



PETER HUSTINX
SUPERVISOR

Mr Juan Fernando LÓPEZ AGUILAR
Chair, Committee on Civil Liberties,
Justice and Home Affairs,
European Parliament
B-1047 Brussels

13 November 2013
PH/HH/mk C 2013-0879 D(2013) 0430
Please use edps@edps.europa.eu for all
correspondence

Subject: Supervision on Europol

Dear Mr López Aguilar,

We have seen that the data protection supervision on Europol is one of the issues that raised the attention of members of the LIBE-Committee, in the context of the discussion on 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) and repealing Decisions 2009/371/JHA and 2005/681/JHA.

We have also seen a number of amendments by members of your committee that aim at replacing the EDPS as proposed responsible supervisor for Europol by a "Joint Supervisory Authority".

We feel that adoption of these amendments would seriously prejudice the need for strong and effective supervision on Europol, which is all the more important in view of its growing powers and duties, as well as the need for a consistent approach on data protection at EU level.

As you know, we fully supported the choice of the Commission to make us responsible for supervision on Europol, of course in good cooperation with the data protection authorities in the Member States, where relevant because of the nature of data processing operations. We strongly feel that the choice the Commission made is the most appropriate one for ensuring that Europol can fulfil its tasks, while respecting data protection requirements.

In view of the ongoing discussion, we feel that it is useful to further explain the position of the EDPS on this subject.

This position is based on a number of considerations. We would like to share with you the most important ones:

1. Supervision by the EDPS is the logical consequence of the development of Europol into an EU body, which fully operates within the legal framework of the Treaties. This means, at latest from 1 December 2014, that decisions relating to Europol may be challenged before the Court of Justice in Luxembourg. Also, all other arrangements for EU bodies apply to Europol, like control by the Court of Auditors and a role for the European Ombudsman. It would not make sense if data protection supervision would be the only exception.
2. Supervision should follow the controller. Where Europol, an EU body, is the controller, also the supervision should be guaranteed by a European body, and not by a cooperation mechanism of national authorities. The present system with a JSB has served as a provisional solution in another context, but is now no longer appropriate.
3. This does not in any way mean centralisation of supervisory powers, or even worse, exclusion of national data protection authorities. In this context, we point at the good experiences we have in cooperation, for instance relating to Eurodac, SIS II and VIS, through what is usually called 'coordinated supervision'. The Commission proposal foresees a similar system. There are good reasons to strengthen this cooperation mechanism even further in the context of Europol, and we would be delighted to give suggestions for strengthening this mechanism.
4. The legal framework for data protection is under review, with the aim of providing a comprehensive system of protection, with robust supervision, as required by Article 16 TFEU and Article 8 of the Charter. It does not fit in this development to exclude a specific area from the supervision which is foreseen for all other EU bodies, and by doing so not giving priority to consistent and homogeneous application of data protection rules. We note that the proposed new legal framework for Eurojust also foresees supervision by the EDPS.
5. A comprehensive approach for data protection is needed, but fully recognising the specificities of the police sector. We are aware of the specificities and capable to deliver. We supervise EU bodies in adjacent areas, like OLAF and FRONTEX, and have in our advisory role addressed many issues relating to data protection in the police sector. Moreover, in recent years the EDPS has recruited officials with experience in the field of police and judicial cooperation, from other EU institutions and from national DPAs. In short, we fully recognise that specific expertise for this area is needed, but such expertise is already available and will be developed further.
6. The present system with a JSB is not sustainable. The JSB does not fulfil the criteria for independent supervision, as mentioned in Article 16 TFEU and Article 8 of the Charter and developed by the Court of Justice (in cases C-518/07 and C-614/10). The JSB has limited powers (e.g. enforcement powers are lacking) and reports only to the Management Board of Europol, to mention just two shortcomings. Moreover, its members can only on part time basis dedicate their efforts to Europol.

7. To the contrary, the EDPS is a data protection authority, which fulfils the criteria set by the Court of Justice, and which has the capacity and experience to supervise Europol. The EDPS is an established data protection authority with more than 50 staff.
8. An alternative to the EDPS which fulfils the Lisbon criteria would require transforming the current JSB into an authority that could itself fully work within the EU context. This would in fact mean the establishment of a new EU agency, which would operate parallel to the EDPS. This would not be very cost-effective.

Finally, a ninth consideration, which summarises our main concerns. *Effective supervision requires that a supervisory body can act quickly, and with a simple decision making structure.* A body which consists of representatives of all Member States' data protection authorities - and which in practice would have to work on the basis of consensus - would not be sufficiently effective. This is not in line with Europol's growing scope of activities and could well serve as a handicap.

Earlier, we sent a similar letter to the Chair of the CATS-Committee in view of the discussions in Council.

Yours sincerely,

(signed)

Peter HUSTINX

CC: Mr. Agustín Díaz de Mera García-Consuegra, rapporteur