

I

(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN DATA PROTECTION SUPERVISOR

Opinion of the European Data Protection Supervisor on the Initiative of the Kingdom of Belgium, the Czech Republic, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Kingdom of Sweden with a view to adopting a Council Decision concerning the strengthening of Eurojust and amending Decision 2002/187/JHA

(2008/C 310/01)

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,

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, and in particular its Article 41,

HAS ADOPTED THE FOLLOWING OPINION:

I. INTRODUCTORY OBSERVATIONS

1. On 27 February 2008, the Official Journal published the Initiative of 14 Member States with a view to adopting a Council Decision on the strengthening of Eurojust and amending Decision 2002/187/JHA ⁽¹⁾.
2. The EDPS was not asked for advice on this initiative. Therefore he issues this opinion on his own initiative, in the same way as he issued opinions on the initiative for a

Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime ('Prüm-Treaty') and on the initiative for a Council Decision on the implementation of the former Council Decision ⁽²⁾. According to the EDPS, the present opinion should be mentioned in the preamble of the Council Decision, in the same way as his opinion is mentioned in a number of legal instruments adopted on the basis of a proposal by the Commission.

3. Although there is no legal obligation for a Member State or a group of Member States that take the initiative for a legislative measure under Title VI of the EU Treaty to ask the EDPS for advice, the applicable rules do not preclude the request for such an advice either. The EDPS regrets that the Member States did not ask for his advice in the present case, since a significant part of the initiative deals with the — conditions for — processing of personal data.
4. Likewise, he regrets the absence of an Impact Assessment accompanying the initiative ⁽³⁾. This is a necessary element enhancing the transparency and more in general the quality of the legislative process. For the citizens of the European

⁽¹⁾ OJ C 54, 27.2.2008, p. 4.

⁽²⁾ Opinion of 4 April 2007 on the initiative of 15 Member States with a view to adopting a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ C 169, 21.7.2007, p. 2) and Opinion of 19 December 2007 on the initiative of the Federal Republic of Germany, with a view to adopting a Council Decision on the implementation of Decision 2007/.../JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ C 89, 10.4.2008, p. 1).

⁽³⁾ An Explanatory Memorandum (not published in the Official Journal, but available on the public register of the Council) explains the initiative. However, it does not solve the lack of transparency (etc.) as addressed in this Opinion.

Union, it is not easy to understand why this element is a normal part of the legislative process when the Commission issues proposals, but not if Member States take the initiative.

5. In the present case, the accompanying documents could have given a justification of the urgency of the amendment of Decision 2002/187/JHA. In this context one has to underline that the initiative has been taken, with a view to adopting a legal instrument just before the entry into force of the Lisbon Treaty. This treaty will lead to a change of the status of Eurojust, *inter alia* due to the fact that the pillar structure of the EU Treaty will be abolished.
6. As a final introductory observation, the EDPS reminds that the 14 Member States have presented a second and closely linked initiative, with a view to adopting a Council Decision on the European Judicial Network ⁽⁴⁾. The EDPS will not issue an opinion on the latter initiative since it has less importance from the perspective of protection of personal data. The information disseminated within the European Judicial Network — as proposed under Article 8 of that initiative — does normally not focus on personal data.

II. GENERAL POINTS

The initiative in its context

7. According to its recitals, the initiative aims at further enhancing the operational effectiveness of Eurojust. This aim fits within a context in which the further development of Eurojust is seen as a logical step forward for this organisation. In the Hague Programme of November 2004 ⁽⁵⁾, the European Council has already asked the Commission to consider the further development of Eurojust. In October 2007, the Commission presented a Communication to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union ⁽⁶⁾. This Communication concludes that amending the Eurojust Decision is needed to enable Eurojust to develop its potential for cooperation and to further establish itself as a vital player in the fight against organised crime and terrorism in Europe.
8. The EDPS also recalls that Article 85 of the Treaty on the Functioning of the Union (Lisbon Treaty) will extend the legal basis for Eurojust, in comparison to the present basis in Article 31(2) of the EU Treaty. Article 85 of the Treaty on the Functioning of the European Union mentions *inter alia* the initiation of criminal investigations. Article 86 of the Treaty on the Functioning of the European Union lays down that the Council may establish a European Public Prosecutor's Office from Eurojust.

9. The Communication notes that the operational record of Eurojust is positive. The number of cases that Eurojust dealt with is significantly increasing. However it also notes that this development requires clarification and reinforcement of the powers of the national members of Eurojust and of the College. The Communication substantiates the shortcomings of the present framework, which does not guarantee sufficient authority for the national members and the College.
10. The EDPS understands the need for improving the legal framework of Eurojust, in order to make it more effective. It is a developing organisation. Its role in criminal investigations and prosecutions is growing and should grow, in order to establish Eurojust as an important player in this area.

The information position of Eurojust

11. The Communication underlines that access to information is fundamental. It is in this perspective logical that a substantial number of the proposed amendments in the initiative relate to the information position ⁽⁷⁾ of Eurojust. This opinion of the EDPS will in particular focus on this issue, since it involves the collection, storage and exchange of personal data. It is in this context also important that the second part of the Communication focuses on the relations between Eurojust and other players in the judicial cooperation in criminal matters. Improvement of these relations is also paramount in the Initiative and will be an important element of this opinion.
12. The EDPS notes that the initiative contains provisions of particular interest in relation to the collection, storage and exchange of personal data:
 - Article 9(4) allows the national member of Eurojust full access to a number of registers,
 - Article 9a defines the full powers of the national member including his information position,
 - according to Article 12(5) the Eurojust national coordination system shall be connected to the Case Management System of Eurojust,
 - the new Article 13a deals with the information provided by Eurojust to national authorities,
 - the exhaustive lists relating to data processing in Article 15 will be replaced by open lists. New types of information are added in Article 15(1)(l) and the concept of a Case Management System is added,

⁽⁴⁾ OJ C 54, 27.2.2008, p. 14.

⁽⁵⁾ OJ C 53, 3.3.2005, p. 1.

⁽⁶⁾ Communication of 23 October 2007, COM(2007) 644 final. Further: the Communication.

⁽⁷⁾ The term 'information position' refers to the possibilities of Eurojust and its members to gather information.

- according to Article 26(1a), the College of Eurojust may open and participate in a Europol Analysis Work File. Article 26(2) further facilitates the relations with the European Judicial Network, Frontex and other players,
 - Article 27a deals with requests for judicial cooperation from third States.
13. These provisions extend the possibilities for the collection, storage and exchange of personal data and therefore entail additional risks for the protection of personal data. Of course, risks can not always be avoided since the applicable rules must allow that Eurojust can perform its operational activities in an effective way. However, when establishing new provisions that extend the possibilities for data processing the European legislator should strike a good balance between the different public interests involved, taking into account the principle of proportionality.
14. This requires in any event that those rules are established on the basis of an analysis of the shortcomings of the existing rules and the expected effectiveness of the new provisions. It is also for this reason regrettable that the initiative is not accompanied by documents providing for such analysis, notwithstanding the fact that the Communication gives much useful information. For example, no evidence is given for the need to replace the exhaustive lists of Article 15 by open lists.

The context of national criminal law

15. The demand for evidence is even more predominant in the light of the complex reality in which Eurojust has to operate. At the present stage of European integration criminal investigations and prosecutions fall within the domain of national law. National laws in this area are based on long standing legal traditions and show a wide variety. The task of Eurojust is to facilitate the optimal coordination of action for investigations and prosecutions covering the territory of more than one Member State with full respect for fundamental rights and freedoms ⁽⁸⁾.
16. In addition, Decision 2002/187/JHA leaves much discretion to national governments in the way they give effect to their tasks relating to Eurojust, for instance in the position they give to the national members.
17. The consequences of this reality are varied. In the first place, there seem to be good reasons to limit the discretion of the Member States in order to ensure that Eurojust can function effectively. The proposed Article 2(2) enhances the minimum level of resources that Member States should give to the national members. Also the new Article 9a aims at

strengthening the position of the national members. Member States must confer certain powers to them.

18. In the second place, it has to be taken into account that Eurojust exchanges information within widely varying legal systems, with different legal (and constitutional) requirements about the use of and access to this information. These requirements should not be used to limit the powers of Eurojust to collect, store and exchange information, nor to keep them limited, but in such a complex environment all potential consequences should be well assessed and considered beforehand.

The Lisbon Treaty and the urgency of the changes: are changes needed now?

19. The Lisbon Treaty has three important consequences which relate to this initiative:
- (a) Article 85 of the Treaty on the Functioning of the European Union extends the functions of Eurojust, whereas Article 86 even foresees a more fundamental change of function, namely the development into a European Public Prosecutor's Office (see also point 8 of this opinion);
 - (b) the legislative framework for Eurojust must be adopted by the European Parliament and Council, within the ordinary legislative procedure with Qualified Majority Voting within Council. The infringement procedure of Article 228 EC (under the Lisbon Treaty: Article 260 of the Treaty on the Functioning of the European Union) will apply to the implementation in the Member States;
 - (c) as a consequence of the abolishment of the pillar-structure, Eurojust will become a body of the European Union to which all the provisions having general application of Title II of the of the Treaty on the Functioning of the European Union will apply, such as for instance the provisions on transparency and on data protection.
20. The question arises whether it would not be better to wait for the entry into force of the Lisbon Treaty, before adopting the amendment to the legislative framework for Eurojust as presented in the initiative.
21. According to the EDPS, there are some convincing arguments in favour of an approach of waiting for the entry into force of the Lisbon Treaty. Those arguments are the following:
- (a) it allows the full inclusion of the tasks mentioned in Article 85 of the Treaty on the Functioning of the European Union ⁽⁹⁾;

⁽⁸⁾ See the second recital of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime.

⁽⁹⁾ Article 86 of the Treaty on the Functioning of the European Union is less relevant in this context, since it will not necessarily become operational immediately after the entry into force of the Lisbon Treaty.

- (b) it recognises the role of the European Parliament, as co-legislator and as stakeholder in the evaluation of Eurojust's activities ⁽¹⁰⁾;
- (c) it allows the control by the Commission and the Court of Justice on the implementation in the Member States, and prevents the new provisions from profiting from the exemptions of Title VII of Protocol No 36 of the Lisbon Treaty, that provide that the limited competences of the Court of Justice shall not change in respect of acts adopted before the entry into force of the Lisbon Reform Treaty, until such acts are amended or 5 years have passed;
- (d) it allows considering the consequences of the abolishment of the pillar structure which might in the area of data protection have as a consequence that Regulation (EC) No 45/2001 ⁽¹¹⁾ could be applicable to Eurojust.

III. PROVISIONS ON THE PROCESSING OF PERSONAL DATA

The general framework

22. Article 14 of Decision 2002/187/JHA lays down that Eurojust may, within the framework of its competence and in order to carry out its tasks, process personal data. This Article furthermore contains a reference to Council of Europe Convention No 108 ⁽¹²⁾, includes some general principles of data protection and provides that Eurojust shall establish an index of data relating to investigations and may establish temporary work files which also contain personal data.
23. The initiative does not propose to replace the reference to Convention No 108 by a reference to the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters ⁽¹³⁾, nor does it in any other way refer to this Council Framework Decision ⁽¹⁴⁾. For reasons of consistency, the EDPS recommends adding such a reference to Article 14 of Decision 2002/187/JHA. Such reference is all

⁽¹⁰⁾ See the last sentence of Article 85(1) of the Treaty on the Functioning of the European Union.

⁽¹¹⁾ 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 (OJ L 8, 12.1.2001, p. 1).

⁽¹²⁾ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe, 28 January 1981.

⁽¹³⁾ The last public version of the proposal for a Council Framework Decision dates from 11 December 2007 and is available on the public register of the Council.

⁽¹⁴⁾ Unfortunately, the proposal for a Council Decision establishing the European Police Office (Europol) (see point 31 of this opinion) does not contain such a reference either.

the more important because Eurojust exchanges personal data with national authorities that will be bound by the Council Framework Decision on the protection of personal data, after its entry into force in the Member States.

The Case Management System

24. The initiative proposes replacing the reference to the 'index' by a reference to a 'Case Management System containing an index'. The EDPS supports this change, since it better reflects the practice within Eurojust. It clarifies that the provisions on — the restrictions on — the processing of personal data apply to the 'Case Management System' as such and not only to the index.
25. The initiative proposes replacing the limited lists of personal data that may be processed under Article 15(1) and (2) by similar lists, but with an open nature. The words 'only' will be deleted and in Article 15(1), the word 'such as' is added. Apart from a small inconsistency in the initiative (why only add 'such as' in Article 15(1)?), in the opinion of the EDPS this modification should not be adopted in Union law. The modification changes the nature of the list with a negative effect for data protection and for legal certainty, without an adequate underlying reason ⁽¹⁵⁾.
26. The EDPS does not understand why this modification is needed, in particular since the lists of data are already quite extensive. If a specific category of data is lacking it would be better to include this category in the Decision itself. The present initiative is a good opportunity to do so, as is shown by the proposed addition of a category (l) to Article 15(1).

Addition of a category of data

27. This addition concerns telephone numbers, vehicle registration data, phone and e-mail traffic related data, DNA records and photographs, all in relation to persons who are suspect of a criminal investigation or prosecution for certain types of crime. The EDPS understands the need for processing such data, but raises some specific points that need clarification:

- (a) the notion of DNA records is not clear. It is essential that the concept of DNA records will be clearly defined and that a difference is made between DNA profiles and DNA data that can provide information on genetic

⁽¹⁵⁾ The EDPS is aware that also within the Working group of Council this issue is being discussed, with as possible result keeping the closed nature of the list. Such a result would of course be welcomed.

characteristics and/or the health status of a person. In the view of the EDPS, the processing by Eurojust could be limited to DNA profiles ⁽¹⁶⁾;

- (b) as to phone and e-mail traffic related data, it is not fully clear which data are included and which not. Especially as far as e-mail is concerned, the difference between traffic data and content data is not obvious. This problem is recognised in the context of the Data Retention Directive 2006/24/EC ⁽¹⁷⁾ and in the discussion on the implementation of this directive. Article 5(2) of the Directive states: 'No data revealing the content of the communication may be retained pursuant to this Directive'. The EDPS recommends adding a similar clarification to Article 15 of the Council Decision;
- (c) photographs can reveal sensitive information of the suspect himself (or herself), but also of others such as the witnesses or victims meant in Article 15(2). In the view of the EDPS, it should be ensured that the processing of photographs is surrounded by similar procedural safeguards as included in Article 15(4). Article 15 should be amended in that sense.

- (b) SitCen is not an independent organisation but an entity within Council without a legal personality. It should be further considered how appropriate relations with SitCen, including necessary safeguards for data protection, should be established;
- (c) as to Interpol, the EDPS understands that the exchange of information with Eurojust will be necessary in specific cases. The text of the Initiative can be supported, but it would have been even better if an agreement between the two bodies, as far as it relates to the processing of personal data, would be subject to approval of the Joint Supervisory Body;
- (d) finally, the EDPS is opposed to the exchange of personal data between Eurojust and the World Customs Organisation since there does not seem to be any clear need for such exchange. He suggests deleting Article 26(10) from the Initiative or at least ensuring in the text that the agreement will not concern the exchange of personal data.

IV. RELATIONS WITH EXTERNAL PARTNERS

28. According to the seventh Recital of the Initiative it is also necessary to strengthen Eurojust's capacity to work with external partners, such as Europol, OLAF and Frontex, as well as authorities of third countries.

29. Furthermore, Article 26 contains some new provisions on the relations and close cooperation with other partners such as the European Judicial Network, the Joint Situation Centre (SitCen), Interpol and the World Customs Organisation. It follows from the text of the Initiative that this cooperation may in all cases include the exchange of personal data. This leads to the following observations:

- (a) as far as the European Judicial Network is concerned, this Initiative as well as the Initiative for a Council Decision on the European Judicial Network includes precise rules on the cooperation which is much welcomed;

⁽¹⁶⁾ See in the same sense earlier opinions of the EDPS, such as the Opinion on the Initiative of 15 Member States, with a view to adopting a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (Prüm), points 47-48.

⁽¹⁷⁾ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ L 105, 13.4.2006, p. 54).

Cooperation with Europol

30. As to the cooperation with Europol, the Initiative contains several new elements, which mainly relate to the position of Eurojust vis-à-vis Europol's Analysis Work Files ⁽¹⁸⁾. Article 9a(1)(c), as proposed, gives national members of Eurojust powers to perform tasks in relation to the Europol Analysis Work File. The proposed Article 26(a)(1a) is of particular importance since it lays down that Member States shall ensure that the College may actually be able to open such an Analysis Work File and that it may participate in its functioning. This proposal is of a fundamentally new nature since it ends a situation in which the legal frameworks of Europol and Eurojust keep the two bodies fully separated. They cooperate, for instance on the basis of a mutual agreement, but do not have direct access to each other's systems.

31. The proposal for a Council Decision establishing the European Police Office (Europol) does not contain a similar provision to Article 26(a)(1a) allowing for the access and participation of Eurojust to Europol's Analysis Work Files ⁽¹⁹⁾. To the contrary, Article 14 of that proposal contains strict limitations on the participation and

⁽¹⁸⁾ The Analysis Work Files are described in Articles 14 and 16 of the proposal mentioned in point 31 of this opinion. Article 26 of the Initiative uses the term Analytical Work Files.

⁽¹⁹⁾ The EDPS issued an opinion on the proposal on 16 February 2007 (OJ C 255, 27.10.2007, p. 13). The latest version of the proposal dated 10 April 2008 is available on the public register of the Council.

analysis of these Work Files. Article 14(2) provides that only analysts shall be authorised to enter data into the file concerned and modify such data and that all participants of the analysis group may retrieve data from the file.

32. This leads to two opposing legal obligations. On the one hand, Europol should restrict the participation and analysis of these Work Files to analysts/participants of an analysis group. On the other hand, Member States are obliged under Union law to allow opening of and participation to the Files by Eurojust. It is not evident which one of these obligations would prevail. For reasons of legal certainty it is necessary that the Council amends one of the two legal instruments before final adoption. Both instruments should be compatible with each other.

33. In this perspective, there is also a fundamental question that needs to be answered. Is it necessary for the College of Eurojust to actively participate in the work of Europol, or would it be sufficient if Eurojust requests Europol to open an Analysis Work File and/or receives information from Europol on request, as is the present situation under the agreement between the two bodies?

34. In the view of the EDPS, under the present circumstances and in the absence of a clear and public motivation, one should consider whether it would not be enough to continue within the present arrangements, provided that:

- (a) this will not prejudice the information position of the national members of Eurojust and of the College;
- (b) the structural links between the two bodies are strong enough to ensure cooperation and to avoid double work ⁽²⁰⁾.

Such a solution would also favour the interest of data protection. The responsibilities of Europol and Eurojust as to the processing of personal data (who will be processor? who will be controller?) will stay clearly distinguished, which is also useful in the light of different systems of supervision on the data processing, with different Joint Supervisory Bodies, the Joint Supervisory Body of Eurojust being composed of judges ⁽²¹⁾.

Cooperation with authorities of third countries

35. This also leads to the cooperation with authorities of third countries. The already existing arrangements under Article 27 of Council Decision 2002/187/JHA will be completed by an Article on Liaison Magistrates seconded to

third States (Article 26a) and by an Article on requests for judicial cooperation from third States (Article 27a).

36. The EDPS approves of these new provisions, but asks for specific attention for the level of data protection in third States which is dealt with under Article 27(4) of Decision 2002/187/JHA. The EDPS recommends using the present modification of the Council Decision, that further extends the scope of exchanges with third States, for laying down in the Council Decision a procedure for the assessment of adequacy. This assessment should be made by the College of Eurojust, with approval of the Joint Supervisory Body.

V. SUPERVISION

37. Decision 2002/187/JHA includes extensive provisions in order to ensure compliance with the data protection requirements applicable to Eurojust. Article 17 deals with the Data Protection Officer within Eurojust, whereas Article 23 establishes a Joint Supervisory Body that shall monitor the activities of Eurojust collectively.

38. The initiative does not propose fundamental changes to these provisions which seem to function well. Only one small addition is proposed as regards Article 23(10) which states that the secretariat of the Supervisory Body may rely upon the expertise of the secretariat established by the Council Decision 2000/641/JHA ⁽²²⁾.

39. The EDPS welcomes this addition which could foster the consistency of the supervision of data protection within the area of police and judicial co-operation in criminal matters (present third pillar). Using the experiences with other EU bodies and large scale information systems could not have any other effect than further improving the quality of the protection.

Staff data

40. Another issue of consistency that deserves attention is the following. Article 38 of the proposal for a Council Decision establishing the European Police Office (Europol) ⁽²³⁾ deals with the Staff of Europol. Article 38(1) brings the Director, the Deputy Directors and the Staff of Europol within the scope of the Staff Regulations of officials of the European Communities (and similar rules). At the same time, Article 38(5a) provides that Europol shall apply the provisions of Regulation (EC) No 45/2001 to the processing of personal data relating to Europol staff. This includes monitoring of the application of this Regulation by the EDPS.

⁽²⁰⁾ See in this respect also the discussion paper of the Counter Terrorism Coordinator of November 2007 (Council Doc. 15448/07).

⁽²¹⁾ Article 23 of Council Decision 2002/187/JHA.

⁽²²⁾ Council Decision of 17 October 2000 establishing a secretariat for the Joint Supervisory data protection bodies set up by the Convention of the Establishment of a European Police Office (Europol Convention), the Convention on the use of Information Technology for Customs purposes and the Convention implementing the Schengen Agreement on the global abolition of checks at the common borders (Schengen Convention) (OJ L 271, 24.10.2000, p. 1).

⁽²³⁾ Latest text, see footnote 19.

41. The EDPS recommends that the Council take the same approach in relation to Eurojust and adds a similar provision on the processing of personal data of Europol Staff. An additional reason for this approach is that it is not at all clear whether the Joint Supervisory Body is competent to monitor the processing of personal data of Europol Staff. Indeed, Article 23(1) of Decision 2002/187/JHA specifically refers to the monitoring of the Eurojust activities referred to in Articles 14 to 22 of the Decision, which does not necessarily include data of the administration of Eurojust such as Staff data.
42. Such an approach is all the more useful, since the entry into force of the Lisbon Treaty leading to the abolishment of the pillar structure could possibly bring Eurojust within the scope of application of the Regulation (EC) No 45/2001, and in any event will bring it within the scope of Article 16(2) of the Treaty on the Functioning of the European Union obliging the Union legislator to establish rules on the processing of personal data by all EU bodies.

Consultation of the Joint Supervisory Body

43. Finally, the Initiative recognises the advisory role of the Joint Supervisory Body. Several decisions can only be taken after the consultation of the Joint Supervisory Body. This recognition must be welcomed. At some points this role could even be strengthened by obliging the College of Eurojust not only to consult the Joint Supervisory Body, but also to follow its advice (see points 29 and 36 above).

VI. CONCLUSION

On procedure

44. The EDPS regrets that the Member States did not ask for his advice, since a significant part of the initiative deals with the — conditions for — processing of personal data by Eurojust.

On the absence of an Impact Assessment

45. The initiative should have been accompanied not only by an Explanatory Memorandum, but also by an Impact Assessment, which are both necessary elements enhancing the transparency and more in general the quality of the legislative process. These documents could have given a justification of the urgency of the amendment of Decision 2002/187/JHA.

The need for improving the legal framework of Eurojust

46. The EDPS understands the need for improving the legal framework of Eurojust, in order to make it more effective. It is a developing organisation. He notes that:
- (a) the amendments extend the possibilities for the processing of personal data and therefore entail additional risks for the protection of personal data;
 - (b) Eurojust exchanges information within widely varying legal systems, with different legal (and constitutional) requirements about the use of and access to this information.

Also for these reasons, new rules must be established on the basis of an analysis of the shortcomings of the existing rules and the expected effectiveness of the new provisions.

The Lisbon Treaty

47. The opinion mentions four arguments in favour of waiting for the entry into force of the Lisbon Treaty:
- (a) it allows the full inclusion of the tasks mentioned in Article 85 of the Treaty on the Functioning of the European Union;
 - (b) it recognises the role of the European Parliament, as co-legislator and as stakeholder in the evaluation of Eurojust's activities;
 - (c) it allows the control by the Commission and the Court of Justice on the implementation in the Member States, and prevents the new provisions from profiting from the exemptions of Title VII of Protocol No 36 of the Lisbon Treaty;
 - (d) it allows considering the consequences of the abolishment of the pillar structure which might have as a consequence that Regulation (EC) No 45/2001 could be applicable to Eurojust.

On the provisions on the processing of personal data

48. A reference should be made to the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters. The lists of personal data that may be processed under Article 15(1) and (2) should remain closed lists. Clarifications are needed as to the new data elements that are added in Article 15(1)(l).

On the relations with external partners

49. The EDPS is opposed to the exchange of personal data between Eurojust and the World Customs Organisation.

50. As to the relation with Europol, it should be considered to continue within the present arrangements, provided that:
- (a) this will not prejudice the information position of the national members of Eurojust and of the College;
 - (b) the structural links between the two bodies are strong enough to ensure cooperation and to avoid double work.
51. As to the cooperation with authorities of third countries, it is recommended to use the present modification of the Council Decision, that further extends the scope of exchanges with third States, for laying down in the Council Decision a procedure for the assessment of adequacy.
53. The EDPS recommends including a provision similar to Article 38(5a) of the proposal for a Council Decision establishing the European Police Office (Europol) in order to establish that the provisions of Regulation (EC) No 45/2001 shall apply to the processing of personal data relating to Eurojust staff.
54. The provisions on the advisory role of the Joint Supervisory Body are welcomed and could at some points even be strengthened.

On supervision

52. The EDPS welcomes the addition proposed in Article 23(10) which states that the secretariat of the Supervisory Body may rely upon the expertise of the secretariat established by the Decision 2000/641/JHA.

Done at Brussels, 25 April 2008.

Peter HUSTINX
European Data Protection Supervisor