



The Hague, 30 October 2018

Joint Parliamentary Scrutiny Group Secretariat

To the attention of the JPSG Co-Chairs

By email only:

jpsg.libesecretariat@europarl.europa.eu

Ref: Europol reply to written questions by the Joint Parliamentary Scrutiny Group

Dear Ms. Lueger,
Dear Mr. Moraes,

In accordance with Article 4.2 of the JPSG Rules of Procedure and Article 51 of the Europol Regulation, Europol would hereby like to respond to the questions received from the Co-Chairs of the JPSG:

1. Which operational advantages does Europol associate with agreements, currently at the planning stage, that aim to promote the exchange of data between Europol and a wide range of countries in the Middle East and North Africa, and which data does Europol plan to exchange with these countries in view of the very different data protection and human rights situations in these states?

As outlined by the EU Global Strategy "Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy" presented by the High Representative/Vice President Mogherini in June 2016, EU priority areas for cooperation comprise inter alia the Maghreb and the Middle East, including the Union for the Mediterranean, and focus on issues such as border security, anti-trafficking, counterterrorism (next to others not of direct relevance for Europol's mandate). The countries in question are furthermore identified by Europol's Management Board to be in the First Group in the List of Priority Partners (MB meeting of 13 December 2017) due to their operational and strategic value.

Europol may not send personal data to any of the states in question if there is no international agreement or adequacy decision in respect to data protection issued by the Commission in place, unless in very specific exceptional cases. According to Article 23(6) of the Europol Regulation, "personal data shall only be transferred by Europol to Union bodies, third countries and international organisations if necessary for preventing and combating crime falling within the scope of Europol's objectives and in accordance with this Regulation, and if the recipient gives an undertaking that the data will be processed only for the purpose for which they were transferred."

A regular and continuous data transfer to third partners is possible if the following conditions are met:

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- The access restrictions set by the provider of the information allow for the transfer to the third partner in question (Article 19(2) of the Europol Regulation) and an
- Adequacy decision on data protection (Article 25(1)(a) of the Europol Regulation), an international agreement concluded by the EU (Article 25(1)(b) of the Europol Regulation), or a cooperation agreement covering the exchange of personal data was concluded prior to the current legal basis of Europol (Article 25(1)(c) of the Europol Regulation).

The responsibility for the adequacy decision or the negotiation of a respective international agreement lies with the European Commission. Data protection safeguards and fundamental rights are addressed by the European Commission in the corresponding negotiation mandate. Mandated by the Council and the European Parliament, the European Commission has chosen to enter into negotiations for international agreements with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey.

A business interest of Europol to cooperate with MENA countries can be established across crime areas, at ranging levels of intensity. Examples include firearms trafficking, drugs trafficking, and financial crimes including money laundering, cybercrime, facilitated illegal migration and terrorism.

2. Will Europol take the European Data Protection Supervisor's data protection guidelines and suggestions into account when drafting the agreements being negotiated with what are known as the MENA states and, if so, to what extent?

Europol is not in charge of the negotiations of the underlying international agreements. However, in the implementation of the relevant agreements through corresponding administrative arrangements (which are for Europol to negotiate and conclude), Europol ensures the highest levels of data protection while paying particular attention to any specific issues that may have been identified by the EDPS.

3. Have Europol's analyses and assessments pertaining to traffic data changed and, if so, to what extent? Does Europol consider the legal framework in this regard to be sufficient?

Following the annulment of the Data Retention Directive (DRD) by the European Court of Justice (ECJ) in April 2014, due to a lack of proportionality (Digital Rights Ireland), and the Tele2/Watson ruling in December 2016, according to which also Article 15 ePrivacy Directive cannot serve as legal basis for law enforcement data retention, law enforcement and judicial authorities face enormous challenges in investigating online crime. In concrete terms, there is no pan-European legal framework any longer which would require telecommunications providers to retain information on who communicated with whom, when, where and how. This communication meta-data - which is not content information, e.g. does not include recordings of the actual conversations - is also referred to as traffic data.

The lack of this kind of information for law enforcement purposes has serious implications since on too many occasions leads pointing to serious criminals and terrorists cannot be investigated further. In practical terms, if Europol, for instance receives the image of a server hosting child abusive material, Europol's analysis can no longer focus on the most notorious offenders. Instead, for instance, German IP addresses found on such a server have to be prioritized by default as it is known

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that these can only be attributed to actual users if utmost hurry is applied considering there is factually no data retention in Germany any longer.

Europol has analysed the data retention related ECJ rulings in order to identify the criteria which the court has established for the legislature to arrive at a proportionate data retention regime. The Court explicitly recognised data retention as a legitimate tool for the prevention and combatting of serious crime and terrorism provided the necessary safeguards are implemented.

Europol, together with the Bulgarian Presidency hosted two workshops on 20 March and 14 May 2018, bringing together specialised investigators and forensic experts from 26 Member states. The Commission, the General Secretariat of the Council, the EU Counter-Terrorism Coordinator's office and Eurojust participated in an observer role. In total 65 participants joined the first workshop in March while 47 were continued the work in May 2018. The result of these workshops was that the implementation of the proportionality principle is mainly achievable via access restrictions to retained data rather than restricting the scope of data to be retained in the first place.

A different legislative approach would hence be possible: Restriction of retained data categories would be required just as far as it is practically possible – without rendering the whole concept incompatible for fighting serious crime and terrorism ('restricted data retention'). Higher safeguards with regard to storage, access and use of the data would ensure overall proportionality ('targeted data access').

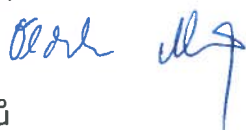
In its most recent ruling re 'Ministerio Fiscal' the ECJ demonstrated that the right to data protection is not absolute. The Court clarified that criminal offences that are not particularly serious may justify access to personal data retained by providers of electronic communications services provided that that access does not constitute a serious infringement of privacy.

4. What form will Europol's cooperation with the future European Public Prosecutor's Office take, also with respect to Eurojust, and are sufficient resources available in this regard?"

Europol is committed to supporting the activities of the European Public Prosecutor's office (EPPO). In this respect, Europol is already taking part, together with OLAF and Eurojust, in the steering committee established to facilitate the development of EPPO Case Management System. In accordance with EPPO Regulation, Europol shall provide analytical support to the investigations led by EPPO. Administrative arrangements between the two organisations might become necessary to regulate working relations. The EPPO is still in the process of establishment. The extent of the support that will be required is therefore difficult to assess at this point in time. However, it is reasonable to assume that it will trigger a significant increase in the requests for Europol expertise and support in the areas under EPPO mandate (fraud, money laundering and asset recovery). With this scenario in mind, Europol's resources will have to be scaled up accordingly.

Trusting these answers will prove satisfactory; Europol remains available for further clarifications.

Yours sincerely,



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Deputy Executive Director Governance

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