

ARTICLE 29 Data Protection Working Party



Brussels, 9 December 2013

Juan Fernando López Aguilar
Committee on Civil Liberties,
Justice and Home Affairs
European Parliament
Rue Wiertz 60
B-1047 Brussels
Belgium

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)

Dear Mr López Aguilar,

The Article 29 Data Protection Working Party (Working Party) considers the European Commission's Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol Regulation) as an important piece of legislation in the field of law enforcement cooperation. Not only because it will determine the competences and activities of Europol, one of the most important Union agencies in the field of law enforcement, but also because it will most probably be a model for future legislation in this area. Taking into account the challenge of keeping the EU safe in a changing international crime environment and the need to ensure proper enforcement of citizens' fundamental rights, it is crucial that the Europol Regulation takes a balanced approach and proposes viable solutions to all of these expectations.

The Working Party would like to take note of the opinions on the proposed text published by the European Data Protection Supervisor (EDPS) and the Joint Supervisory Body of Europol (JSB Europol).¹ These opinions, even though expressing different views on parts of the proposed Regulation, will contribute to fuel the debate on how to improve and strengthen Europol's data protection regime.

The JSB Europol, set up under Article 35 of the Council Decision of 6 April 2009 establishing the European Police Office (ECD), composed of members appointed by the national data protection authorities, has demonstrated over the years being a valuable tool in supervising and fostering data protection in Europol within the boundaries of the former Europol Convention of 1998 and the current European Council Decision of 2009. Its opinions

¹ Opinion of the European Data Protection Supervisor of 31 May 2013, Opinion of the Joint Supervisory Body of Europol (Opinion 13/31) of 10 June 2013 and Second Opinion of the Joint Supervisory Body of Europol 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) of 9 October 2013

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 02/34.

focused on specific issues with particular emphasis on Europol's role, responsibilities and tasks, the data processing environment, controllability and the level of data protection.

The Working Party shares the main elements of the analysis in the JSB Europol opinions. Mindful of its task and considering the highly sensitive data protection aspects and provisions of the proposal due to their nature and possible implications, the Working Party wishes to highlight the following elements.

Ensuring an adequate level of data protection

The Working Party has been stressing repeatedly that the use of personal data for law enforcement purposes gives rise to serious concerns and risks in terms of privacy and data protection. Even though there is no doubt that the processing of personal data can, under specific circumstances, be an efficient tool in combating terrorism and serious crime, national authorities and EU bodies as Europol processing personal data with that purpose on a large scale, are particularly obliged to follow the requirements of a data protection regime imposing the high standards on the protection of privacy and personal data.

As regards personal data processing by Europol, the proposal seems to be intended to make Europol's analytical tasks flexible to the extent possible, in particular by removing the limitation to process data in accordance with systems and data files as defined in the current Europol Decision. Account should be taken of the risks derived from the removal of safeguards specific to the systems defined, as well as of the strict purpose limitation requirement for data processing in analysis files included in the current Europol Decision and implementing Regulations. This is also relevant when dealing with the regime governing data transfers to third countries and international bodies.

To support the desired flexibility, the Commission proposal provides for a privacy by design approach founded on enhanced transparency obligations towards both the internal and external data protection supervisor. A set of general principles is defined, but there is a lack of rules applicable to specific data processing activities. Furthermore, there is no indication on how the privacy by design approach is going to be applied in practice. Thus, the Working Party considers that the level of data protection as defined in the proposal falls short of the standards set out in the Europol Council Decision. In any case, the proposal needs to be improved in order to contribute to an improved and stronger data protection regime for Europol. Therefore, it seems to be necessary to reformulate some key provisions in the draft Europol Regulation and to introduce stronger data protection safeguards where possible specific to Europol's activities.

Aligning principles and provisions

The proposal coincides in time with the on-going negotiations on the data protection reform package as well as with the discussions on the reform of the Council of Europe Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data of 28 January 1981 and the Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987. As a part of the data protection reform package, a Directive on the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, has been proposed. Since that proposal will have an impact on the way national law enforcement authorities are dealing with the processing of personal data, and given the close link between the activities of those authorities and Europol, a close alignment in terms of principles and provisions on data

protection should be sought. The Working Party would however like to point out that the ECD provides for a robust data protection regime already and considers that this level should not be lowered.

Definition of serious crime

The Working Party has always been concerned about the lack of a shared definition of serious crime at national level and the impact of this issue on the implementation of EU legal instruments related to the law enforcement sector. Since the introduction of the European Arrest Warrant in 2002, there has however been a serious crime definition favouring a common ground while considering specific national practice. The proposed text deviates from the current practice for reasons that are not properly explained nor motivated in the proposal. The Working Party considers that a more accurate definition is needed when describing the scope of Europol's competences as well as specific crimes where Europol will have competence in the future.

Parliamentary scrutiny

The Working Party welcomes the introduction of parliamentary scrutiny at European and national level, as well as the provision allowing access of the European Parliament to classified information processed by or through Europol. This new possibility for legal scrutiny, that might include in some cases issues connected to the data protection regime at Europol, not only contributes to a better controllability but also helps to avoid undesirable situations happened in the recent past.

Responsibility in data protection matters

A balanced allocation of responsibilities in data protection matters between Europol and Member States with regard to the information provided and processed is of paramount importance for the good functioning of the system. In that sense, the proposal lacks a clear allocation of responsibilities with regard to the information provided by third parties. Since the ECD made an explicit assignment of responsibilities to Europol, it is not easy to understand why such references were omitted in the current proposal. In the same way, there is no clear assignment of responsibilities related to the results of the analytical tasks carried out by Europol. Since there is a link between the data used for preparing a report and the final result, any report based on inaccurate data should be updated accordingly and this can only be done when a clear responsibility is allocated. Therefore, the Working Party recommends introducing this responsibility for Europol.

Purpose of information processing activities

It seems to be clear that the wording of the articles dealing with the purposes of information processing activities will not let Europol fulfil its present and intended future tasks and will again have a negative impact to individuals' privacy. Therefore the Working Party suggests introducing provisions which defining the conditions for setting up data processing systems where only dedicated personal data should be processed. It seems to be evident also to add data protection safeguards to the use of these specific systems (which takes into account the principles of necessity, proportionality and purpose limitation). Furthermore, the Working Party considers that it cannot be assumed – as is currently proposed in Article 29 – that Member States have consented to the onward transfer of personal data when this possibility has not been expressly limited. This would be against the principles of data protection. The

Working Party therefore requests that this provision is reconsidered: Member States' consent as a formal requisite for transfers should be maintained.

Privacy by design and Privacy by default

According to the explanatory memorandum, the data protection regime of Europol will be built around the concept of privacy by design. The Working Party understands that the proposal will greatly benefit from the addition of specific elements of the privacy by design approach, namely the inclusion of privacy impact assessments as a mandatory tool in specific cases as well as mechanisms ensuring privacy by default. This would also be a positive sign in relation with the need for alignment with other instruments as indicated above.

Security

The proposal introduces the obligation for Europol to put in place an extensive set of security requirements that are in line with the requirements made in other legal instruments. However, the Working Party notes the absence of an obligation to notify personal data breaches to the supervisory authority and to the data subject in specific cases as included in the data protection package, notably Articles 28 and 29 of the proposed Directive. The Working Party therefore strongly recommends including this obligation in the proposal, taking into account the specificities of Europol's tasks.

Several other elements of the proposed Europol Regulation also cause concern with regard to the protection of personal data and the privacy of the European citizens. These are addressed in more detail in the JSB Opinions, to which the Working Party refers for brevity.

On a final note: the Working Party is well aware of the current discussion on the data protection supervision model regime for Europol that is taking place both in the Council and in the European Parliament. This issue is also still under discussion within the Working Party.

The Working Party remains available for any further input into this matter and appreciates the Commission's intention to keep us informed of developments in the negotiations.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman

cc: Commissioner Cecilia Malmström
Council Working Group Law Enforcement