

Meeting on Europol's MB Decisions on Art. 18(2), 18(6), 18(6a) and 18a of the amended ER

Brussels

Friday, 2 September 2022, at 15:00

Purpose of event

Meeting requested by the Chairman of Europol's Management Board ('EMB') further to the letter addressed to him on 15 July 2022 with regard to the adoption of the MB Decisions without the prior consultation of the EDPS. In this letter, the EDPS has stated that *'In case you [i.e. the Chairman of EMB] do not inform the EDPS by 26 August 2022 that the Management Board has repealed the four Decisions, I would be compelled to request their annulment by the competent Court for violation of the essential procedural requirement of prior consultation of the EDPS'*.

According to the meeting proposal, the purpose of this meeting is *'to explore any possible avenue to overcome the current situation and avert the occurrence of a judicial procedure'*. The Europol Executive Director and the MB Member for the Commission have also expressed their willingness to join this meeting.

Main messages

[to be added when agreed]

Case officer / contact point

[Redacted]

Background

o Participants:

o On **Europol's side**:

- Mr Bonet: Chairman of Europol's MB;

- Ms De Bolle: Europol's ED;

- [Redacted] Governance Directorate;

- [Redacted] and

- Ms Pariat: DG - DG Home

o On **EDPS side**:

- Wojciech Wiewiórowski: EDPS;

- Kazik Ujazdowski: Member of the Cabinet of the EDPS;

- Thomas Zerdick, HoU S&E

- [Redacted] S&E

○ **Timeline of events relevant to the meeting**

- **On 5 July 2022** ([A\(2022\) 2573](#)), the Chairman of the EMB transmitted by letter to the EDPS **four MB Decisions** implementing Articles 18 and 18a of the amended Europol Regulation **for consultation**. However, and contrary to the informal advice offered via written comments and dedicated meetings (see in detail below), the four MB Decisions brought before the EDPS for consultation **were already adopted** and hence the **essential procedural requirement** of prior consultation of the EDPS **was not met**. In this letter, the MB took note that the EDPS had received the first drafts of these Decisions and that subsequent draft versions had been prepared by Europol to reflect the informal comments provided by the EDPS. The MB stated also their commitment **to duly consider any further observation the EDPS** may wish to make and **revisit its Decisions as appropriate**.
- On **15 July 2022** ([Our ref.: 2022-0703 - D\(2022\) 1766](#)), the EDPS referred the case to Europol by letter and urged Europol to repeal the MB Decisions as the essential requirement and safeguard of the prior consultation with the EDPS has not been complied with. The EDPS asked Europol to inform him **by 26 August 2022** that the Management Board has repealed the four Decisions, otherwise he would be compelled to request their annulment by the competent Court for violation of the essential procedural requirement.
- The EDPS also referred the matter to the European Parliament ([D\(2022\) 1790](#)), the Council ([D\(2022\) 1791](#)) and the Commission ([D\(2022\) 1789](#)).
- On **23 August 2022** ([A\(2022\) 2946](#)), the Chairman of the EMB proposed to hold a meeting with the EDPS *'in order to explore any possible avenue to overcome the current situation and avert the occurrence of a judicial procedure'*. The Europol Executive Director and the MB Member for the Commission have also expressed their willingness to join this meeting.
- On **24 August 2022** ([RE: @EXT: EDPS letter dated 15 July 2022 \(C2022-0703\)](#)), the EDPS accepted the proposal for a meeting, while the Chairman of the EMB on **25 August 2022** ([A\(2022\) 2972](#)) reiterated *'his confidence that it is possible to avert the occurrence of a judicial action and its consequences, and trusts that this discussion, related to the entry into force of the Amended Europol Regulation, is a unique opportunity to build a renewed relationship on a consolidated basis between Europol and its data protection Supervisor'*. The Chairman also referred to his experience as a chief of police in France and highlighted that he is convinced that operational needs can always be conciliated with data protection legal requirements, and that adapted legal solutions can stem from an open and trustful discussion between police forces and their supervising authorities without putting at risk police work targeting organised criminal groups and terrorists.
- **Timeline of informal cooperation** with Europol on MB implementing Decisions ([2022-0454](#))
 - On **13 April 2022**, Europol shared a set of four MB Decisions respectively implementing Article 18(2), 18(6), 18(6a) and 18a of the new Europol Regulation. According to the DPO's cover email he was pleased *'to launch a consultation with you (EDPS) on four draft MB Decisions on the conditions related to the processing of personal data on the basis of Articles 18(2), 18(6), 18(6a) and 18a of the amended Europol Regulation. Please note that, providing that the amended Europol Regulation*

will be applicable by then, the MB intends to adopt the enclosed Decisions at its 28-29 June 2022 meeting'.

- On **29 April 2022**, the EDPS and Europol held a first meeting at staff level in order to clarify the new process and data flows. Minutes in the form of bullet points were shared with Europol on 3 May 2022 ([D\(2022\) 1108](#), [Meeting on Europol MB Decisions 03 05 2022](#)), to which Europol made no comments.
- On **16 May 2022**, the EDPS sent written informal comments on the draft MB Decisions, followed by a meeting at staff level on the same day to explain our comments. In the informal comments shared with Europol ([D\(2022\) 1249](#) , [Europol MB Decisions informal comments EDPS](#)) it is explicitly mentioned that *'This document is meant to provide initial feedback on the four Management Board decisions. It constitutes a purely informal advice. This informal consultation by Europol cannot replace the formal consultation of the EDPS that can only take place once the new Europol regulation has entered into force. The EDPS will strive nevertheless to provide a swift formal reply to that future consultation building on the present and future informal exchanges. In order to be as constructive as possible and in the interest of timing the EDPS has prepared the comments below, as well as revised versions of the decisions (in track-changes, attached). Please note that this way of working should not be meant as constituting a precedent, and is without any prejudice to any further comments or measures by the EDPS'*.
- On **31 May 2022**, Europol shared a second set of drafts integrating comments received from Member States and from the EDPS ([A\(2022\) 2109](#)).
- On **7 June 2022**, the EDPS and Europol held a third meeting at staff level to discuss EDPS informal comments on the second set of draft MB Decisions. Our main comments can be found in the following document, which was presented during the meeting ([Europol MB Decisions informal comments EDPS - in2ndraft](#)). The following email informing HoU and legal service of the main take-aways of the meeting can serve as a kind of minutes ([Takeaways from meeting of 7 June - RE: 2022-0484 Europol draft MB Decision - outcome of meeting with Europol](#)). In this email, it is one more explicitly stated that we informed Europol that these meetings aim at offering informal advice and cannot replace the formal consultation of the EDPS *'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'*.
- On **22 June 2022**, a fourth short meeting took place ([D\(2022\) 1539](#)), where Europol thanked us for the assistance provided during the process. The issue of the formal consultation was once more raised but we do not have any evidence of this.
- It has **to be highlighted that Thomas** had several **informal phone exchanges with Europol's Deputy ED - Governance** [REDACTED] where he made it abundantly clear that a) our comments made at this stage were informal and b) that we expected a formal consultation on the draft/provisional MB decisions.



- Europol **linked the case** regarding the adoption of the **MB decisions** (Case 2022-0703) with the **inquiry on the big data challenge** ([2021-0699](#)). In their reply dated **19 August 2022** ([EDOC -#1247646-v9A-Letter from Europol to the EDPS in response to the EDPS request on the implementation of the EDPS Decision issued in January 2022 \(002\)](#)) to an EDPS letter dated **15 July 2022** and requesting clarifications on Europol's second implementation report of the EDPS order ([Letter Mrs De Bolle - 2019-0370 and 2021-0699 \(e-signed\)](#)), the Agency stated that due to the pending discussion with regard to the MB decisions **they are not in position to comment** about (i) the **further submission of implementation reports** under the EDPS decision issued to Europol on 3 January 2022 and (ii) the erasure of datasets lacking DSC at 3 January 2023, when the 12 months referred to in the EDPS order issued on 3 January 2022 will expire.
- **Potential scenarios Europol might bring to the table**
 - **Consider the issue arisen as the outcome of a 'misunderstanding'**

Under this scenario, Europol could argue that it was not clear to them that they should formally consult the EDPS on draft (and not on adopted) MB implementing Decisions.

Indeed the Chairman of the EMB in his cover letter (also reflected in the body of the MB Decisions) stated that: *' the Board took note that the **EDPS had received the first drafts** of these Decisions on 12 April and that **subsequent draft versions had been prepared** by Europol with the support of both MB Working Groups **to reflect the comments provided by your Office** both in writing and during dedicated meetings ... Further, having noted that the **EDPS considered that the formal consultation could only take place upon the entry into force** of the referred amending Regulation, the Board invited its Chairperson to transmit its four Decisions to the Supervisor forthwith after the meeting. With this in mind, **I am pleased to enclose the referred MB Decisions...** As reflected in the respective recitals, the **MB will duly consider any further observation** you may wish to make and revisit its Decisions as appropriate'.*

Furthermore, Europol keeps arguing that according to the advice offered by the legal service of the European Commission, the implementing MB Decisions should have been in place as of day 1, so there is no legal void created in the processing of operational data that could jeopardise national investigations and possibly court proceedings.

However, such an argumentation is not valid/convincing, as it is common knowledge (common in administrative laws and procedures around the European Union) that the essential procedural requirement of prior consulting the supervisory authority (or any administrative body) in order to be effective takes place before a legal act is adopted. The procedure is in place to protect the substance (in our case the data subjects' right to data protection) and is not just a good practice that the Agency should follow.



In any event, the correct way for Europol to proceed would have been:

1) to explain in detail why there would be a 'legal void', also considering that the new provisions mostly 'legalise' internal practices, already publicly exposed by the EDPS. No explanations have been provided, however;

2) in case the MB Decisions were indeed to be considered essential to avoid legal risks, Europol should have simply waited a few days the receipt of the EDPS opinion before adopting and immediately applying the new provisions of the amended Europol Regulation.

As we have referred the issue to the Commission, the European Parliament and the Council, **it does not appear appropriate not to follow up** based only on such clarifications.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- **Suggest to suspend the application of the MB Decisions until the EDPS issues his Opinion**

This proposal might be politically perceived as a sign of good will and appeasement, but it does nothing to remedy the breach of the essential procedural requirement of *prior* consulting the supervisory authority. Suspension does not call into question the unlawfulness of **adoption** of the MB decisions, and therefore is not as strong as repealing the MB Decisions. According to Europol's own reading, suspension would mean that the risks of 'legal void' would arise again, since not just the existence but also the actual implementation of such decision and the safeguards contained therein should be considered 'essential' to apply the amended ER. [REDACTED]

[REDACTED]

Suspension is the approach that Frontex followed, when they received the EDPS Opinions relating to the Management Board Decisions adopting rules on the processing of personal data by the Agency. However, the legal framework for Frontex MB Decisions is not comparable to the one of Europol since Article 41(1) EUDPR that applies with regard to the adoption of the Frontex MB Decisions provides for the information of the Supervisor and does not impose an obligation to prior consult EDPS.



- **Suggest to address all our comments in the MB Decisions and amend them before the deadline for filling an action for annulment elapses (ddl 15 September 2022)**

