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## NOTE

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From:	Presidency
To:	Permanent Representatives Committee/Council
No. prev. doc.:	5388/7/21 REV 7
No. Cion doc.:	13908/20+COR 1
Subject:	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation - Progress report

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## I. INTRODUCTION

1. The proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation<sup>1</sup>, was presented by the Commission on 9 December 2020. The proposal is based on Article 88 of the Treaty on the Functioning of the European Union and is subject to the ordinary legislative procedure. Upon presentation, it was accompanied by an Impact Assessment<sup>2</sup>.

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<sup>1</sup> 13908/20 + COR 1.

<sup>2</sup> 13908/20 ADD 1 + ADD 2 + ADD 3 (+ COR).

2. At the same time, the Commission presented a related proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol<sup>3</sup>.
3. The objective of the proposal is to strengthen the mandate of Europol in a number of areas where the Member States indicated strong operational needs – for instance to improve Europol’s cooperation with private parties and with third countries, to clarify the possibility for Europol to process large and complex datasets, or to strengthen the role of Europol in the area of research and innovation. The proposal also aims at strengthening Europol’s cooperation with the European Public Prosecutor’s Office (EPPO), aligning Europol’s data protection regime with Regulation (EU) 2018/1725, expanding the possibility for Europol to request the initiation of a criminal investigation in a Member State, and enabling Europol to make third-country data available to frontline officers through the Schengen Information System (SIS).
4. Ireland made use of the possibility set out in Article 3 of Protocol (No 21) to the Treaties on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice and notified its wish to take part in the adoption and application of the proposed measure. In application of Protocol (No 22) to the Treaties on the Position of Denmark, Denmark is not taking part in the adoption of the proposed measure.
5. The European Parliament (EP) appointed Mr Javier ZARZALEJOS (EPP, ES) as rapporteur. On 26 May 2021, Mr ZARZALEJOS presented his draft report to the Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the EP. Amendments may be tabled by 4 June 2021.

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<sup>3</sup> 13882/20.

## II. WORK IN THE COUNCIL

6. Work has been organised around nine thematic blocs and the proposals have been discussed in 12 meetings of the Law Enforcement Working Party (LEWP) and one meeting of the Working Party on JHA Information Exchange (IXIM) so far, with two more meetings of the LEWP planned for 14 and 21 June 2021, after which the Presidency will submit the results of its work to COREPER in order to seek a mandate for negotiations with the EP on as many negotiating blocs as possible.
7. Major progress has been achieved. A number of blocs can be considered closed or practically do not require any further discussion except for some final technical adjustments: this is notably the case of blocs 1 and 5 on cooperation with private parties and with third countries, respectively, but also bloc 3 on Europol's role in innovation and bloc 6 on the relationship between Europol and the European Public Prosecutor's Office (EPPO). Last but not least, changes required in bloc 7 on the initiation of criminal proceedings have also been fully agreed on by the Member States.
8. Significant progress can also be noted on the remaining blocs under discussion. Bloc 2 on the handling of big datasets is technically complicated but the Member States share a common goal – a regime based on appropriate safeguards which will allow Europol to adequately support the Member States in the age of modern technologies marked by large amounts of data to be processed. Bloc 8 on the alignment of Europol's data protection regime with Regulation (EU) 2018/1725 has been discussed in two meetings and the text has been revised in order to accommodate a number of concerns raised by the Member States. And finally, during the last meeting on 1 June 2021, the Presidency tabled a second compromise suggestion on the entering of third country information in the SIS, in order to find a solution that closes the perceived information gap and can obtain sufficient support amongst the Member States. These issues still require further work but may yet be solved before the end of June.

9. The state of play and the main parameters of the agreement amongst the Member States on the individual negotiation blocs can be summarised as follows:
- a) **Cooperation with private parties (bloc 1):** the Member States agreed on a number of additions and clarifications to be made to the Commission proposal, e.g. to prevent any interference with the work of Financial Intelligence Units under the legal framework which currently applies to them. Further rules and guidelines are to be set out by the Management Board of Europol, for instance regarding the issue of whether the Member State of establishment of a private party is to be automatically considered as a Member State concerned by the exchange of data with it. Regarding cooperation with private parties in online crisis situations, clarifications have been made to avoid duplication of efforts between Europol and the Member States.
  - b) **Handling of big data (bloc 2):** the Member States are currently discussing a solution that would further clarify the aim of the Commission proposal, which is to make sure that Europol is able to carry out a pre-analysis of large datasets in order to determine which of the data contained therein is compatible with its mandate and may be further processed, and also to make sure that Europol is able to support Member States' investigations at their request, irrespective of whether the data concerned is compatible with Annex II of the Europol Regulation, for as long as the requesting Member States are allowed to process that data themselves. The above solution partly consists in departing from the definition of an investigative case file and instead simply referring to investigative data, while further explaining the relevant situations in the corresponding recitals.

- c) **Innovation (bloc 3)**: the Member States have clarified the need to provide Europol with appropriate resources to fulfil its ever increasing role in innovation for the needs of European law enforcement. On the other hand, the Member States agree that Europol should not be tasked with any role in the screening of Foreign Direct Investment (FDI), as initially proposed by the Commission. Regarding the use of data transmitted to Europol before the entry into force of this amending Regulation, the Member States wish to make sure that Europol can only use past data for research and innovation if the data owner agrees with that use, be it *en bloc* or for individual research and innovation projects. In the closing stages of the negotiations, delegations are discussing whether this agreement should be based on a system of opt-outs or opt-ins.
- d) **Entry of third country information into the SIS (bloc 4)**: a number of discussions took place in both the LEWP and IXIM in order to determine the main parameters of a solution that will allow for the entry of third country information into the SIS in order to make it available to frontline officers. The Member States did not support a first attempt to find a compromise maintaining Europol's own information alerts, with further safeguards compared to the Commission proposal (limitation to terrorism and to trusted third countries, and possibly only on the basis of an explicit request by a Member State). In that light, the Presidency has now tabled a second compromise suggestion, consisting in Europol providing support in the analysis and verification of third country information, so that it could propose information to be entered into the SIS by the Member States. The provision would be accompanied by a reporting mechanism in order to monitor the state of play regarding the alerts proposed by Europol. This solution is currently still under discussion amongst the Member States.

- e) **Cooperation with third countries (bloc 5):** the Member States agree on the need to attempt a more significant advancement in the possibilities for structural cooperation with third countries, beyond that initially proposed by the Commission. On that basis, a provision inspired by the Eurojust Regulation has been added to allow for transfers of data to third countries for which appropriate safeguards with regard to the protection of operational personal data are provided for in a legally binding instrument, or are established as being in existence on the basis of Europol's self-assessment. This possibility requires an authorisation by the Management Board of Europol.
- f) **Relationship between Europol and the EPPO (bloc 6):** compared to the initial Commission proposal, the Member States agree on the need for a stricter correspondence between the relevant provisions in the existing EPPO Regulation and the new provision under discussion. References to active support have been deleted in both the operative part and the corresponding recital, as have references to the support to prosecutions, which were considered incompatible with Europol's mandate. On the other hand, references to restrictions on the use of information provided by the Member States have been added in order to make sure that the data owners retain full control over future transmissions of their data, including to the EPPO.
- g) **Request by Europol to initiate criminal investigations in Member States (bloc 7):** the Member States oppose the Commission proposal to extend the possibility for Europol to request investigations to cases where only one Member State would be concerned, and they decided to revert to the current wording of the Europol Regulation, according to which at least two Member States have to be concerned by the relevant crime falling within the scope of Europol's objectives.

- h) **Europol's data protection regime (bloc 8):** the Commission proposal mainly consists of a horizontal alignment of Europol's previously standalone data protection regime with Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions. During the meeting on 1 June 2021, the Commission provided extensive explanations to a number of questions raised by the Member States in writing, and the European Data Protection Supervisor (EDPS) delivered a general presentation on the impact of the Europol regulation on data protection. A first revision of the relevant provisions has already taken place, with clarifications regarding prior consultation for new types of processing operations, processing of photographs in relation to the definition of biometric data, or a targeted extension of access to some data by Member States officials. Various technical corrections have also been made in this chapter.
- i) **Other provisions not included in any of the preceding blocs (bloc 9):** the examination of this negotiating bloc has not started yet. It covers various new provisions and amendments, for instance on Europol's support to EMPACT activities, to investigations on High Value Targets (HVTs) and to intervention units, but also on Europol's cooperation with OLAF, ENISA and with the FIUs. The Presidency is planning to address these issues during the remaining meetings of the LEWP on 14 and 21 June 2021.

### III. CONCLUSION

10. Very significant progress has been achieved during this semester, and delegations continue to analyse the proposal and the successive revisions of the Presidency text at technical level. Despite the complexity of the proposal, the Presidency remains fully committed to further work in the remaining weeks of this semester in order to close the examination of as many of the above negotiation blocs as possible and obtain a (partial) mandate for negotiations with the European Parliament.
  11. Against this backdrop, the Permanent Representatives Committee is invited to submit this progress report to the Council in order that it take note of it at its meeting on 7 and 8 June 2021.
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