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**EUROPEAN
DATA
PROTECTION
SUPERVISOR**

The EU's independent data
protection authority

Joint Parliamentary Scrutiny Group
(JPSG)

Speaking points

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Introduction - role of the EDPS and balancing of interests

- J The EDPS has throughout the 5 years approached the task of the supervision of Europol with the idea that the protection of personal data in the law enforcement context requires a very careful consideration of interests. To ensure that law enforcement authorities can ‘do their job’ of providing public security and investigate crime, while also upholding the fundamental rights and liberties that themselves underpin our democracies and the rule of law. All this requires a careful balancing of the interests and prohibits giving priority to one of them in general. In this sense, the consideration exercise is not a trade-off, but supports the objective that ‘police work’ is carried out in a way that fully respect the common European constitutional traditions that constitute the basis of our democracy.
- J In this context, it is important to clarify possible misinterpretations with regard to the right to liberty and to security provided in Article 6 of the EU Charter.
- J The objective of combating serious crime, which can contribute to protecting the rights and freedoms of others, is considered a public policy objective recognised by the Union, which is able to justify limitations on the rights guaranteed by the Charter, as the right to data protection. However, **this objective does not mean there is a fundamental right to detect, fight and prosecute crime**. It should not be confused with the **fundamental right to security protected under Article 6 of the Charter**, which is the **right to physical integrity** stemming from the ‘habeas corpus’. It is not the right of the society to be safe.
- J This is why, Article 6 cannot be interpreted as imposing **any obligation on public authorities to adopt specific measures to investigate and prosecute criminal offences**. The Court of Justice has conclusively clarified this matter on different occasions and any misinterpretation and misuse of this Article is dangerous.

EMB Decisions on internal rules

- J The Europol Regulation is framed around the balance between data protection and operational needs. The **amendments to the Europol Regulation** have now **shifted this balance**, as they significantly expand the mandate of Europol - sadly, without any vacatio legis. For example, Europol may now process large datasets with the risk that data relating to individuals that have no established link to a criminal activity will be treated in the same way as the personal data of individuals with such a link.



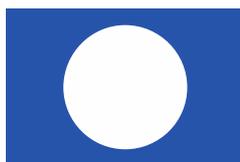
- J The extent to which those risks can materialise or be mitigated now lies in the details of the implementation of the new provisions of the amended Europol Regulation.
- J This is why the Management Board Decisions concerning the implementation of Articles 18a and 18(6a) of the amended Regulation are of particular importance. This is the reason why the EDPS insisted on being consulted on them before their adoption by the Europol Management Board - as is **clearly required by the recently adopted Regulation**.
- J When it came to my attention that Europol infringed the essential procedural requirement of prior consulting the EDPS on the MB Decisions, I decided to use for the first time my **corrective power, based on Art. 43 (3) of the Europol Regulation, to refer the matter to Europol**, and - at the same time - **to the Commission, the Council and the European Parliament** as well.
- J I am satisfied that further to subsequent bilateral meetings with Europol, the **Agency submitted for consultation new draft** MB Decisions that would repeal and replace the old ones as from the date of their adoption. My services are currently drafting the relevant opinion.
- J As far as the European Parliament is concerned, I considered that this matter (i.e. the breach of an essential procedural requirement by Europol) is of **particular interest in the context of the political supervision of Europol exercised by this committee that I am standing before today**. I am convinced that by cooperating we can reinforce each other in fulfilling our respective missions and attaining the legislator's goal to effectively monitor Europol's activities under its new broad mandate.

Data Protection by Design - NEO

- J Another area in which the balance of interests must be ensured is the design of Europol's systems and processing operations.
- J In March 2022 we opened an enquiry on Europol's New Environment for Operations ('NEO') to ensure that data protection principles are implemented from the beginning in such a complex and important environment. We are currently collecting evidence in cooperation with the Agency and assessing them.

Data Protection by Design - prior consultations

- J In 2022, the EDPS has received **7 prior consultations** and reacted speedily, always within the legal deadlines. These prior consultations were (also) with



regard to the development of information systems that involve high risks for individuals (such as the SIS II, the Platform for takedown of illegal content online ('PERCI') and the European Police Records Index System ('EPRIS')).

- J By assessing the processing operations prior consulted with the EDPS, we have **identified recurrent issues**, such as **deficiencies in the risk assessment methodology** applied by Europol, which impacts on the scoping of these assessments and on the identification of the key risks for individuals, as well as deficiencies in appropriately documenting the risk assessments.
- J The EDPS is concerned by these findings as
 - o (i) a proper **risk assessment methodology** is key for identifying when a specific processing involves high risks for individuals and identifying mitigating measures,
 - o (ii) the amended Europol Regulation increases the **accountability of the Agency**, e.g. by rising the threshold for filing a prior consultation requests with the EDPS and by allowing Europol to start processing activities with high risks before the EDPS issues an opinion. We thus intend to monitor closely how Europol conducts rigorous DPIAs.

Action for annulment

- J The points analysed above prove EDPS' key role in keeping a careful consideration between data protection and Europol's operational needs and in monitoring the implementation of the safeguards put in place by the legislator in order to strike this balance.
- J However, the very ability of the EDPS to be able to fulfil its role, requires the rule of law to be upheld at all times in a manner which protects the EDPS' institutional prerogatives including the independent exercise of his powers. This is why the EDPS has been compelled to **bring judicial action against the co-legislators and to request that the CJEU annuls articles 74a and 74b** of the amended Europol Regulation that alter retroactively a situation settled definitively by the EDPS via the exercise of his powers, i.e. via issuing his order of 3 January 2022 for erasure of unlawfully processed data by Europol. This action is however not directed against Europol, nor it is part of our supervision of Europol.
- J I have decided to file this application in order to guarantee the independence of data protection authorities' supervisory powers.



