



27 March 2023

EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

*“12th Joint Parliamentary Scrutiny
Group”*

27 March 2023, Stockholm

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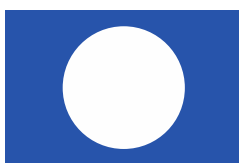
Introduction

I would like to build my intervention today around 3 main topics:

1. Update on so-called PERCI
2. Europol 2021 Inspection Report
3. New Europol Regulation and areas of focus it has brought for the EDPS

PERCI

- Let me start by updating you on so called PERCI project, as I have also received a question on this in advance of the meeting and as this file is currently in the final stages of preparations on the EDPS side.
- In the light of Regulation (EU) 2021/784 on addressing the dissemination of terrorist content online, Europol intends to provide Member States with a technical solution for managing referrals and removal orders to hosting service providers ('HSPs') for the removal of terrorist content online. This will materialise via the European Platform for takedown of illegal content online (*Plateforme Européenne de Retraits des Contenus illégaux sur Internet - 'PERCI'*), which is the successor of IRMa (Internet Referral Management application).
- The EDPS already in his prior consultation Opinion (June 2022) addressed several recommendations to Europol. Among others, the EDPS noted that Europol's prior consultation request had not identified specific areas of potential risk that arise from the possible transfers of Europol's data to private parties in third countries acting as processors (Cloud Service Providers).
- I acknowledge that Europol, following up on this recommendation, invested many resources and carried out a thorough analysis of different technical solutions in order to address my concerns. Staff level meetings have taken place as the issue to be addressed in this case is indeed a particularly difficult one. This is **the first time that the EDPS is being asked to greenlight (or not) the use of public cloud services in the sensitive environment of law enforcement**. We are assessing in this complex case if the technical solution suggested by Europol are compliant with the data protection legal framework.
- We fully share the conviction that Europol must be able to use state of the art technologies for carrying out the tasks entrusted to them by the Union legislator, and we believe this should be achieved with respect to the high standards with regard to data protection, as interpreted by the Court of Justice.
- The EDPS **final position will be provided in the course of the following weeks** to Europol and I ask for your understanding that I do not want to disclose its content before an answer is sent to Europol.

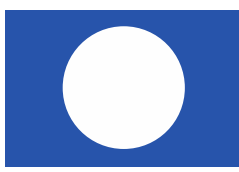


Europol 2021 Inspection Report

- Moving to the second point, I would like to share a few words about the recent report from the inspection conducted in Europol. Since 2022, the EDPS decided on an important change of its approach towards Europol audits. Whereas under the previous approach, an audit would result solely in non-binding recommendations, and a rather lengthy follow-up, under the new approach, in case the audit/inspection activities reveal a suspicion or indication of breach of the Europol Regulation, we directly proceed with an opening of investigations or pre-investigations that could lead to the exercise of the EDPS' powers.
- The outcome of the 2021 annual inspection was the opening of two investigations and one pre-investigation. One of the issues under investigation by the EDPS is the recurrent deficiencies identified in the data protection risk assessment prepared by Europol. A solid risk assessment process is instrumental for the protection of the fundamental rights of data subjects in the light of the enhanced Europol mandate under the amended legal framework.
- The other two topics investigated are: (1) Europol's access to national and international information systems and its proper logging and (2) the assignment of operational data to the correct Analysis Project.

New Regulation

- Let me now move to the third point of my intervention, concerning the new legal framework for Europol. The amendments to the Europol Regulation that have entered into force since June 2022 have shifted the balance between data protection and Europol's operational needs and they considerably expanded the mandate of Europol with regard to the processing of personal data. Therefore, the extent to which the risks for the data subjects can materialise or be mitigated now lies in the details of the implementation of the new provisions of the amended Europol Regulation, some of which merit already now an attention.
- First, in our Opinion of 17 November 2022 on the content of the Europol Management Board Decisions concerning the implementation of Articles 18a and 18(6a) of the amended Regulation, the EDPS raised three areas of focus, the most important of which is the one with regard to the scope of application of new Article 18a. As you might remember, this is the provision that now allows Europol to process datasets without an attributed data subject category for the purpose of supporting a specific ongoing criminal investigation.
- In the EDPS view, this article provides for a derogation to the general rule limiting Europol to process data with an attributed data subject category and hence its scope of application should be interpreted restrictively. The EDPS highlighted that Article 18a is a stand-alone provision, which is meant to apply to specific cases ('ongoing specific criminal investigations') that require the processing of large and complex datasets, for which Europol is better placed to detect cross-border links.
- In case the EDPS interpretation was not followed, this would have considerable negative impact on the rights and freedoms of data subjects. Data regarding individuals with no identified link to a criminal activity could be processed for many more than 3 years and if a link is found at the end of this process - e.g. after 10 years - then the data will be ingested



in Europol's systems. This would effectively make art. 18a a rule that trumps the logic of the Regulation - a Regulation still, *at least on paper*, based on the principle of categorisation.

- Secondly, the handling of Data subject access requests (DSARs) by Europol is a topic that takes on added importance under the amended Europol Regulation. The amended Regulation aligns the handling of DSARs with Chapter IX of the EUDPR and brings a number of changes to Europol's treatment of requests - one of the most prominent being that data subjects are no longer obliged to channel their requests via a designated Member State authority, which is very welcome. However, the inclusion of Articles 18a and 18(6a) imply a significant increase in unstructured data contained in Europol's systems. The question therefore arises of whether - and how - all of this data will be searched in the scope of DSARs and how to ensure that the rights of individuals whose data transmitted to Europol (regardless of whether or not they have an established link to criminal activity) will be realised in practice.
- The EDPS already in 2021 issued an opinion to Europol on the handling of DSARs. In this Opinion, we responded to the fact that Europol was not conducting searches in all parts of its systems where those contained unstructured datasets. We underlined that no (part of) Europol's systems should be a priori excluded from a search and requested Europol to implement all necessary and appropriate technical measures to facilitate the efficient search and retrieval of data subjects in response to a DSAR and to integrate those functionalities into the development of new systems and IT architecture.
- We understand (due to on site verifications that we carried out in the context of investigating complaints) that although improvements have been made in this respect, this recommendation has not yet been fully implemented. Therefore, we intend to follow this up as part of our supervisory activities for Europol in 2023.
- Third, the new Regulation does not mean that the EDPS order is no longer in place or that the implementation obligations has ceased to exist. We continue to follow closely the implementation of the Order of 3 January 2022 and required that Europol submitted all the quarterly reports evidencing the progress achieved with regard to its implementation and the erasure of datasets that were not compliant with the Europol Regulation. The information submitted by Europol in mid-January 2023 raised is currently being assessed as to the best way forward to ensure in particular:
 - the definite erasure of individuals' personal data from Europol's systems where there is no legal basis for its continued processing (including storage) and/or
 - accurate categorisation of the data subjects whose data are processed by Europol.

