**Council of the European Union / Law Enforcement Working Party**

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**Comments on the Data Protection Supervision of Europol**

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Let me first of all thank the Greek Presidency for inviting me to attend this discussion on the Chapters VII-VIII of the draft Europol Regulation, and in particular Articles 45-47 on the structure of supervision. So let me address those provisions immediately.

I believe that the revised Articles 45-47, as proposed by the Presidency, have all the right ingredients for a balanced and effective system of supervision.

This is the case mainly for three reasons:
1) Supervision should follow the controller, both at national and at EU level. So, if control is at national level, supervision should be exercised by a national data protection authority. If control is at EU level, supervision should be exercised by the appropriate European data protection authority.

2) Supervision should build on close cooperation between the two levels, and on structural involvement of national DPAs. This involvement should be clearly defined in the Regulation and not be left to general language as "where necessary" or "where needed".

3) The outcome should always be a clear decision, for which the responsible authority can be fully accountable, and which may be subject to judicial control by the competent court, either at national or at EU level.

Let me now develop these points in a bit more detail.

**Supervision follows controller**

Firstly, Europol now generally has a good reputation in data protection, and this current level of data protection should be kept. However, Europol's roles and tasks will be growing under the Regulation. Consequently, there will be a need for stronger and more robust supervision.

The EDPS can provide that stronger supervision. It is a permanent body, not dependent on infrequent meetings, and it has long experience in supervising most EU institutions and bodies, including some also engaged in law enforcement. Therefore, it is fully capable to act both effectively and efficiently.

For example, our services already include at least eight staff members with experience in law enforcement, including some 'first hand' experience at Europol. Moreover, in our consultation on new draft legislation, we have been covering law enforcement issues at an average of 40% of the total case load for many years.

What is more, the EDPS can also provide a long term engagement and long term security to Europol, due to our capacity to agree and enforce a long term supervision strategy. This will allow Europol to develop its role, with due regard for all data protection requirements, and to remain fully accountable.

National DPAs would - on the basis of the same principle - remain competent for supervision of national authorities, including the national units and liaison officers at Europol.

**Structural involvement of national DPAs**

Secondly, close cooperation with national DPAs is essential and their structural involvement should be clearly defined in the Regulation. Article 47 as proposed is exactly doing this and should therefore be welcomed. The proposed text builds on a distinction between 'specific issues' requiring national involvement and 'strategic and general policy issues'.

Specific issues would cover issues such as those involving the exercise of the right of access or the right to rectification as mentioned in Articles 39-40, and also referred to in Article 49(2). However, they would also cover other categories of issues where there is a need for

concrete assessment by a national data protection authority. In those cases, we would of course involve the national DPAs concerned and build on their input.

Strategic and general policy issues would typically be on the agenda of regular coordination meetings - to be held at least once, twice or three times a year - of all DPAs involved. Such meetings are also being held in other areas, such as Eurodac, VIS, CIS, and more recently SIS II, and the practice has largely been one of consensus building.

Relevant subjects might be the way in which 'data management' and 'accountability' for data protection compliance are developing at Europol. They could also involve 'information security standards' or the most effective interaction with the office of the internal Data Protection Officer. Such issues are of general relevance for all, but would not necessarily require the direct involvement of all DPAs in any specific case.

However, at this stage, I would certainly not exclude the involvement of national experts in joint inspections or joint investigations. In fact, this has been a good annual practice for many years, and I see no reason to change it, when the Europol Regulation has entered into force.

**Decision subject to judicial control**

Thirdly, a clear allocation of responsibilities is essential for an effective judicial review of any decision taken as a result of a close cooperation. If decisions are taken jointly without any individual DPA being fully responsible and accountable, there would no longer be space for an effective judicial review.

There is no doubt that judicial review will be more challenging in the future, in particular after 1 December 2014, when the transition period ends foreseen in Protocol 36 of the Lisbon Treaty. I also emphasise in this context the impact of Article 8 Charter and Article 16 TFEU. This is why the problem of the current arrangements for supervision has become more urgent.

The present arrangements for supervision of Europol are no longer sustainable: the powers of the current JSB are inadequate, its current position does not comply with legal standards for complete independence, and judicial review is now impossible, but entrusted to an appeals committee, which is only a subcommittee of the JSB.

The increasing challenges for Europol will thus require more robust arrangements, and this is clearly in the interest of data subjects, but also of Europol itself, and any third parties that may be involved.

**JSB or JSB +**

I fully understand that there is a human tendency to idealise the status quo, which has been created many years ago, or perhaps to prefer an upgrade of the present situation in the form of a JSB +. I understand this even more, since I have been a member of the JSB Europol myself and a chairman of the appeals committee.

However, the truth is that the current arrangements have many hidden deficiencies and these will now become visible. Upgrading the JSB and turning it into a small "stand alone" body will not fix the problem and will not be cost effective. Extending its scope, by involving Eurojust and the proposed European Public Prosecutor's Office, will not solve the problem either, due to the inherent shortcomings in the structure and functioning of a JSB.

The essential problem is that a JSB confuses the responsibilities at different levels, and does not satisfy a key condition for complete independence of a supervisory body according to the ECJ case law: i.e. that it must be free from any external influence. Instead, it builds on direct external influence from national supervisory authorities as its main characteristic.

Finally, in this context, let me mention a point also touched upon in a recent letter of the JSB Eurojust which has been circulated widely. It is true that the supervisory competence of the EDPS does not extend to the ECJ in its judicial capacity (see Article 46(c) of Regulation 45/2001).

However, this does not mean that the ECJ as such is exempted from supervision by the EDPS, but only any processing of personal data in the context of judicial activities such as delivering judgments in cases before it.

Therefore, the mere fact that Eurojust is composed of judges and public prosecutors does not put its role in supporting cross border cooperation in criminal investigations and prosecutions at the same level as the judicial decision making of a court. In other words, there is no good reason for insisting on a JSB in this case either.

**EDPS powers**

Finally, the powers of the EDPS in Article 46(3) seem to have raised concerns, especially the power to impose a temporary or definitive ban on processing. This issue has at least two sides.

First, this is part of the standard set of enforcement powers, also available to the EDPS for all other EU institutions and bodies. However, a temporary or definitive ban on processing has never been imposed so far, simply because institutions and bodies have complied long before this ultimate sanction could have become an option. This will probably also be the case for Europol.

At the same time, reducing the scope of this ultimate sanction or making it more difficult to use - e.g. by requiring a two-thirds majority in the Management Board, as done by the LIBE Committee - throws doubt on the availability of an ultimate remedy in extreme situations, and therefore also on the compatibility of the proposal with Article 47 of the Charter.

However, the revised text of Article 46(3)(f), as now proposed by the Presidency, only seems to entail a welcome clarification.

**Closing remarks**

In sum: the revised Articles 45-47, as proposed by the Presidency, provide for a balanced and effective system, which is much to be preferred over the current system of supervision with a JSB, either or not in an upgraded form.

It is essential to clearly distinguish the different responsibilities at national and at EU level. In short: effective supervision does not require large or frequent meetings, and close cooperation should not be confused with "holding hands collectively" at every step on the road.

It is time to take a more realistic view on effective supervision of Europol and move ahead along the lines now proposed by the Presidency.