

Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision establishing the European Police Office (Europol) — COM(2006) 817 final

(2007/C 255/02)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ⁽²⁾, and in particular its Article 41,

Having regard to the request for an opinion in accordance with Article 28(2) of Regulation (EC) No 45/2001 sent to the EDPS on 20 December 2006.

HAS ADOPTED THE FOLLOWING OPINION:

I. PRELIMINARY REMARKS

Consultation of the EDPS

1. The Proposal for a Council Decision establishing the European Police Office (Europol) was sent by the Commission to the EDPS for advice, in accordance with Article 28(2) of Regulation (EC) No 45/2001/EC. According to the EDPS, the present opinion should be mentioned in the preamble of the Framework Decision ⁽³⁾.

The importance of the proposal

2. The objective of the proposal is not a major change in the mandate or the activities of Europol, but mainly to provide Europol with a new and more flexible legal basis. In 1995, Europol was created on the basis of a Convention between Member States, as meant in Article K.6 EU (now: Article 34) ⁽⁴⁾. The disadvantage of such Conventions in terms of flexibility and effectiveness is the need for ratification by all the Member States, which as recent experience shows can take several years. As the Explanatory Memorandum of the present proposal shows, the three protocols amending the Europol Convention, adopted in 2000, 2002 and 2003 had not yet entered into force by the end of 2006 ⁽⁵⁾.

3. However, the proposal also contains substantive changes, so as to further improve Europol's functioning. It extends the mandate of Europol and it contains several new provisions, aiming to further facilitate the work of Europol. In this perspective, the exchange of data between Europol and others (such as bodies of the European Community/European Union, authorities of Member States and third countries) becomes a more prominent issue. The proposal stipulates that Europol shall make every effort to ensure the interoperability between the data processing systems of Europol and the systems of the Member States and of bodies of the European Community/European Union (Article 10(5) of the proposal). It furthermore provides for direct access by national units to the system of Europol.

4. Furthermore, the position of Europol as a body under Title VI of the Treaty of the European Union (third pillar) has consequences for the applicable data protection law since Regulation (EC) No 45/2001 only applies to processing carried out in the exercise of activities falling within the scope of Community law and therefore does in principle not apply to processing operations by Europol. Chapter V of the proposal contains specific rules on data protection and data security, that can be considered as *lex specialis* providing for additional rules on top of a *lex generalis*, a general legal framework on data protection. However, this general legal framework for the third pillar has not yet been adopted (see further points 37-40).

5. A final point that has to be mentioned is that some other changes will bring the position of Europol more in line with other bodies of the European Union, established under the Treaty establishing the European Community. Although this does not fundamentally change the position of Europol, it can be seen as a first, encouraging development. Europol will be financed from the Community budget and the Staff of Europol will come within the scope of the Community Staff Regulations. This strengthens the control of the European Parliament (because of its position in the budgetary procedure) and of the European Court of Justice (in disputes on the budget and on Staff matters). The EDPS will have competences with regard to the processing of personal data related to Community Staff (see further point 47).

The focus of this opinion

6. This opinion will successively deal with the substantive changes (meant under point 3), the applicable laws on data protection (under point 4) and the growing similarities between Europol and Community bodies (under point 5).

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

⁽²⁾ OJ L 8, 12.1.2001, p. 1.

⁽³⁾ In accordance with the practice of the Commission in other (recent) cases. See, most recently, the Opinion of the EDPS of 12 December 2006 on proposals for amending the Financial Regulation applicable to the general budget of the European Communities and its Implementing Rules (COM(2006) 213 final and SEC(2006) 866 final), published on: www.edps.europa.eu

⁽⁴⁾ OJ C 316, 27.7.1995, p. 1.

⁽⁵⁾ The entry into force is foreseen for March/April 2007.

7. The opinion will pay specific attention to the increasing importance of the exchange of data between Europol and other bodies of the European Union, which in most cases fall under the supervision of the EDPS. In this context, Articles 22, 25 and 48 of the proposal can be specifically mentioned. The complexity of this issue leads to concerns both with regard to the principle of purpose limitation and with regard to applicable data protection laws and supervision in cases where different supervisory bodies are competent to supervise the different European bodies, depending on the pillar in which they are based. Another point of concern relates to the interoperability of the Europol Information System with other information systems.

II. THE PROPOSAL IN ITS CONTEXT

8. The legislative environment of this proposal is rapidly changing.
9. In the first place, the present proposal is one of a number of legislative activities in the fields of police and judicial cooperation, aiming to facilitate the possibilities for storage and exchange of personal data for law enforcement purposes. Some of these proposals have been adopted by Council — such as the Council Framework Decision of 18 December 2006 on the exchange of information and intelligence for instance ⁽¹⁾, whilst other proposals are still in process.
10. The guiding principle for these legislative activities is the principle of availability which was introduced as an important new principle of law in the Hague Programme in November 2004. It entails that information needed for the fight against crime should cross the internal borders of the EU without obstacles.
11. The principle of availability is not sufficient in itself. Additional legislative measures are needed in order to enable police and judicial authorities to effectively exchange information. In some cases, the instrument chosen to facilitate this exchange includes the establishment or improvement of an information system at a European level. The Europol Information System is such a system. The EDPS has addressed basic issues of such systems in respect of the Schengen Information System and will address some of those issues also in respect of the present proposal. Such issues include the conditions for granting access to the system, interlinking and interoperability and the applicable rules on data protection and supervision ⁽²⁾.
12. Furthermore, the proposal should be examined in the light of the most recent developments, such as the initiative presented by the German presidency of the European Union to transpose the Prüm Treaty into the legal framework of the EU.

⁽¹⁾ Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ L 386, 29.12.2006, p. 89).

⁽²⁾ This is a selection of the main issues mentioned in the EDPS-opinion on SIS II, based on their relevance for the present proposal. See: Opinion of 19 October 2005 on three Proposals regarding the Second Generation Schengen Information System (SIS II), (COM(2005) 230 final, COM(2005) 236 final and COM(2005) 237 final) (OJ C 91, 19.4.2006, p. 38).

13. In the second place, the framework for data protection in the third pillar — a necessary condition for the exchange of personal data — is (as said before) still not adopted. To the contrary, the negotiations in Council on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters have turned out to be rather difficult. The German Presidency of the Council has announced that a new text ⁽³⁾ will be proposed, with some essential differences to the approach taken in the Commission proposal.

14. In the third place, the proposal is directly related to the developments concerning the Treaty establishing a Constitution for Europe. Article III-276 of the Constitutional Treaty is supposed to be a major step in a process in which on the one hand the role and tasks of Europol are gradually extended and on the other hand Europol is gradually included into the European institutional framework. As stated in the Explanatory Memorandum of the present proposal, this Article incorporates the vision which emerged regarding Europol's future. The present decision takes part of this vision on board, taking into account the uncertainty of whether and when the provisions of the Constitutional Treaty will enter into force.

III. SUBSTANTIVE CHANGES

Competence and tasks of Europol

15. Articles 4 and 5 and Annex I of the proposal determine the mandate of Europol. This mandate is now extended to criminality which is not strictly related to organised crime and which covers the same list of serious crimes as included in the Council Framework Decision on the European arrest warrant ⁽⁴⁾. A second extension of the role of Europol is that its databases now will include information and intelligence forwarded by private entities.
16. As to this first extension, it is a logical step in the development of police cooperation in criminal matters. The EDPS recognises that this results in a better harmonisation of the legal instruments aiming to facilitate the police cooperation. Harmonisation is useful, not only because it improves the conditions for better cooperation, but also because it enhances the legal certainty of the citizen and it enables a more efficient control of the police cooperation, since the scope of all different instruments extends to the same categories of crimes. The EDPS assumes that this extension of the mandate is proposed, taking into account the principle of proportionality.

⁽³⁾ This new text can probably be expected by March 2007.

⁽⁴⁾ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

17. As to the second extension, this fits within the recent trend in police cooperation in which the use of data collected by private companies for purposes of law enforcement becomes more and more important. The EDPS recognises that there can be a need for such use. In particular for the combat of terrorism and other serious crime, it can be necessary for law enforcement to have access to all relevant information, including information in the hands of private parties ⁽¹⁾. However, the nature of information and intelligence coming from private parties requires additional safeguards, *inter alia* in order to ensure the accuracy of this information since these are personal data that have been collected for commercial purposes in a commercial environment. It should also be ensured that this information has been lawfully collected and processed before forwarding it to Europol, under national legislation implementing Directive 95/46/EC and that access by Europol is only allowed under well defined conditions and limitations: access should only be allowed on a case-by-case basis, for specified purposes and be under judicial control in the Member States ⁽²⁾. The EDPS therefore suggests including such conditions and limitations in the text of the decision.

Article 10 on information processing

18. Article 6 of the Europol Convention takes a restrictive approach on the processing of collected information by Europol. This processing is limited to three components: the Europol Information System, Analysis Work Files and an index system. Article 10(1) of the proposal replaces this approach by a general provision allowing Europol to process information and intelligence in so far as it is necessary to achieve its objectives. However, Article 10(3) of the proposal states that the processing of personal data outside of the Europol Information System and Analysis Work Files is subject to conditions laid down in a decision by Council after consulting the European Parliament. According to the EDPS this provision is drafted in a sufficiently precise way to protect legitimate interests of data subjects. The consultation of data protection authorities before the adoption of such a decision by Council as proposed in point 55 should be added to Article 10(3).

19. In Article 10(2), the possibility for Europol to 'process personal data for the purpose of determining whether such data are relevant for its tasks' seems contrary to the principle of proportionality. This wording is not very precise and encompasses in practice the risk of processing for all kinds of undefined purposes.

⁽¹⁾ See, in this respect, the Opinion of 26 September 2005 on the Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005) 438 final) (OJ C 298, 29.11.2005, p. 1).

⁽²⁾ See also similar recommendations in the Opinion of 19 December 2005 on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (COM(2005) 475 final) (OJ C 47, 25.2.2006, p. 27).

20. The EDPS understands the need for processing of personal data in a stage when their relevance for the carrying out of a task of Europol has not yet been established. However, it should be ensured that processing of personal data whose relevance have not yet been assessed is strictly limited to the purpose of assessing its relevance, that this assessment is carried out within a reasonable amount of time, and that, insofar as the relevance is not checked, the data are not processed for law enforcement purposes. A different solution would not only impinge on data subjects rights, but would also hinder efficiency of law enforcement.

Therefore, in order to comply with the principle of proportionality, the EDPS proposes adding a provision to Article 10(2) laying down the obligation to store data in separate databases until the relevance to a specific task of Europol is established. Furthermore, the amount of time for which these data may be processed must be strictly limited and in any event not last longer than 6 months ⁽³⁾.

21. According to Article 10(5) of the proposal, every effort shall be made in order to ensure interoperability with the data processing systems in the Member States and with the systems in use by the Community and Union related bodies. This approach reverses the approach of the Europol Convention (Article 6(2)), which prohibits the linking to other automated processing systems.

22. In his comments on the Communication of the Commission on interoperability of European databases ⁽⁴⁾, the EDPS opposed the view that interoperability is primarily a technical concept. If databases become technically interoperable — which means that access to and exchange of data is possible — there will be pressure to actually use this possibility. This poses specific risks related to the principle of purpose limitation, because data can easily be used for a different purpose than the purpose of collection. The EDPS insists on applying strict conditions and guarantees, when the interlinking with a database is actually put in place.

23. The EDPS therefore recommends adding a provision to the proposal requiring that interlinking is only allowed after a decision laying down the conditions and guarantees for this interlinking, in particular with regard to the necessity of the interlinking and the purposes for which the personal data will be used. This decision should be adopted after consulting the EDPS and the Joint Supervisory Body. Such a provision could be related to Article 22 of the proposal on relations with other bodies and agencies.

⁽³⁾ This is the maximum storage period laid down in Article 6a of the Europol Convention after inclusion of the amendments by the three protocols mentioned in point 2.

⁽⁴⁾ Comments of 10 March 2006, published on EDPS website.

Article 11: Europol information system

24. The EDPS notes with respect to Article 11(1) that the existing restriction of access by a national unit to personal data relating to possible criminals who have not (yet) committed a crime has been deleted. This restriction is now laid down in Article 7(1) of the Convention and restricts the direct access to the details of the identity of the persons concerned.
25. In the view of the EDPS there is no justification for this substantive modification. To the contrary, these specific safeguards for this category of persons are fully in line with the approach of the Commission-proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. The EDPS recommends providing more safeguards for the access to the data of these persons who have not (yet) committed a crime and in any event not to weaken the protection given under the Europol Convention.

Article 20: Time limits for storage

26. According to the amended text of Article 21(3) of the Europol Convention ⁽¹⁾, the need for continued storage of personal data relating to individuals as referred to in Article 10(1) shall be reviewed every year and the review documented. However, Article 20(1) of the proposal only requires review within three years after the input of the data. The EDPS is not convinced that this extra flexibility is needed and therefore recommends inserting an obligation for a yearly review in the proposal. A modification to the proposal is even more important, since the proposal should contain an obligation to review the storage on a regular basis, not only once after three years.

Article 21: Access to national and international databases

27. Article 21 is a general provision allowing Europol to gain computerised access and retrieve data from other national and international information systems. This access should be allowed only on a case by case basis, under strict conditions. However, Article 21 allows for access that is much too wide which is not necessary for the tasks of Europol. In this context, the EDPS refers to his opinion of 20 January 2006 on Access to VIS by authorities responsible for internal security ⁽²⁾. The EDPS recommends modifying the text of the proposal accordingly.
28. It is important to keep in mind that the provision, as far as it concerns the access to national databases, is wider than the communication of information between Europol and national units, which is dealt with *inter alia* in Article 12(4) of the proposal. This access will not only be subject to the provisions of the present Council Decision, but also be

governed by national law on access to and usage of the data. The EDPS welcomes the notion included in Article 21 that the stricter rule shall apply. Moreover, the importance of the communication of personal data between Europol and national databases, including the access by Europol to those national databases, is an additional reason for the adoption of a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, offering an adequate level of protection.

Article 24: Communication of data to third bodies

29. Article 24(1) lays down two conditions for communication of data to public authorities of third countries and international organisations: (a) communication may only take place if necessary in individual cases for the combat of crime and (b) on the basis of an international agreement assuring that an adequate level of data protection is afforded by the third body. Article 24(2) allows for derogation in exceptional cases, taking the level of data protection of the receiving body into consideration. The EDPS understands the need of these exceptions, and emphasises the need of a strict application of the exceptions, on a case by case basis in very exceptional situations. The text of Article 24(2) reflects these conditions in a satisfactory way.

Article 29: Right of access to personal data

30. Article 29 deals with the right of access to personal data. This is one of the basic rights of the data subject, which is enshrined in Article 8(2) of the Charter of Fundamental Rights for the European Union, and is also guaranteed by the Council of Europe Convention 108 of 28 January 1981 and by Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987. This right is part of the principle of fair and lawful processing of personal data and is designed to protect the essential interests of the data subject. However, the conditions laid down by Article 29 limit this right in a way which is not acceptable in the light of the above.
31. First of all, Article 29(3) lays down that the request for access — made in a Member State according to Article 29(2) — will be dealt with in accordance with Article 29 and in accordance with the laws and procedures of the Member State in which a request is made. As a result, national law may limit the scope and the substance of the right of access and may impose procedural constraints. This result could be unsatisfactory. For instance, requests for access to personal data can also be made by persons whose data are not processed by Europol. It is essential that the right of access extends to these requests. It therefore must be ensured that national law entailing a more limited right of access does not apply.

⁽¹⁾ As laid down in the Europol Convention after inclusion of the amendments by the three protocols mentioned in point 2.

⁽²⁾ Opinion of 20 January 2006 on the Proposal for a Council Decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (COM(2005) 600 final) (OJ C 97, 25.4.2006, p. 6).

32. According to the EDPS, the reference to national law in Article 29(3) should be deleted and be replaced by harmonised rules on scope, substance and procedure preferably in the Council Framework Decision on the protection of personal data or, where necessary, in the Council Decision.
33. Furthermore, Article 29(4) lists the grounds for refusal of access to personal data, in case the data subject wants to exercise his right of access to personal data concerning him that are processed by Europol. According to Article 29(4) access shall be denied if such access 'might jeopardise' certain specific interests. This wording is much wider than the wording of Article 19(3) of the Europol Convention, which allows refusal of access only 'if such refusal is necessary to'.
34. The EDPS recommends maintaining the stricter wording of the text of the Europol Convention. It must also be ensured that the data controller is obliged to state the reasons for refusal, in such a way that the use of this exception can be effectively controlled. This principle is expressly laid down in the Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe. The wording in the Commission proposal is not acceptable since it does not do justice to the fundamental nature of the right of access. Exceptions to this right can only be accepted if this is necessary in order to protect another fundamental interest, if *in other words* access would undermine this other interest.
35. Last but not least, the right of access is strongly limited by the consultation mechanism laid down in Article 29(5). This mechanism makes the access conditional upon consultation of all competent authorities concerned and, with regard to analysis files, also upon consensus of Europol and all Member States participating in the analysis or directly concerned. This mechanism *de facto* overturns the fundamental nature of the right of access. Access should be granted as a general principle and may be restricted only under specific circumstances. Instead, according to the text of the proposal, access would be granted only after consultation is carried out and consensus is reached.

IV. THE APPLICABILITY OF A GENERAL FRAMEWORK ON DATA PROTECTION

General point

36. Europol will be a body of the European Union, but not a Community institution or body as meant in Article 3 of Regulation (EC) No 45/2001. For this reason, the Regulation does not normally apply to processing of personal data by Europol, apart from specific situations. Chapter V of the proposal therefore introduces a data protection regime *sui generis*, which also relies on an applicable general legal framework on data protection.

A general legal framework on data protection in the third pillar

37. The proposal acknowledges the need for a general legal framework on data protection. According to Article 26 of

the proposal, as a *lex generalis* Europol shall apply the principles of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. This reference to the (proposed) Council Framework Decision replaces the reference in Article 14(3) of the Europol Convention to the Council of Europe Convention 108 of 28 January 1981 and Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987.

38. The EDPS welcomes Article 26 of the proposal. This provision is crucial for the effectiveness of data protection, as well as for reasons of consistency since it facilitates the exchange of personal data which also benefits law enforcement. However, compatibility between the two instruments should be guaranteed which is not self evident bearing in mind that:

- the text of the Council Framework Decision has been discussed in the Council and has been fundamentally changed during the negotiations, finally leading to an impasse in the negotiations at the end of 2006,
- the German Presidency announced the proposal of a new text, to be issued in March 2007, mainly containing general principles of data protection,
- direct applicability of the Council Framework Decision to processing by Europol is an important issue in the current discussions.

Depending on the outcome of the negotiations in Council on this framework decision, probably based on the German proposal, additional safeguards might be needed in the present proposal. This point must be assessed at a later stage, when there is more clarity on the outcome of the negotiations on the Council Framework Decision.

39. The EDPS emphasises that the present Council Decision should not be adopted before the adoption by Council of a framework on data protection, guaranteeing an appropriate level of data protection in conformity with the conclusions of the EDPS in his two opinions on the Commission proposal for a Council Framework Decision ⁽¹⁾.

40. In this context, the EDPS underlines two specific elements of the Commission proposal for a Council Framework Decision, which are in particular appropriate in enhancing the protection afforded to data subjects in case of processing of their data by Europol. In the first place, the proposal opens up possibilities for distinguishing the processing of data in accordance with their degree of accuracy and reliability. Data based on opinions are distinguished from data based on facts. Such a clear difference between 'soft data' and 'hard data' is an important method, in order to comply with the data quality principle. In the second place, the proposal provides for a distinction between data of categories of persons, based on their possible involvement in a criminal offence.

⁽¹⁾ Opinion of 19 December 2005 (OJ C 47, 25.2.2006, p. 27) and Second Opinion of 29 November 2006, not yet published in OJ (can be found on: www.edps.europa.eu).

Regulation (EC) No 45/2001

41. This leads to the applicability of Regulation (EC) No 45/2001 to activities of Europol. This Regulation (EC) No 45/2001 does first of all apply with regard to the Staff of Europol which will be dealt with in point 47. Secondly, and this is the subject of Part IV of this opinion, the Regulation will apply to exchanges of data with Community bodies, at least in so far as data are being sent by these bodies to Europol. Important examples of Community bodies are the bodies mentioned in Article 22(1) of the proposal.

42. One can expect that these bodies will be required to send personal data to Europol quite regularly. In doing so, Community institutions and bodies will be subject to all the obligations laid down by Regulation (EC) No 45/2001, in particular with regard to the lawfulness of processing (Article 5 of the Regulation), prior checking (Article 27) and consultation of the EDPS (Article 28). This raises questions as to the applicability of Articles 7, 8 and 9 of Regulation (EC) No 45/2001. Europol, being 'other than Community institutions or bodies' and not subject to Directive 95/46/EC, may well fall under Article 9. In that case, the adequacy of protection afforded by Europol should be assessed under Article 9(2) of Regulation (EC) No 45/2001 in the same way as other international organisations or third countries. This solution would create uncertainty and would moreover not be in conformity with the basic idea in the proposal of bringing the position of Europol more in line with institution and bodies under the EC Treaty. A better solution would be to treat Europol as a Community body as far as it processes data originating from Community bodies. The EDPS suggests adding a paragraph to Article 22 reading as follows: 'Where personal data are transferred by Community institutions or bodies, Europol shall be regarded as a Community body as meant in Article 7 of Regulation (EC) No 45/2001'.

Exchange of data with Olaf

43. Special attention has to be given to the exchange of personal data with the European Anti-fraud office (Olaf). Presently, the exchange of information between Europol and Olaf takes place on the basis of an administrative agreement between the two bodies. This agreement provides for the exchange of strategic and technical information, but excludes the exchange of personal data.

44. The proposal for a Council Decision is of a different nature. Article 22(3) provides for the exchange of information, including personal data, in the same way as data are exchanged between Olaf and authorities of the Member States⁽¹⁾. The purpose of this exchange is limited to fraud,

⁽¹⁾ Based on Article 7 of the Second Protocol to the Convention on the protection of the European Communities' financial interests (OJ C 221, 19.7.1997, p. 12).

active and passive corruption and money laundering. Both Olaf and Europol shall take account, in each specific case, of the requirements of investigation secrecy and data protection. For Olaf this means in any event, ensuring the level of protection as set out in Regulation (EC) No 45/2001.

45. Moreover, Article 48 of the proposal lays down that Regulation (EC) No 1073/1999⁽²⁾ applies to Europol. Olaf shall have the power to carry out administrative investigations within Europol and shall to that effect have the right of immediate and unannounced access to any information held by Europol⁽³⁾. According to the EDPS, the scope of this provision is not clear:

— it covers in any event investigations by Olaf on fraud, corruption, money laundering and other irregularities affecting the financial interests of the European Community, within Europol itself,

— it also implies that Regulation (EC) No 45/2001 applies to those investigations, including the supervision of the EDPS on the use by Olaf of its powers.

46. However, the provision does not and should not cover investigations on irregularities outside Europol, on which data processed by Europol could shed additional light. The provisions for the exchange of information, including personal data, under Article 22(3) would be sufficient for those cases. The EDPS recommends clarifying the scope of Article 48 of the proposal in this sense.

V. BRINGING EUROPOL IN LINE WITH OTHER BODIES OF THE EUROPEAN UNION, ESTABLISHED UNDER THE EC TREATY

The Staff of Europol

47. The Staff of Europol will fall within the scope of the Staff Regulations. In case of processing of data relating to Europol Staff, both the substantive and the supervision rules of Regulation (EC) No 45/2001 should apply, for reasons of consistency and non discrimination. The 12th recital of the proposal mentions the applicability of the Regulation on the processing of personal data, notably as regards personal data related to Europol Staff. According to the EDPS, it is not enough to clarify this notion in the recitals. Recitals of a Community Act are of a non binding nature and shall not contain normative provisions⁽⁴⁾. In order to fully ensure the application of Regulation (EC) No 45/2001, a paragraph should be added in the text of the decision itself — for instance in Article 38 — stating that Regulation (EC) No 45/2001 shall apply to processing of personal data relating to the Europol Staff.

⁽²⁾ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ L 136, 31.5.1999, p. 1).

⁽³⁾ See Articles 1(3) and 4(2) of the Regulation.

⁽⁴⁾ See, for instance, Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ C 73, 17.3.1999, p. 1), guideline 10.

Supervision on the data processing by Europol

48. The proposal does not aim at a fundamental change of the system of supervision on Europol with a central role for the joint supervisory body. Under the proposed legal framework, the supervisory body will be established in conformity with Article 33 of the proposal. However, some changes in the status and activities of Europol will lead to a limited involvement of the EDPS, apart from his tasks relating to the Europol Staff. For this reason, Article 33(6) of the proposal lays down that the joint supervisory body must cooperate with the EDPS, as well as with other supervisory authorities. This provision mirrors the obligation for the EDPS to cooperate with the joint supervisory body under Article 46(f)(ii) of Regulation (EC) No 45/2001. The EDPS welcomes this provision as a useful instrument promoting a consistent approach on data on supervision throughout the EU, independently of the pillar.

49. As said before, the present proposal does not foresee any fundamental change of the system of supervision. However, the wider context of this proposal might require more fundamental reflection on the future system of supervision on Europol. Two specific developments can be mentioned. In the first place, Articles 44-47 of Regulation (EC) No 1987/2006 ⁽¹⁾ provide for a new structure of supervision on SIS II. In the second place, in the context of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters the German Presidency announced that it is considering a new structure for the supervision of European information systems under the third pillar, including Europol.

50. According to the EDPS, this opinion is not the right occasion to discuss fundamental changes in the system of supervision. The system of supervision on SIS II as a networked system is grounded within the first pillar and would not be appropriate to Europol as a body within the third pillar which entails limited competences of Community institutions, in particular the Commission and the Court of Justice. In the absence of the safeguards under the third pillar, a specific system of supervision will still be needed. For example, Article 31 deals with appeals by individuals. Moreover, the ideas on a new structure for the supervision of European information systems as announced by the German Presidency are still in a very early stage. Finally, the present system functions well.

51. The EDPS will therefore focus his remarks on his role relating to the exchange of personal data between Europol and other bodies on the level of the European Union. Provisions relating to this exchange are an important new element of the proposal. Article 22(1) mentions Frontex,

the European Central Bank, the EMCDDA ⁽²⁾ as well as Olaf. All of these bodies fall within the scope of the supervision by the EDPS. Article 22(2) states that Europol may conclude working arrangements with those bodies which may include the exchange of personal data. As far as Olaf is concerned, this exchange can even take place without working arrangements (Article 22(3)). Also, Article 48 of the proposal — discussed in points 45 and 46 — is relevant in this respect.

52. It should be ensured that the EDPS can exercise the powers conferred to him under Regulation (EC) No 45/2001, with regard to data communicated by Community bodies. This is all the more important in cases of transfer of personal data where Europol will be regarded as a Community body as meant in Article 7 of Regulation (EC) No 45/2001, as proposed before. This makes the close cooperation with the joint supervisory body under Article 33 even more important.

53. The EDPS has two additional recommendations to make, with regard to the data subjects' rights relating to those data:

— Article 30 of the proposal entails the right of the data subject to correct or delete incorrect data concerning him. Article 30(2) obliges Member States to correct or delete such data if they have been directly transmitted by them to Europol. A similar provision is needed as regards data communicated by a Community body supervised by the EDPS, in order to ensure that Europol and this Community body react similarly,

— Article 32(2) deals with the right of an individual to check the lawfulness of processing in cases whereby personal data have been communicated or are consulted by a Member State. A similar provision is needed as regards data communicated by a Community body supervised by the EDPS.

54. By virtue of the aforementioned considerations, the EDPS should closely cooperate with the joint supervisory body, at least once the arrangements to exchange data with Community bodies will be in place. This is one of the main areas where the mutual obligations to cooperate will become effective.

Consultation of data protection authorities

55. Article 10(3) provides for a Council Decision determining the conditions for the establishment of certain systems for the processing of personal data by Europol. The EDPS recommends adding the obligation to consult the EDPS and the joint supervisory body before the adoption of such a decision.

⁽¹⁾ Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II) (OJ L 381, 28.12.2006, p. 4).

⁽²⁾ European Monitoring Centre for Drugs and Drug Addiction.

56. Article 22 deals with the relations of Europol with other Community or Union related bodies and agencies. The cooperative relations mentioned in this Article may be implemented through working arrangements and may concern the exchange of personal data. For this reason, the EDPS and the joint supervisory body should be consulted upon the adoption of the arrangements under Article 22, as far as these agreements are relevant to the protection of personal data processed by Community institutions and bodies. The EDPS recommends amending the text of the proposal accordingly.

57. Article 25(2) states that implementing rules for the exchanges with other Community or Union related bodies and agencies shall be laid down. The EDPS recommends that not only the joint supervisory body, but also the EDPS should be consulted prior to the adoption of such rules, in line with the practice under Community law that Community bodies consult the EDPS under Article 28(1) of Regulation (EC) No 45/2001.

Data Protection Officer

58. The EDPS welcomes Article 27 that contains a provision on a Data Protection Officer (DPO) who will *inter alia* have the task of ensuring, in an independent manner, the lawfulness and compliance with the provisions on the processing of personal data. This function has been successfully introduced on the Community level by Regulation (EC) No 45/2001, within Community institutions and bodies. Within Europol, the function of DPO is also being exercised, however without adequate legal basis to date.

59. For the success of the functioning of the DPO it is essential that his independence is effectively guaranteed by law. For this reason, Article 24 of Regulation (EC) No 45/2001 contains several provisions ensuring this objective. The DPO is appointed for a certain period and can only be dismissed under very exceptional circumstances. He will be provided with the necessary staff and budget. He may not receive instructions in the performance of his duties.

60. Unfortunately, these provisions are not included in the present proposal, except for the provision on taking instructions. The EDPS therefore strongly recommends including the guarantees concerning the independence of the DPO, such as the special safeguards for the appointment and the dismissal of the DPO, and his independence towards the Management Board. These provisions are necessary to ensure the independence of the DPO. Moreover, these provisions would bring the position of the DPO of Europol more in line with the position of the DPOs within Community institutions. Finally, the EDPS emphasises that Article 27(5) of the proposal that urges the Management

Board of Europol to adopt implementing rules on certain aspects of the functioning of the DPO is by nature not appropriate as guarantee for the independence of the DPO. It has to be kept in mind that independence is above all needed towards the management of Europol.

61. There is one more reason for harmonising the provision of the DPO in the Council decision with Article 24 of Regulation (EC) No 45/2001. With respect of the personal data of the Staff of Europol (see point 47), this Regulation applies, which means that for these matters the DPO of Europol will fall under this Regulation. In any event, a DPO should be appointed in accordance with the requirements of the Regulation.

62. Furthermore, the EDPS recommends applying the system of prior checking as provided for in Article 27 of Regulation (EC) No 45/2001 for Community bodies to Europol. The system of prior checking has proved to be an effective instrument and plays an essential role in data protection within the Community institutions and bodies.

63. Finally, it would be useful for the DPO of Europol to participate in the existing DPO-network in the first pillar, even apart of the activities of the DPO in respect of the Staff of Europol. This would further ensure an approach on data protection issues common to the approach taken by the Community bodies and would perfectly conform with the objective formulated in the 16th Recital of the proposal, namely the cooperation with European bodies and agencies ensuring an adequate level of data protection in conformity with Regulation (EC) No 45/2001. The EDPS recommends adding a sentence to the recitals of the proposals in which the objective of this common approach is laid down. Such a sentence could read as follows. 'In carrying out his tasks, the Data Protection Officer will cooperate with the Data Protection Officers appointed under Community law.'

VI. CONCLUSIONS

64. The EDPS understands the need for a new and more flexible legal basis for Europol, but pays specific attention to the substantive changes, the applicable laws on data protection and the growing similarities between Europol and Community bodies.

65. As to the substantive changes, the EDPS recommends:

— including specific conditions and limitations in the text of the decision with respect to information and intelligence coming from private parties, *inter alia* in order to ensure the accuracy of this information since these are personal data that have been collected for commercial purposes in a commercial environment,

- ensuring that processing of personal data whose relevance have not yet been assessed is strictly limited to the purpose of assessing its relevance. These data should be stored in separate databases until the relevance to a specific task of Europol is established, for no longer than 6 months,
 - as to interoperability with other processing systems outside of Europol, applying strict conditions and guarantees, when the interlinking with another database is actually put in place,
 - including safeguards for the access to the data of persons who have not (yet) committed a crime. The safeguards given under the Europol Convention should not be weakened,
 - ensuring that the need for continued storage of personal data relating to individuals should be reviewed every year and the review documented,
 - computerised access and retrieval of data from other national and international information systems should be allowed only on a case by case basis, under strict conditions,
 - as to the right of access: the reference to national law in Article 29(3) should be deleted and be replaced by harmonised rules on scope, substance and procedure preferably in the Council Framework Decision on the protection of personal data or, where necessary, in the Council Decision. Article 29(4) should be reworded and only allow refusal of access only 'if such refusal is necessary to'. The consultation mechanism laid down in Article 29(5) should be deleted.
66. The present Council Decision should not be adopted before the adoption by Council of a framework on data protection, guaranteeing an appropriate level of data protection in conformity with the conclusions of the EDPS in his two opinions on the Commission proposal for a Council Framework Decision. Data based on opinions should be distinguished from data based on facts. A distinction should be made between data of categories of persons, based on their possible involvement in a criminal offence.
67. The EDPS suggest adding a paragraph to Article 22 reading as follows: 'Where personal data are transferred by Community institutions or bodies, Europol shall be regarded as a Community body as meant in Article 7 of Regulation (EC) No 45/2001'.
68. Article 48 of the proposal on investigations by Olaf should not cover investigations on irregularities outside Europol, on which data processed by Europol could shed additional light. The EDPS recommends clarifying the scope of Article 48 of the proposal.
69. In order to fully ensure the application of Regulation (EC) No 45/2001, a paragraph should be added in the text of the decision stating that Regulation (EC) No 45/2001 shall apply to processing of personal data relating to the Europol Staff.
70. The scope of two provisions on the rights of the data subjects (Article 30(2) and Article 32(2)) should be extended to data communicated by a Community body supervised by the EDPS, in order to ensure that Europol and this Community body react similarly.
71. Articles 10(3), 22 and 25(2) should contain (more precise) provision on consultation of data protection authorities.
72. The EDPS strongly recommends including the guarantees concerning the independence of the DPO, such as the special safeguards for the appointment and the dismissal of the DPO, and his independence towards the Management Board, in conformity with Regulation (EC) No 45/2001.
- Done at Brussels, 16 February 2007.
- Peter HUSTINX
European Data Protection Supervisor