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From:	Eurojust
date of receipt:	13 February 2018
To:	Ventsislav Karadjov, Chair DAPIX Working Party
Subject:	Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002

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Delegations will find in Annex a letter of the President of Eurojust to the Chair of the Dapix Working Party.



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Mr Ventsislav Karadjov  
Chair  
DAPIX Working Party

Via e-mail:  
[\[vkaradjov@cpdp.bg\]](mailto:vkaradjov@cpdp.bg)

The Hague, 13 February 2018

**Eurojust position regarding the ongoing discussion on the new Eurojust Regulation and the recast of Regulation 45/2001**

Dear Mr Karadjov,

Mr Petar Rashkov has informed Eurojust that you would be very interested in the position of Eurojust regarding the ongoing discussion on the new Eurojust Regulation and the recast of Regulation 45/2001.

I am grateful for your willingness to involve Eurojust in the discussions and take this opportunity to point out Eurojust's perspective on the crucial issues at stake.

**Eurojust's objectives**

For Eurojust to be able to carry out its mandate properly, the present negotiations of both Regulation 45/2001 and the Eurojust Regulation should lead to a result creating no obstacles to operational work, offering legal certainty and ensuring a high level of data protection.

As the relevant data on investigations are entrusted to Eurojust by the competent national authorities (Public Prosecution Offices or Courts), these authorities must be sure that their data are safe with Eurojust. If a legal framework leads to a situation in which Eurojust might need to grant access to these sensitive data under different conditions than those observed by the home authorities, which are the controllers of these data, the home authorities will properly refrain from involving Eurojust in their investigations.

As Eurojust is closely working with Europol and will be closely working with the EPPO in the near future, the data protection regimes of all three agencies need to be aligned, as the agencies will exchange data and need to be assured that their data will be safe with the other agencies. For the EPPO and Europol, the legislators have opted for the exclusion of operational data in the application



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of the present form of Regulation 45/2001 for exactly the reasons outlined above. We hope that the legislators will apply the rationale consistently and therefore also to Eurojust.

The present proposal from the European Parliament on the application for the recast of Regulation 45/2001 on all EU agencies independent of their nature and especially to operational data leads to this most problematic situation for the operation of Eurojust and might undermine the trust of the home authorities or other agencies in Eurojust. However, their trust is absolutely essential for the work of Eurojust.

Therefore, taking into account the operational needs, Eurojust believes that the common approach of the Council is the best solution.

#### Other possible solutions

Eurojust is aware of the demands of the general application of the recast of Regulation 45/2001 and its application to operational data as a general principle. As Eurojust strives for a result that creates no obstacles to operational work, offering legal certainty and ensuring a high level of data protection, we could foresee that such a result could be reached with the following three-layer legal construction:

1. A chapter in Regulation 45/2001 applicable to operational data processed by EU JHA agencies, containing only very general principles and establishing that the founding acts of the agencies may contain specific and detailed rules that are considered *lex specialis*.
  - The key element would be to delete the proposed article 2.2a on scope and article X(1) of the additional chapter on operational data (also on scope) and replace them by a provision along the following lines:

'As far as operational data is concerned, the Union agencies carrying out activities that fall within the scope of Chapters 4 and 5 of Title V of Part Three of the TFEU, including those in which the founding acts of these Union agencies lay down a comprehensive data protection regime for the processing of personal data, shall apply the principles laid down in Chapter X of this Regulation (the chapter on operational data). Provisions relating to specific processing of operational data contained in the founding acts of these agencies shall be considered *lex specialis*.'

- The chapter as such may then contain articles on the main subjects now included in the EP draft: principles regarding the processing of personal data, lawfulness of processing, distinction between different categories of data subject, distinction between operational personal data and verification of quality of operational personal data, specific processing conditions, etc. Similar principles have been applicable at Eurojust for many years and will not create issues in practice.
- The most relevant issues are those related to the articles on the rights of individuals (information, access, rectification and erasure). There, the provisions should contain general principles and include a separate article on 'limitations of such rights', in which the following should be stated:

'Union agencies may delay or restrict the exercise of such rights to the extent and for as long as such measure is provided by their founding legal acts adopted on the basis of the Treaties, and constitutes a necessary and proportionate measure in a



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democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned.'

In practice, this clause would mean that the corresponding articles should be included in the Eurojust Regulation concerning exceptions to the rights as well as the procedure, including the essential consultation with the national authorities.

2. Specific provisions in the Eurojust Regulation, reinstating in the text almost all provisions which the EP initially proposed to delete.
3. The rules of procedure, including those on data protection, will need to be drafted after the Eurojust Regulation enters into force, as was done following the first Eurojust Decision.

**On the basis of these views, Eurojust agrees that the proposal by the Bulgarian Presidency (Doc. 5580/18) presented for the meeting of the DAPIX Working Party on 9 February 2018, is in principle acceptable, as it is based on the *lex generalis - lex specialis* rule as outlined above.**

However, we feel that this concept needs to be expressed more clearly to avoid disputes about it at a later stage:

- Greater clarity could be achieved by amending recital 7a and adding the following sentence: 'If a conflict arose between the *generalis* rules in this Regulation and the specific rules in the Eurojust Regulation, the latter will prevail.' This sentence is in the cover text of the Presidency, but should be in the legal text itself.
- Along the same line, Article 69c could be amended by the following: 'Notwithstanding further rules in the Eurojust Regulation, processing by a Union body... shall be permitted in so far...'
- One final practical issue is the date of application. The text states that this Regulation will enter into force in May 2018, while the Eurojust Regulation will only enter into force later, most probably in 2019. Adding a provision would be advisable, specifying that, as far as Eurojust is concerned, this Regulation will enter into force at the same time as our Regulation. Otherwise, we will have two supervisory bodies competent at the same time, two sets of rules in parallel (also for administrative data), etc.

#### Consequences for the Eurojust Regulation

In principle, the text as stated in the general approach of the Council is acceptable. The key elements are the following:

- The most important point is that the provisions regarding data protection/data processing included in this Regulation are *lex specialis*.
- The articles proposed to be deleted by the EP should be reintroduced (automated/manual processing of personal data; categories of data subjects; reference to the list of data categories; conditions for processing of personal data for witnesses/victims; conditions for processing of special categories of data; articles regarding the precise time limits regime; clear rules on access to operational data both on the national level and at Eurojust; clear responsibility in data protection matters; detailed provisions on how Eurojust processes data in the Case Management System; and a detailed regulation regarding transfers to third States/international organisations).



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- Regarding the rights of individuals, the provisions, including the exceptions, are necessary: cases for which limitations of rights are allowed, in the specific context of Eurojust, if the exercise of such rights could jeopardise ongoing investigations or prosecutions in which Eurojust is assisting, and including the consultation procedure to the national authorities before Eurojust reaches a decision on an individual case.
- A legal basis should be provided, allowing Eurojust to further develop its rules of procedure, including those on data protection, as was done after the first Eurojust Decision.

To avoid any legal gaps or uncertainty, a 'sunset' clause should be included, allowing the existing rules and internal procedures to be retained for a limited time until they are replaced, such as the data protection rules, security rules and policies, CMS guidelines, etc.

Eurojust would be grateful if the Bulgarian Presidency could take these views into account, as the question of the trust of the national authorities in the safety of their data transmitted to Eurojust is of utmost importance to the work of Eurojust. Without that trust, the basis for Eurojust's work might be undermined. The legislators have, for good reasons, opted for a different solution for Europol and the EPPO. These reasons are valid for Eurojust as well, especially as we do not 'produce' the relevant data ourselves. So the issues at stake are rather essential for Eurojust.

Yours sincerely,

Ladislav Hamran  
President of Eurojust