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Delegation

Mr. Juan Fernando López Aguilar
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Please use europol-cooperation-board@edps.europa.eu for all correspondence

Subject: Invitation to exchange of information by electronic means in the framework of the JPSG

Dear Mr Ostojic,
Dear Mr López Aguilar,

Although we are unfortunately not able to meet and exchange in person this time, I am eager to share with you about recent developments on the work of the Europol Cooperation Board (ECB) since our last meeting in Brussels last September. National data protection authorities, together with the EDPS, have continued to ensure the coordinated supervision of Europol personal data processing activities, under the unique model foreseen by the Europol Regulation.

On the one hand, information flow is an essential element of police cooperation, and the exchange of personal data is at the core of cooperation among law enforcement authorities within the Union. On the other hand, preserving the fundamental right to protection of personal data serves the overall objective of the preservation of the rule of law and of trust in the law enforcement authorities, which are cornerstones of law enforcement in our democracies. The ECB, keeping in mind these two objectives, has been keen on ensuring its advisory role contributes to the good application by authorities of the Europol data protection framework.

The issue of data flows pertaining to the Europol external strategy, and operational agreements with third countries, which you chose as a focus for this exchange of contributions, is a major

subject for the ECB. Indeed, in the past months, we have paid particular attention to the review of Europol cooperation agreements with third countries. The ECB has reiterated its call to the European Commission for a swift and meaningful review, by 2021, of all agreements concluded by Europol with third countries under the previous regime, as mandated by the new Europol Regulation. For your information, we provide you, as an annex, our latest letter to the European Commission in this regard.

The EU data protection framework, and in particular the data protection regime applying to Europol processing activities, has significantly evolved over the past years. It is therefore essential that agreements adopted and implemented prior to the effective application of the Europol Regulation – some of them dating back to 2001 – are brought in line with current data protection rules. To this end, in addition to the relevant provisions of the Europol Regulation, the benchmark for the review should also be Directive (EU) 2016/680 and Chapter IX of Regulation (EU) 2018/1725.

The ECB considers in particular that the following guarantees are of key importance in assessing the provisions of existing agreements, as well as in the drafting of updated and new agreements, such as:

- Necessity and proportionality;
- General data protection principles, as well as the situation and effectiveness of safeguards concerning the rule of law, respect for human rights and fundamental freedoms in the third country concerned;
- Strict definition of the categories of personal data transferred and purposes of their processing, in line with the EU data protection *acquis*;
- Assessment of reliability of the source and accuracy of information;
- Strict limitations on the processing of special categories of personal data (e.g. genetic data) and of different categories of data subjects (e.g. minors);
- Time-limits for the storage and erasure of personal data;
- Security of processing, notification of personal data breaches, logging and documentation;
- Definition and strict limitation on recipients or categories of recipients of the personal data, further processing and onward transfers (which includes the assessment of access to data transferred by other public authorities in the third country);
- Enforceable rights for data subjects, including effective administrative and judicial remedies.

The Commission has received mandates to start negotiating agreements with eight countries on behalf of the EU – Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey – on the exchange of information, including personal data, with Europol. A mandate for a similar agreement with New Zealand has also been requested. The ECB reiterates its position on the need for such negotiations to duly take into account the EU data protection *acquis* and the specific regime applying to the processing of personal data by Europol. It is paramount that any future agreement fully complies with EU primary and secondary law and remains consistent with the data protection provisions of the Europol Regulation. The ECB believes that, in order to better achieve this goal, a comprehensive framework agreement would constitute a most

useful tool, that would clearly define our standards vis-à-vis third-country authorities eager to enter into cooperation with Europol.

While facilitating the necessary cooperation and exchange of information with third countries, the conclusion of these agreements must not lead to any inconsistency nor any parallel regime regarding the transfer of personal data to third countries and international organisations. I believe that exchanges between the JSPG and the ECB are particularly important in this regard, given the parliamentary involvement in the conclusion of such agreements.

Third countries are not the only entities with which Europol exchanges personal data. Indeed, information flow within the EU and the exchange of personal data among law enforcement authorities at the European level has also been a key focus of our most recent discussions. As provisions for “interoperability” through the interconnection of EU information systems are now being implemented, the ECB believes that special attention must be paid to interactions of this framework with Europol personal data processing.

As you know, the new rules establishing a framework for “interoperability” between EU information systems in the field of borders and visa (Regulation (EU) 2019/817) and in the field of police and judicial cooperation, asylum and migration (Regulation (EU) 2019/818) were adopted by the Council and Parliament in May 2019. These Regulations entered into force on 11 June 2019. The various interconnection components, however, require technical implementation, which is why the date of the operational use of the components is to be determined by the Commission. It is expected that they would be available by 2023.

The European Data Protection Board (EDPB) has reiterated in November 2019 its views that the “Interoperability” (interconnection) Framework poses enormous risks to the rights for privacy and data protection. The EDPB considered that, by interconnecting IT systems so as to enable cross-access processes that are difficult to account for, the legislator has disregarded its own enshrined principle of Data Protection by Design and by Default. The EDPB expressed its deep concern with regards to the challenges the “Interoperability” Framework poses for compliance with the principle of purpose limitation, data subjects’ rights and additionally the fulfilment of supervisory tasks of the data protection authorities.

These concerns are shared by the ECB. Regulation 2019/818 also applies to Europol data, to the extent of enabling them to be queried simultaneously alongside the EU information systems referred to. As regards personal scope, the Regulations apply to persons whose personal data may be processed in the EU information systems referred to and/or in the Europol database.

The ECB has debated on the European Search Portal (ESP) which, by establishing a single search interface, aims at enabling its users to launch concurrent queries in all the respective information systems as well as some Europol and Interpol databases. The access regime for this portal builds on the existing access rights and is to be implemented through the use of different access profiles. We consider that, when it comes to Europol processing, issues related to access privileges and “hit/no hit” results on the basis of the respective underlying databases shall be further scrutinised, in order to avoid any unauthorised or backdoor access.

Because the European Search Portal is able to provide an overview of all the information relating to a certain third country national that is available in the connected EU information systems as well as Europol data and Interpol systems, the ECB also believes it requires much caution and attention as concerns its impact on data subjects’ rights deriving from search tools, in particular with regard to potential for discrimination of individuals. It is important to recall that search results shall not unduly or unlawfully result in legal effects concerning data subjects, or similarly significantly affecting them.

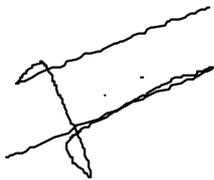
It is paramount that these concerns and considerations are taken into account while the technical implementation of the overall “Interoperability” Framework is being rolled out. Here again, I believe that parliamentary scrutiny has a key role to play and the ECB is committed to contribute with its expertise, within the remits of its competences. We have recently considered that the effective exercise of the data subjects’ rights vis-à-vis several systems and data controllers, as well as the coordination of supervisory activities, shall be subject to a particular attention by ECB members.

The current policy agenda at the EU level calls for a continuation of our exchanges on the many data protection issues that need to be addressed by both the legislator and the supervisory authorities in the near future. The ongoing discussion on the future relation between the EU and the UK, and the need for any security partnership to rely on a strong data protection framework, deserves particular attention. In addition, the recent announcement of the European Commission of its intention to revise the Europol mandate, notably to bring Europol’s data protection rules in line with current EU rules, will also be one of our top priorities. I hope that we will soon be able to meet in person, in order to debate on these essential matters.

To conclude this letter, as in my previous reports before you, I would like to reiterate that the ECB is committed to pursue its tasks in an open and transparent manner, and make the application of the Europol data protection framework a reality for both the Agency and data subjects. We very much welcome the oversight of the Joint Parliamentary Scrutiny Group on these important issues, and I would like to assure you of the Board’s willingness to bring all the information and assistance possible.

Yours sincerely,

François Pellegrini
Chair

A handwritten signature in black ink, appearing to be 'FP', written over a faint rectangular box.