EDPS

EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data protection authority

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"Europol Joint Parliamentary Scrutiny Group"

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Introduction

- As the European Data Protection Supervisor, I am entrusted by the European Parliament and by the Council to ensure the protection of fundamental rights of EU citizens. It is with this aim and this mandate that the EDPS approaches its supervision of EU institutions, agencies and bodies, and its independence and objectiveness in this task, which are crucial in the checks, and balances system.

- With this in mind, I would like to present to you an update on the EDPS' supervisory activities in relation to Europol in the past months, with particular focus on the issues that I believe are of particular interest to this committee.

Information on the last inspection

- In September 2021, the EDPS conducted its first in-person inspection since the pandemic. The team consisted of 10 members, including 3 national experts from national Supervising Authorities of Member States. Appointed with consultation with EUROPOL Co-operation Board and EDPB. The inspection was considerably more targeted in nature than previous ones, auditing three different areas that intersected Europol's investigation of large criminal communications networks. The EDPS inspection team looked at:

  o Europol's DPIA process;

  o Europol's suite of machine learning tools that it is developing to process data in the future;

  o Europol's current operational structure, its current tools and its way of working with these datasets, in the absence of ML tools.

- The results of the inspection are now subject to analysis – they will definitely influence the plan of supervisory actions of the EDPS for 2022 - and they will be included in the inspection report.

Follow-up to the EDPS' admonishment decision of 17 September

- Ms de Bolle has already said a few words on the current state of play regarding the practices of processing large datasets without Data Subject Categorisation - the so-called big data challenge - that has resulted in the EDPS' use of corrective powers, an admonishment (issued last year in September).
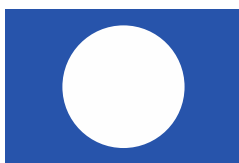
- Let me start by reiterating what is fundamentally at stake in these discussions: the risk that people, whose link with criminal activity is not established, are inserted into Europol's systems. To prevent such risk, the legislator included strict safeguards in the Europol Regulation. Namely by including Annex II.B, the legislator created a requirement that data shared with Europol should only concern individuals who have a link with criminal activity. This is because transmitting personal data from the level of national police to Europol, where data will be shared with other LEAs and crosschecked with information coming from other countries, significantly magnifies the potential impact and risks for the data subject.

- I take note that the legislator, including the European Parliament, believes this principle should be maintained as it has been reflected in the works on the draft review of the Europol Regulation, albeit with certain exceptions in this regard.

- In line with my initial remarks, I would like to stress that the EDPS is tasked with enforcing compliance with this applicable legislative framework as it currently stands, protecting fundamental rights when Europol fulfils its core tasks. Against this background, the EDPS is closely monitoring the follow-up to the admonishment. As part of these proceedings, we have had regular exchanges with Europol with regard to the implementation of the action plan, to ensure that the measures put in place fully address the above-described risks with as little delay as possible.

- **12 months after the admonishment**, I take the developments that Ms de Bolle presented as a confirmation that the EDPS' action last year was necessary. The EDPS is satisfied with a number of the measures being put in place (flagging, labelling, and a separate secure environment for storing large datasets) with one significant exception I will mention later.

- This committee has been updated regularly on the measures taken within the action plan requested by the EDPS and we confirm our satisfaction with the progress made. In the next months, the EDPS will continue to monitor and verify if the measures put in place are being implemented correctly.

- **12 months after the admonishment,** we need to ensure however that the risk of processing data of individuals not linked to criminal activity is significantly decreased. This is why the EDPS has been requesting retention periods as they are critical, as such processing constitutes a potential breach of Article 18(3) and (5) and Annex II B ER, which reflects on a core principle of the Europol Regulation.

- In this respect, I confirm that in July the EDPS presented Europol with the formal Preliminary Analysis. It was stated that in the absence of the retention periods, the EDPS will have to enforce them through the means of corrective power, ordering Europol not to process data stored longer than what the Regulation could allow for, in particular in the light of the proportionality and necessity principle.
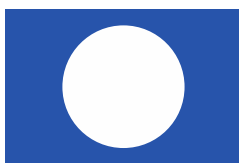
- As Ms de Bolle said, last week the EDPS received Europol's reply with a proposed way forward based on the principles of the currently negotiated draft Europol Regulation recast. While the EDPS, as an authority bound by existing legislation, cannot justify its actions solely on the basis of the provisions that might become law, we welcome the willingness of Europol to start applying retention periods and to do so as soon as possible.

- The EDPS will analyse in detail the proposed course of action (and will come back to Europol once a legal analysis of the possible next steps are concluded, with the goal - which I am now glad to say we share with Europol - to limit the risks of processing data of individuals not necessarily linked to a criminal activity.

Supervision by the EDPS of the use of AI by Europol

- I would now like to move to the use of Artificial Intelligence by Europol and the EDPS actions in this regard. Since February 2021, the EDPS has been in close contact with Europol about the use of some pre-trained machine learning models for purposes of operational analysis.

- In order to make sure that Europol correctly addresses data protection risks linked to the use of AI, on **5 March 2021**, the EDPS issued an Opinion on a prior consultation requested by Europol on the development and use of machine learning models for operational analysis. The Opinion concluded that the EDPS was not yet in a position to assess the compliance of the processing operations but included a series of recommendations to ensure Europol would avoid breaching the applicable law.

- Following further exchanges, including exchanges at the annual inspection of 28-29 September that specifically looked into that topic, we can say that Europol is aware of the capacities and limitations of machine learning models and intends to mitigate the risks through a diligent development process. In the next weeks, the EDPS will present its final guidance on the measures that Europol has proposed to mitigate data protection risks. The EDPS will thus continue to work closely with Europol on this topic.