EUROPEAN DATA PROTECTION SUPERVISOR

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Subject: Invitation to the Seventh JPSG meeting on 28-29 September 2020

Dear Mr. López Aguilar,
Dear Mrs. Mittag,
Dear Mr. Pistorius,

The seventh meeting of the Joint Parliamentary Scrutiny Group ("JPSG") will exceptionally take place by remote participation due to the measures related to the Covid-19 pandemic.

I was asked to present to the JPSG - through this written contribution and by my intervention in a panel on 28th of September 2020 - my report on the supervision of Europol between March and September 2020 with a special focus on the Covid-19 crisis.

Let me start recalling the role of the EDPS as defined by Regulation 2016/794 (the "Europol Regulation"). According to Article 43 of the Europol Regulation, the EDPS is the supervisor of Europol. In that capacity, the EDPS shall monitor and ensure the application of the provisions of the Europol Regulation relating to the protection of fundamental rights and freedoms of natural persons with regard to the processing of personal data by Europol. The EDPS shall monitor and ensure that Europol notifies without undue delay to the EDPS and to the competent authorities of the Member States concerned, any personal data breach. The EDPS shall monitor the communication of a personal data breach to the data subject according to Article 35 of the Europol Regulation. The EDPS shall also advise Europol and data subjects on all matters concerning the processing of personal data. To that end, the EDPS has, in particular, the duty to conduct inquiries and advise Europol either on his own initiative or on a basis of a complaint, and to hear and investigate complaints. EDPS staff also holds regular meetings with Europol Data Protection Officer and his team in order to ensure a smooth and continuous collaboration. As the personal data processed by Europol are for a large part shared by Member States, the EDPS shall act in close cooperation with national supervisory authorities on issues requiring national involvement. The EDPS thus participates actively to the meetings of the Europol Cooperation Board, held twice a year.

The extraordinary circumstances we live in since March, which led to a general lockdown and telework of my staff and of the staff of Europol, have not fundamentally altered the way how the EDPS supervises Europol. Bi-monthly meetings with Europol Data Officer and his team were replaced by online meetings and held more frequently (every two or three weeks) in order to follow up ongoing cases but also to discuss new issues arising from the crisis. We paid specific attention to the ability of Europol to answer, within the legal deadlines, to data subjects' access requests. Furthermore, we did not neglect our daily supervisory activities. We have for instance launched an inquiry into the use of Clearview AI by Europol, after a press release revealed the use of this software at an event organised at Europol that gathered national law enforcement authorities. We liaised with other national supervisory authorities investigating the use of Clearview AI by national law enforcement authorities. The EDPS got reassurance that Clearview AI is not used for day-today activities of Europol.

The COVID-19 crisis had an impact on the files involving the exchange of EU-restricted documents, which were suspended for a few weeks. In addition, because of the travel restrictions, I decided to postpone the 2020 annual inspection, scheduled for 11-13 May, to the month of November 2020. In light of the recent uptake of the virus, we are now looking for alternative solutions to carry out this key supervisory activity remotely.

In the **2020-2024 EDPS Strategy**, we committed to follow the evolution of data processing practices and technology that may have an impact on privacy and data protection. In particular, the EDPS intends to closely monitor the use of new tools involving data analytics and artificial intelligence by Europol and other agencies in the Area of Freedom Security and Justice, in compliance with the mandate assigned to them by law, while promoting solutions to protect individuals' rights and freedoms.

Thus, I would like to draw your attention to the supervisory activities of the EDPS performed in relation to the processing of large datasets by Europol.

Over the past years, Europol started receiving large and unfiltered datasets from Member States and its operational partners, or collecting them from publicly available sources (the so-called Open Source Intelligence - OSINT). The nature of the data collected at national level in the context of criminal investigations and criminal intelligence operations is not limited anymore

to targeted data collection but also increasingly includes the collection of large datasets. More digital content is generated and thus available for law enforcement in the context of criminal investigations, which, in turn, impacts the methods used to produce criminal intelligence. The processing of large datasets has become an important part of the work performed by Europol to produce criminal intelligence and support Member State's law enforcement authorities.

In that regard, the EDPS identified three areas that, in my view, deserve your attention:

The **first** area relates to the fact that, under the Europol Regulation, Europol can only process information about certain categories of individuals, namely suspects, contacts and associates, victims, witnesses or informants, and certain categories of data. National law enforcement authorities do not have such constraints under Directive (EU) 2016/680[1] (the "Law Enforcement Directive"). The problem is that the volume of information Europol receives in some cases is so considerable that its content is often unknown until the moment when analysts extract the relevant entities for entry into the corresponding database. These datasets are further stored throughout the criminal investigation or criminal intelligence operation in order to investigate new leads.

At the meeting requested by Europol in April 2019 between Executive Director Catherine de Bolle and the European Data Protection Supervisor, Giovanni Buttarelli, Europol informed the EDPS about this problem. The EDPS has investigated this matter for one year and concluded that **it is highly likely that Europol stores personal data on individuals for whom it is not allowed to do so and retains categories of personal data that go beyond the restrictive list provided in the Europol Regulation.**

In the course of this investigation, Europol has addressed many of the data protection concerns identified at the beginning of my inquiry but structural issues remain. **Thus, the EDPS has decided to admonish Europol**. Admonishments are meant to signal data processing activities that are not in line with the applicable data protection framework and to urge the agency to adjust its practices.

We now expect Europol, as responsible data controller, to devise effective mitigation measures that will both reduce the risks for data subjects, in line with the provisions of the Europol Regulation and secure Europol's operational capabilities. I have asked Europol to provide an action plan within two months and to inform me of the measures put in place to address the issue within six months. We understand that this problem might also be of interest for the EU lawmaker in the context of future legal framework.

The **second** area relates to the **processing of operational data for data science purposes**. I have started an inquiry on this matter when I discovered that while Europol had put in place strict policies with regard the processing of operational data for testing purposes, in line with the EDPS position, Europol was considering using operational data for the testing, development and training of algorithms. This initiative reflects the current trend - present also at national level - towards using automated processing techniques and algorithms in the law enforcement context. Taking also into account that the operational data of Europol originate from national law enforcement authorities, the EDPS wants to get a clear understanding of the data processing

[1] Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.

activities taking place in that regard at Europol and to verify that they rely on an appropriate legal basis.

Finally, the **third** matter relates to the **involvement of national criminal analysts in personal data processing activities taking place in Europol systems. In some fields,** Europol receives, from its operational partners, substantial amounts of personal data of which it should further share with competent national authorities. In order to tackle this issue, Europol is looking towards closer involvement of Member States' investigators to determine national priority criteria according to operational usefulness. However, **the Europol Regulation does not provide a clear legal basis that supports an analysis role for national investigators at Europol**, **even for thematic analysis purposes**. Thus, there are also no clear data protection safeguards in place to regulate such new data processing operations by Member States. These questions were discussed with Europol in the context of a prior consultation submitted under Article 39 of the Europol Regulation.

Finally, yet importantly, the EDPS continues to follow **closely the announced legislative changes** aimed at extending and strengthening the mandate of Europol. In this regard, there is ongoing exchange of information with the respective Commission services at expert level in order to better understand the objectives and the potential impact of these measures. I am looking forward to examining the legislative proposal later this year and will issue an opinion in accordance with Article 42 of Regulation (EU) 2018/1725.

I am looking forward to receiving your questions linked to this report during my remote intervention of this Monday, September 28th.

Sincerely yours,

[**E-signed**]

Wojciech Rafał WIEWIÓROWSKI