

From: [REDACTED]
ZERDICK Thomas <thomas.zerdick@edps.europa.eu>;
To: [REDACTED]
Sent at: 07/06/22 18:48:46
Subject: RE: 2022-0484 Europol draft MB Decision - outcome of meeting with Europol

Dear Thomas, [REDACTED]

[REDACTED] spent 3 hours today discussing with Europol our comments on the draft MB Decisions. Here are the main take aways:

- As they want to adopt the MB Decision on the day of entry into force of the ER, **they had hoped they could not consult us formally before adoption.** We restated our position (clearly explained in our written comments of 12 May). They will consult COM legal service.
- **Scope of Art. 18a.** We had a long discussion on the scope of Art. 18a:
 - o First on the basis of their assumption that contributor could share the data with Europol without specifying the request ex ante. We made clear that this was not compliant with the wording of Art. 18a, where **the starting point is a request in the context of a specific ongoing criminal investigation.** They agreed to delete this sentence from the MB Decision on Art. 18a.
 - o Second on **the definition of "specific criminal investigation"**. They explained that they are planning on having something similar to an opening order that would clarify purpose/scope of the request, participants, etc. We pointed to the fact that, while we understand their approach (specificity is defined at Europol level in order to meet the "cross border" element) and see having Opening Orders as a useful tool to define the scope of the processing, we had concerns that it would then be Europol defining the scope of the request instead of the contributor as defined under Art. 18a. They will further reflect on this aspect.
 - o Third on **their interpretation of Art. 18a, as being another derogation to the general rule limiting them to process data with DSC only** thus using Art. 18a only as an anti chamber to processing under APs, similar to Art. 18(6a). We explained that we were discussing internally as there could be another interpretation, which would not be based on the nature of the data (with or without DSC) as trigger for application of Art. 18a, but rather on the needs of a "specific ongoing criminal investigation" (as indicated in the title). For them, this second interpretation would mean that processing without a DSC would then become the rule. They didn't understand that this would rather be limiting them further in terms of what they can do with the data. We said we would come back to them once we have a definitive position.
- We restated the **need for defining criteria that would justify the use of Art. 18a** (assessment that the use of the derogation is necessary and proportionate) and Art. 18(6a) ("strictly necessary"). The discussions showed that they intend to only refer to operational arguments (if a contributor decides to share the data with them, this is necessary and proportionate). Discussions also showed that they had in mind a quite automatic interpretation of Art. 18(6a), that they intend to apply whenever a contributor send data without a DSC. We stressed that these articles were derogations to the general rules, their application could not be automatic.

It is not clear whether they will come back to us for a third round of discussion. It is thus likely that we will have to raise our concerns and take position in an Opinion, once the MB

Decision will be adopted (or before if they finally opt for formally consulting us).

Best,
[REDACTED]

From: [REDACTED]
Sent: 03 June 2022 13:22
To: ZERDICK Thomas <thomas.zerdick@edps.europa.eu>; [REDACTED]
[REDACTED]
Subject: 2022 0484 Europol draft MB Decision preliminary considerations

Dear all,

In view of our meeting of this afternoon, I have indicated in the main document we shared with Europol how they have implemented our comments and I have added some preliminary remarks.

It becomes clear from the modifications in the draft MB Decision on Art. 18a that they interpret this article as a pre filtering chamber where they could store merge datasets without DSC for the whole duration of the investigation in order to extract data and further input it into the EAS. So a derogation to Art. 18(6a), which is already a derogation to Art. 18(5). We'll have to take a position on this point.

Best,
[REDACTED]