



EUROPEAN DATA PROTECTION SUPERVISOR

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Brussels, 12 September 2022

WRW/EC/vm/ D(2022) 2128 - C 2022-0703
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Subject: Management Board Decisions on the conditions related to the processing of personal data on the basis of Articles 18(6), 18(6a), 18a and 18(2) of the amended Europol Regulation - Lack of formal consultation of the EDPS

Dear Mr López Aguilar,

Please allow me to provide you with an update on the state of play of the matter I referred to you on 19 July 2022.

The amended Europol Regulation entered into force on 28 June 2022 (Article 2 of Regulation (EU) 2022/991) and introduced structural amendments with regard to the way Europol processes personal data and in particular data lacking a Data Subject Categorisation (‘DSC’). This refers to the processing by Europol of large datasets including data about individuals with no established link to a criminal activity.

As these processing operations are particularly intrusive for individuals, the co-legislators empowered the Management Board of Europol to adopt implementing measures to further specify the conditions relating to the processing of such data (Articles 11(1)(q), 18(6b) and 18a(5) of the amended Europol Regulation). Yet, the amended Europol Regulation does not provide for any *vacatio legis* as it entered into force the day after its publication.

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These implementing measures have to be adopted ‘*after consulting the EDPS*’ as clearly provided in the abovementioned Articles. This procedural requirement aims at ensuring that Europol is provided with **an independent opinion with regard to the appropriateness of the data protection safeguards devised for the implementation of the above-referred articles. The EDPS Opinion is thus meant to inform the content of the MB Decisions *before* they are formally adopted by Europol.** In that sense, it is an important material safeguard.

The requirement of consulting the EDPS was not fulfilled in the case at hand. The provision of initial feedback at staff level on preliminary drafts of the MB Decisions cannot be considered as fulfilling the essential procedural requirement of consulting the EDPS. EDPS staff commented on drafts that did not integrate the comments of the Member States within excessively short deadlines (i.e. one week). Moreover, there were important considerations of substance related to the draft MB Decisions that could not be raised yet, in particular on the scope of application of Article 18 and Article 18a of the amended Europol Regulation, as the divergence in views only became apparent during the last staff level meeting held on 7 June 2022¹.

In addition, the violation of this essential procedural requirement infringes a provision of institutional nature. It deprives the EDPS of his prerogatives to make Europol reflect and duly consider his opinion before adopting the MB Decisions.

For these reasons, on 15 July 2022, I decided to use, for the first time, my corrective power under Article 43(3)(g) of the amended Europol Regulation and to refer the matter to Europol. On 19 July 2022, I referred the matter as well to the European Parliament, the Council and the Commission.

As far as the European Parliament is concerned, I consider that the matter (i.e. the breach of an essential procedural requirement by the Management Board of Europol) is of particular interest in the context of the political supervision of Europol exercised by the Joint Parliamentary Scrutiny Group (‘JPSG’) and of the general scrutiny over Europol’s activities. The supervision of the processing of large datasets by Europol under Article 18(6a) and Article 18a of the amended Europol Regulation is now a matter of joint parliamentary scrutiny. Article 51(2) of the amended Europol Regulation mandates the JPSG to politically monitor Europol’s activities in fulfilling its mission, including as regards the impact of those activities on the fundamental rights and freedoms of natural persons. To that end, Article 51(3)(g) and

¹ For the detailed timeline of the events of this case, please refer to the Annex.

(k) of the amended Europol Regulation obliges Europol to report on the implementation and use of Article 18a and 18(6a).

As requested, please find in the annex to this letter a timeline of the events that led to the exercise of my corrective powers. It illustrates the spirit of cooperation that my staff showed in order to ensure a swift issuance of my formal Opinion and to cater for Europol's operational needs.

I am convinced that it follows from the above and the detailed timeline of the events that a **violation of an essential procedural requirement** that could lead to the annulment of the MB Decisions has taken place. I am also confident that you comprehend that I was compelled **to defend my institutional prerogatives**, i.e. my own independent supervisory duties and powers. As stressed above, the prior consultation requirement was included by the co-legislators into the amended Europol Regulation. It is meant to act as an important data protection safeguard in view of the considerable extension of Europol's mandate with regard to the processing of personal data outside the limits of Annex II.B of the Europol Regulation, which remains the general rule under the amended Europol Regulation.

Yours sincerely,

[e-signed]

Wojciech Rafał WIEWIÓROWSKI

Annex: Timeline of the events that led to the exercise of my corrective powers under Article 43(3)(g) of the amended Europol Regulation

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- On 13 April 2022, Europol shared a set of four draft Management Board Decisions respectively implementing draft Articles 18(2), 18(6), 18(6a) and 18a of the Europol Regulation that at the moment was in the process of being amended (as the European Parliament only voted on the amendments on 4 May 2022, the Council of the European Union adopted the Regulation on 24 May 2022 and the text only entered into force on the 28 June 2022).
- On 29 April 2022, the EDPS and Europol held a first meeting at staff level in order to factually clarify the new processes and data flows.
- On 16 May 2022, written informal comments on the draft MB Decisions were provided at staff level, followed by a meeting on the same day also at staff level in order to explain and further discuss the comments. In the informal comments shared with Europol it was explicitly stated that *'This document is meant to **provide initial feedback on the four Management Board decisions**. It constitutes a **purely informal advice**. This **informal consultation by Europol cannot replace the formal consultation of the EDPS that can only take place once the new Europol regulation has entered into force**. The EDPS will strive nevertheless to provide a swift formal reply to that future consultation building on the present and future informal exchanges. In order to be as constructive as possible and in the interest of timing the EDPS has prepared the comments below, as well as revised versions of the decisions (in track-changes, attached). Please note that this way of working should not be meant as constituting a precedent, and is without any prejudice to any further comments or measures by the EDPS'*.
- On 31 May 2022, Europol shared a second set of drafts integrating comments received from Member States and from the EDPS.
- On 7 June 2022, the EDPS and Europol held a third meeting at staff level to discuss EDPS informal comments on the second set of draft MB Decisions. The EDPS staff verbally reiterated that the informal consultation process could not replace the formal one the legal basis of which was due to enter into force on 28 June 2022.
- On 5 July 2022, contrary to the EDPS informal advice that a formal consultation should take place **after the entry into force of the amended Europol Regulation and before the adoption of the MB Decisions**, the Chairman of the Europol Management Board transmitted by letter to the **EDPS four adopted Decisions** on the conditions related to the processing of personal data pursuant to Articles 18(2), 18(6), 18(6a), and 18a of the amended Europol Regulation. The MB Decisions were adopted on 28 June 2022 (i.e. on the day that the amended Europol Regulation entered into force) but were only transmitted to the EDPS one week later, i.e. on 5 July 2022.

- On 15 July 2022, I addressed to the Europol Management Board a letter identifying the **violation of the essential procedural requirement** that has taken place and **urging the EMB to repeal** the four contested Decisions. I also asked the EMB Chairman to inform me by 26 August 2022 whether the contested MB Decisions were repealed, otherwise I would be compelled to challenge them before the competent Court.
- On 19 July 2022, given the importance of this case for the prerogatives of the EDPS and the importance of such requirement to ensure a high level of data protection, in exercising my corrective powers I deemed it necessary to also refer this matter to the European Parliament, the Council and the Commission in accordance with Article 43(3)(g) of the amended Europol Regulation.
- On 23 August 2022, the Chairman of the EMB requested to have a meeting with the me in order *‘to explore any possible avenue to overcome the current situation and avert the occurrence of a judicial procedure’*. The meeting, in which the EMB Chairman was accompanied by the Europol Executive Director and the Director General of the DG-Home of the European Commission, took place on 2 September 2022.
- On 2 September 2022, I addressed an email to the Chairman of the EMB and to the Executive Director of Europol summarising the proposal of the EDPS for a last attempt at avoiding litigation, namely that:
 - i. Europol addresses a letter to the European Parliament, the Council, the Commission and the EDPS (this latter in cc), i.e. the Institutions to which the I referred the matter as per Article 43(3)(g) of the amended Europol Regulation, in order to inform them of the settlement reached on the matter; and
 - ii. Europol submits four new draft MB Decisions repealing and replacing the old ones as from the date of their adoption for consultation to the EDPS.

In order to make sure that the content of the letters and of the draft MB Decisions factually reflected the settlement suggested and discussed during the meeting, I asked to be provided with a draft by 9 September 2022, 18h00, in order to reach a common agreement on their content.

It follows from the above that I have sought, as far as possible, to settle this situation with Europol, by offering the possibility of being swiftly but properly consulted on new draft decisions which would have repealed and replaced the ones affected by the procedural breach.

- On 9 September 2022, and within the deadline agreed in the above meeting, the Data Protection Officer (‘DPO’) of Europol informed me that the Chairperson of the MB has obtained the agreement to initiate a consultation with the EDPS on new draft MB Decisions, which were shared with me attached. With the same email, Europol’s

DPO also shared with me the letters to be addressed by the MB Chairperson to the European Parliament, the Council and the Commission.

- EDPS staff replied on the same day (9 September 2022) conveying that the Supervisor welcomed the submission of the four draft MB Decisions and that he has taken note of the draft letters provided. On the latter, I asked Europol to include some changes that would ensure a factual tone and would not further enhance disagreements on the events of the past months. Until the moment of signing this letter, I have not received Europol's final reply.