

**Speaking Note for the Public Hearing before the LIBE  
Committee of the European Parliament on the Future  
of Europol, 10 April 2007**

Session III; The applicability of a general framework on  
data protection

Sub session: *Europol framework for the transfer of data  
towards third countries*

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Ladies and Gentlemen,

With this presentation I would like to give you an overview  
on two issues:

Firstly, I would like to make you familiar with the present  
legal framework that Europol applies for the transfer of  
data stored at Europol to Third partners.

Secondly, I will shortly outline the main elements of the  
legal framework which is foreseen by the Draft Council  
Decision for that purpose.

## **The present situation**

Art. 18(1)2 of the Europol Convention provides that Europol may transmit personal data to third countries only where “an adequate level of data protection is ensured”.

There is only one exception to this rule, the so-called “exceptional clause” (Art. 18(1) 3). This clause, which has been changed by the third protocol amending the Europol Convention (‘Danish Protocol’<sup>1</sup>), which shortly will enter into force, provides for the possibility to exchange personal related data in “*exceptional cases where (the Director) considers the transmission of the personal data to be absolutely necessary to safeguard the essential interests of the Member States concerned*”. The clause now allows Europol, under exceptional circumstances, to transmit personal data to countries not guaranteeing an adequate level of data protection. My colleague, Mr. Donos, will explain you in greater detail what safeguards Europol has in place before such a decision is taken.

Europol’s legal framework is particularly demanding where cooperation with third countries involving the transmission of personal data by Europol is concerned. The main requirement laid out by the Europol Convention

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<sup>1</sup> OJEC 6/1/2004, C2/1.

is clearly that the third country should ensure “an adequate level of data protection”.

The Europol Convention provides only little guidance on how to assess the fulfilment of the “adequacy criterion”. Art. 18(3) merely states that account shall be taken of “*all the circumstances which play a part in the communication of personal data*”, in particular the nature of the data, the purpose for which it is intended, the duration of the intended processing and the general or specific provisions applying to the third State.

It needs to be said that is not a ‘gap’ specific to Europol’s legal framework. Other European instruments containing similar or identical provisions do not provide much more guidance on the way this assessment should be conducted:

- The Council of Europe 108 Convention for the protection of individuals with regard to automatic processing of personal data does not define “equivalent protection” or “adequate protection”<sup>2</sup>.
- Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the

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<sup>2</sup> Art. 12(3)a of the 108 Convention provides that a Party cannot restrict transmission of personal data to a Party providing an “equivalent protection”. The 2001 Protocol to the 108 Convention is stricter in that it provides that each Party shall in principle authorise transfer of personal data to recipients under the jurisdiction of a State that is not Party to the 108 Convention only if that State ensures an adequate level of data protection.

free movement of such data<sup>3</sup> does not define the expression “adequate level of data protection”<sup>4</sup> either. In a wording reminding of Article 18(3) of the Europol Convention, Art. 25(2) of the Directive provides that fulfilment of this criterion shall take into account all the circumstances surrounding a data transfer operation, in particular the nature of the data, the purpose and duration of the proposed processing, the country of origin and country of final destination, and the rules of law in force in the third country.

- Also the most recent version of the proposal for a Council Framework-Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters provides in its “whereas clause” number 12 merely that “*where personal data are transferred from a Member State of the European Union to third countries or international bodies, these data should, in principle, benefit from an adequate level of protection.*”

Assessing the fulfilment of the adequacy criterion thus clearly requires the development of an empiric approach

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<sup>3</sup> OJEC 23/11/1995, C281/31.

<sup>4</sup> Art. 25(1) of the Directive compels Member States to limit transmission of personal data to third States which ensure an adequate level of data protection. Under Article 25(6) of the Directive, the Commission may recognise that certain countries offer adequate protection (such decisions have been taken with regard to Switzerland, Canada, Argentina, Guernsey, the Isle of Man and US enterprises having signed up to the Safe Harbor scheme).

since no general, theoretical definition of what “adequate data protection” actually constitutes has been developed so far. Europol’s approach has to date been the following:

- Ratification of the Council of Europe 108 Convention is seen as a valuable indication that a third country fulfils the adequacy criterion, but is not considered as sufficient in itself: the applicable legislative framework still needs to be assessed.
- This assessment is made first on the basis of answers provided by third countries to the data protection questionnaire sent by Europol (see Annex). This questionnaire focuses on the way the basic data protection principles (lawfulness and purpose of processing, time limits...) are reflected in national law.
- A data protection visit of the potential cooperation partner is then conducted, to see how the relevant legislation is actually implemented.
- On this basis, and pursuant to the Council’s declarations concerning the relations between Europol and third States and non EU related bodies<sup>5</sup>, a data protection report is drafted and submitted to the MB, which consults the JSB. The

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<sup>5</sup> OJEC 13/4/2000, C106/3.

JHA Council has the last word on whether Europol should initiate negotiation of a cooperation agreement including the transmission of personal data with the country concerned.

- During the course of negotiation, possible data protection related concerns identified in the data protection report and/or in the JSB opinion can be remedied by inserting 'tailored-made' provisions in the model agreement.

Even after the cooperation agreement for the exchange of personal related data has entered into force by both parties, data communicated to Europol by a Member State may only be communicated to the Third partner in individual cases with the concerned Member States' consent, which may, however, also be given prior to the exchange in general terms (Art. 18(4) Europol Convention).

### **The Draft Council Decision**

One of the main changes which the Draft Council Decision envisages is that the exchange of personal data between Europol and its future Third partner will only be permissible if the Union has, prior to the exchange, concluded an international agreement with that third

country or international body which also permits the exchange of personal data on the basis of an assessment of the existence of an adequate level of data protection (Art. 24(1)).

The draft Council Decision also foresees an “exceptional clause” for the transmission of data in urgent cases (Art. 24(2)). In this case, the Director has to weigh the risks stemming from a non-adequate level of data protection against the risks for the interests of Member States should the data not be sent. Art. 24 (3) of said decision also lists the circumstances the Director has to take into account when assessing the adequacy of the data protection level.

The necessity to obtain the consent of the Member State which communicated the data persists also under the draft Council Decision.

While on the one hand the idea to make Europol’s external relations dependant on the existence of a agreement between the Union and the Third partner in question could lead to a greater coherence in the Unions external relation, especially in questions of data protection, it is also clear that the negotiation and finalisation of these agreements are even more time-consuming than in the present mechanism for the

conclusion of such agreements between Europol and the Third partner concerned.

This concludes my introduction into Europol's present and possible future legal framework for the exchange of personal data with Third partners. My colleague, Mr. Donos, will now inform you about the practical implementation and application of this framework.

Thank you.

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