



Council of the
European Union

Brussels, 3 January 2018
(OR. en)

5012/18

**Interinstitutional File:
2017/0002 (COD)**

LIMITE

**DATAPROTECT 1
JAI 2
DAPIX 1
EUROJUST 1
FREMP 1
ENFOPOL 1
COPEN 1
DIGIT 1
RELEX 5
CODEC 3**

NOTE

From:	General Secretariat of the Council
To:	Delegations
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/EC - Letter from the Europol Cooperation Board

Delegations will find in Annex a letter from the Europol Cooperation Board on the revision of Regulation 45/2001.

E-MAIL / FAX**EUROPOL COOPERATION BOARD**

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Brussels, 21 December 2017
FP/LS/D(2017) C2017-0145
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Subject: Common position on the revised Regulation (EC) 45/2001

Dear Mr President,

As you know, the Europol Regulation was adopted on 11 May 2016 and became applicable on 1st May 2017. From that date, the EDPS replaced the Joint Supervisory Body as the competent authority for monitoring the lawfulness of data processing carried out by Europol, while the competence of national data protection authorities ("DPAs") remained unchanged. The involvement of national DPAs is essential since the very large majority of data collected and processed by Europol originates from the Member States and will, at a certain point, also be sent back to them. For this purpose, Article 45 of the Europol Regulation has established the Europol Cooperation Board ("the Cooperation Board") composed of the EDPS and the national DPAs.

The Cooperation Board has started its activities and has met already twice since 1st May 2017. The Cooperation Board is fully committed to ensure cooperation between the EDPS and the national DPAs to achieve the highest levels of data protection in the operations of Europol in relation with the Europol National Units.

The Cooperation Board has recently been informed of the latest legislative developments regarding the Proposal 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/EC¹ ("the revised Regulation 45/2001"). The revised Regulation 45/2001 should provide for a new data protection framework applicable to the EU institutions, agencies and bodies, which will be

¹ COM(2017) 8 final.

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consistent with the new General Data Protection Regulation² and should similarly apply as of 25 May 2018.

In this context, the Cooperation Board would like to express serious concerns about the position adopted by the Committee on Civil Liberties, Justice and Home Affairs ("LIBE Committee") on 23 October³, which serves as a basis for the European Parliament during the ongoing trilogue negotiations.

The Cooperation Board is particularly concerned about the extension of the scope of the revised Regulation 45/2001 to the processing of operational personal data by EU agencies in the Justice and Home Affairs area, including Europol. Although the Lisbon Treaty inserted a new, single legal basis for rules on data protection in Article 16 of the TFEU, the Cooperation Board recalls that Declaration No 21 annexed to the TEU and TFEU acknowledges that specific data protection rules may be necessary in the fields of judicial cooperation in criminal matters and police cooperation, because of the specific nature of these fields. This article also underpins the existence of the Law Enforcement Directive, which does exemplify the need for law enforcement competent authorities to have their own separate regime. Similarly, in this context, the Europol Regulation provides for a specific, robust and tailor-made data protection regime for data processed by Europol, while the processing of administrative personal data falls under the scope of Regulation 45/2001.

The Cooperation Board considers that the position adopted in the LIBE Committee report may endanger the balanced approach provided in the Europol Regulation between operational needs and confidentiality on the one hand, and data protection rights of the individual on the other hand.

First, the Cooperation Board would like to stress the risks of legal uncertainty. Under the new Article 2a, provisions relating to specific processing of personal data contained in the Europol Regulation may only particularise and complement the application of revised Regulation 45/2001. As a result, it will be highly difficult to determine which provisions of the Europol Regulation particularise and complement the revised Regulation 45/2001, and which ones will be no longer applicable.

The Cooperation Board insists on the need to clarify the exact data protection rules applicable to the processing of operational personal data by Europol. Regardless of the legal instruments they will be based on, it is essential that these rules are clear and accessible to Europol, the EDPS, the national competent authorities, the national DPAs and individuals. The Cooperation Board considers that the amendments proposed by the LIBE Committee do not provide for such clarity. It recalls that legal uncertainty would not only be detrimental to Europol for the performance of its activities, but could also undermine the proper and efficient supervision of Europol's data processing activities by the EDPS and when appropriate by national DPAs. Additionally, this could create ambiguity and greater complexity for individuals whose personal data are processed by Europol and who seek to exercise their data protection rights.

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, pp. 1–88.

³<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGM1+REPORT+A8-2017-0313+0+DOC+PDF+V0//EN>

For instance, Articles 39 and 40 of the revised Regulation 45/2001 and Article 39 of the Europol Regulation provide for two different prior consultation mechanisms. Without entering into the details of these provisions, the question remains whether the consultation mechanism of the revised Regulation 45/2001 would prevail, or whether both consultation mechanisms would become applicable.

Also, the Cooperation Board regrets that the suggested amendments adopted by the LIBE Committee could entail the non-applicability of a number of provisions of the Europol Regulation that deviate from the revised Regulation 45/2001 but contribute to the high level of data protection Europol has to comply with.

For instance, Article 30(1) of the Europol Regulation relating to the processing of personal data of different categories of data subjects, such as victims, minors and witnesses, requires that the processing of such data be “strictly” necessary and proportionate for preventing or combating crime that falls within Europol’s objectives; such condition is not mentioned in the revised Regulation 45/2001.

In addition, the Cooperation Board notes that the trust of the Member States that their operational data will be processed with the level of confidentiality required may be undermined since, for instance, the provisions on restrictions of processing provided for in Article 19(2) and (3) of the Europol Regulation are not echoed in the revised Regulation 45/2001.

Furthermore, the Cooperation Board stresses that Article 62 of the revised Regulation 45/2001 would create a supervision coordination group⁴ for Europol within the framework of the European Data Protection Board, while the Europol Cooperation Board established by Article 45 of the Europol Regulation already serves as the cooperation mechanism between the EDPS and the national DPAs, and is not repealed by the LIBE report on the revised Regulation 45/2001. The Cooperation Board stresses that the duplication of cooperation mechanisms between competent data protection authorities with distinct applicable rules would raise legal issues. The Cooperation Board would favour continuing its work and preserving a single cooperation mechanism, which offers an increased role to the DPAs.

Moreover, Article 47(2) of the Europol Regulation provides for a specific obligation for the EDPS to consult the DPA or the DPAs concerned in complaint cases relating to data originating from one or several Member States. However, the Board notes that Article 63 of the revised Regulation 45/2001 does not provide for such consultation. The Board considers that this would also reduce the cooperation between the EDPS and the national DPAs in the supervision of Europol.

Finally, the Cooperation Board has some concerns as regards the time frame foreseen for the entering into force of the revised Regulation 45/2001. The date of 25 May 2018 for the applicability of Regulation 45/2001 to Europol processing of operational data raises strong concerns in terms of efficiency and feasibility as this may risk jeopardizing Europol’s ability to keep working as intended and without any significant disruption to the critical services it offers.

⁴ Similar to the supervision coordination groups established for the Customs Information System, the Eurodac system, the Schengen Information System and the Visa Information System.

For the reasons explained above, the Cooperation Board would favour maintaining the current data protection regime provided in the Europol Regulation for the processing of operational personal data. Should the intention of the LIBE Committee be to make the revised Regulation 45/2001 consistent with the entire data protection package (i.e., Regulation (EU) 2016/679 and Directive (EU) 2016/680), the Cooperation Board insists on the need to take into consideration Article 60 of Directive 2016/680 according to which "the specific provisions for the protection of personal data in Union legal acts that entered into force on or before 6 May 2016 in the field of judicial cooperation in criminal matters and police cooperation, which regulate processing between Member States and the access of designated authorities of Member States to information systems established pursuant to the Treaties within the scope of this Directive, shall remain unaffected".

In any event, the Cooperation Board urges the Commission, the European Parliament and the Council to find a common position on the revised Regulation 45/2001 that would ensure consistency, avoid legal uncertainty and maintain a high-level data protection regime for Europol.

Yours sincerely,



François Pellegrini
Chair



Gabriele Löwnau
Vice-Chair

Cc: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General
Ms Kaja TÄEL, Permanent Representative of Estonia
Mr Ralph KÄESSNER, Secretariat General of the Council

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