2. On 28 November 2018, three new Regulations were adopted concerning SIS to operationally and technically update and strengthen the system and to extend its scope of application: Regulation (EU) 2018/1860¹ (“SIS-return”), Regulation (EU) 2018/1861² (“SIS-border checks”), Regulation (EU) 2018/1862³ (“SIS-police”). These Regulations will enter into full application at the end of 2021 and will repeal and replace the legal framework applicable to SIS at present.
3. The European Union Agency for Law Enforcement Cooperation (Europol) was established by Regulation (EU) 2016/794 of the European Parliament and of the Council (the Europol Regulation) to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating serious cross-border crime, terrorism and other criminal activities which affect the common interests of the Union. The Europol Regulation also granted the EDPS the task of supervising the lawfulness of personal data processing by Europol as of 1 May 2017.
4. On 9 December 2020, the European Commission adopted a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol. The legislative proposal is part of a package of measures, announced by the Commission to reinforce the Union’s response to the threat posed by terrorism⁴, together with a Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol’s cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol’s role on research and

¹ Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals.

² Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006.

³ Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU

⁴ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2326

innovation⁵. The latter proposal also provides for the legal possibility for Europol to issue “information alerts” on suspects and criminals as a new alert category in SIS.

5. On 8 March 2021, the EDPS issued Opinion 4/2021 on the Proposal for amendment of the Europol Regulation⁶ but did not comment specifically on the entering of SIS alerts by Europol, as this element was subject to a separate legislative proposal and, respectively, to a separate consultation with the EDPS pursuant to Article 42(1) of Regulation (EU) 2018/1725⁷. Therefore, the issue at hand is analysed in the present formal comments. Notwithstanding the formal separation, the Opinion and the formal comments should be read in conjunction, as both of them concern the proposed reform of Europol’s mandate.

2. Comments

2.1. General comments

6. Currently, pursuant to Article 48 of Regulation (EU) 2018/1862, Europol may, where necessary to fulfil its mandate, access and search data in SIS. It may also exchange and further request supplementary information in accordance with the provisions of the SIRENE Manual. In addition, Member States are obliged to inform Europol through the exchange of supplementary information of any hit on alerts related to terrorist offences. Thus, according to the Explanatory Memorandum to the proposal, the envisaged new power for Europol would constitute “an important paradigm change for SIS”, as until now only Member States have been allowed to enter, update and delete data in SIS and Europol has only “read-only” access⁸.
7. As already stated in his Opinion 4/2021 on the Europol reform, the EDPS understands the need for the law enforcement bodies to benefit from the best possible legal and technical tools to accomplish their tasks that are to detect, investigate and prevent crimes and other threats to public security. The right to data protection is not an absolute right and interferences with it may be justified, provided that they remain limited to what is necessary and proportionate in a democratic society, in line with Article 52(1) of the Charter of Fundamental Rights. Therefore, the task of the EDPS is to conduct a fair and objective assessment of the impact of the proposed measures and to suggest, where deemed necessary, specific recommendations for ensuring the right balance between the values and interests at stake.
8. In this context, the EDPS has specifically scrutinised two aspects of the proposal: (a) the processing by Europol of the information sourced by third countries or international organisations prior to the entering of the alert in SIS, and (b) the possible actions to be taken by Member States’ authorities in case of a “hit”. However, the chosen targeted approach should not be regarded as a general endorsement of the proposed measure and its necessity and proportionality. The EDPS considers that the envisaged extension of Europol’s mandate raises a number of other relevant questions and expects the EU legislator to address them during the negotiations in the Council and in the European Parliament.

⁵ COM(2020) 796 final

⁶ [21-03-08 opinion europol reform en.pdf \(europa.eu\)](#)

⁷ 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, 21.11.2018, L.295, p.39 (Regulation 2018/1725).

⁸ COM(2020) 791 final, p. 3.

2.2. Processing of third-country or international organisation sourced information prior to the entering of an alert in SIS

9. The proposed “information alerts” on suspects and criminals would be issued on the basis of third-country sourced information or information from international organisations. To this end, Europol would have to analyse the received information, *inter alia* by checking it against other available information and verifying its accuracy. If necessary, Europol may also carry out further information exchange with the third country or international organisation. Finally, Europol would be obliged to assess whether entering of the alert is necessary for achieving its objectives as laid down in Regulation (EU) 2016/794.
10. The EDPS takes a positive note of the fact that the safeguards laid down in the proposal, as well as the additional procedural requirements, e.g. for prior consultation and (silent) approval by Member States, create a sequence of mandatory steps preceding the entering of the alert in SIS. Furthermore, he welcomes the fact that Europol is obliged to keep detailed records relating to the issuing of the alert and the grounds for it, in order to permit verification of compliance with the substantive and procedural requirements (Article 37a of the proposal). In the same vein, the one-year retention and review period is indeed shorter than the retention/review periods for the other alerts in SIS, and thus could be deemed as not excessive.
11. The EDPS highlights also the fact that all processing activities, related to the issuing of the alert, should be fully consistent with the data protection rules, provided for in Regulation (EU) 2018/1725 and Regulation (EU) 2016/794, as well as the specific data protection provisions in the legal framework of SIS, in particular Regulation (EU) 2018/1862⁹.
12. While the EDPS appreciates the proposed system of safeguards, he is concerned that the threshold for issuing an alert on a third country national, foreseen in Article 37a (3)(b) of the legislative proposal, i.e. “the alert is necessary for achieving Europol’s objectives as laid down in Article 3 of Regulation (EU) 2016/794”, is very broadly and vaguely defined. Consequently, Europol would have a very wide discretion to decide whether or not to issue an alert. This also means that, in accordance with Article 38 of Regulation (EU) 2016/794, Europol would be fully responsible for its decision. The risks for the individuals by the lack of clear legal criteria is further heightened by the fact that the “information alerts” by Europol are not restricted only to the most serious crimes, such as terrorism (e.g. foreign terrorist fighters), but to any other crime referred to in Article 3 and listed in Annex I to Regulation (EU) 2016/794.
13. Therefore, **the EDPS considers that, instead of a general reference to Europol’s objectives, the legislative proposal should contain specific criteria, which would guide Europol when carrying out carry out a detailed individual assessment of each case and, respectively, taking a decision whether it is necessary and justified to issue an information alert in SIS.**

2.3. Possible actions to be taken by Member States’ authorities in case of a “hit”

14. According to the legislative proposal, a “hit” on the new “information alert” entered by Europol would not impose an obligation on Member States’ frontline officers to take any specific coercive measures vis-a-vis the individual subject of the alert. They would have only a reporting obligation, i.e. to inform the Agency about the fact that the person has been located, as well as the place, time and reason for the check. As a result, the possible further measures would be subject to the discretion of the Member State authorities and would take place under the national law (Article 37b (1)(b) of the proposal).

⁹ See Recitals 12 and 13 of the proposal.

15. Similarly to his comments in the previous point, the EDPS is concerned by the lack of legal certainty and foreseeability of the possible actions in case of a “hit”, which would have a direct impact on the rights and freedoms of the individuals subject to such alerts. He believes that, when a convicted or suspected criminal is considered to pose a serious risk, which justifies the issuance of an alert on him or her in SIS, the follow-up measures by Member States should be, to the extent possible, consistent and coordinated. This understanding does not exclude a certain level of flexibility for the Member States, thus giving them the possibility to tailor their response to the individual circumstances of the case.
16. Furthermore, the EDPS notes that, while the legislative proposal is aimed at facilitating prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, it refers not only to the specific data protection framework in the field of law enforcement and criminal justice, in particular Directive (EU) 2016/680¹⁰ and Chapter IX of Regulation (EU) 2018/1725, but also to Regulation (EU) 2016/679 (GDPR). Given the fact that GDPR does not apply to such processing activities, the possible explanation is that the potential follow-up actions or measures in case of a “hit” would be not only in the area of law enforcement but also in the field of border and migration management, e.g. refusal of entry. However, this important aspect is outside the scope of Regulation (EU) 2018/1862 (SIS-police) and is dealt by other legal instruments like Regulation (EU) 2018/1861 (SIS-border checks) and Schengen Border Code¹¹.
17. In view of the above, **the EDPS recommends that, if Europol is authorised to issue and enter “information alerts” in SIS, then the respective legal framework should provide for specific and clear guidance with regard to the measures which could be taken by Member States’ authorities in case of a “hit”.**

Brussels, 10 March 2021

Wojciech Rafał WIEWIÓROWSKI
(e-signed)

¹⁰ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

¹¹ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders.