



**DIRECTORATE GENERAL FOR INTERNAL  
POLICIES**

**POLICY DEPARTMENT  
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS** 

***Justice, Freedom &  
Security***

The data protection regime applying  
to the inter-agency cooperation and  
future architecture of the EU  
criminal justice and law enforcement  
area

# Presentation by

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## Setting the scene: the data protection legal framework and institutions in the EU criminal justice and law enforcement area

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- **The legal framework:** Article 16 and Declaration 21 TFEU; the Data Protection Framework Decision; Regulation 45/2001;
- **The agencies involved:** Europol, Eurojust, the EPPO, EJM, OLAF;
- The role of the **EDPS**.

### KEY FINDINGS

- Art. 16 TFEU introduces a data protection right and asks for «*independent*» control but Declaration 21 justifies «*specific rules*»;
- The Framework Decision failed to fulfil its (original) purposes;
- Regulation 45/2001, on the EDPS, is an old first-pillar instrument in need of replacement;
- Europol and Eurojust most notably fail to fulfil the «*independent control*» asked by Art. 16 TFEU. Their substantive data protection rules are also in need of amendment.

## Inter-agency cooperation:

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- All agencies routinely exchange personal information both among them and with third countries or international organisations. To this end they have entered formal written **bilateral** agreements.
- **A clear set of data protection rules in all bilateral intra-EU agencies' cooperation agreements is not to be found. Given that the same agencies lack a common data protection regime and a common data protection monitoring mechanism, this is an important legal gap that needs to be remedied.**
- Europol, Eurojust and presumably OLAF apart from bilateral agreements also have the legal power to conduct single, isolated personal data exchanges with third countries (including JITs). These personal data exchanges are only **partially charted** and take place **unmonitored** by any (single, coordinated) data protection mechanism.

# The EU data protection reform package:

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Today the whole EU data protection edifice is under regulatory restructure:

- The (draft) General Data Protection Regulation;
- The (draft) Police and Criminal Justice Data Protection Directive;
- The (draft) Europol Regulation;
- The (draft) Eurojust Regulation;
- The (draft) EPPO Regulation;
- The European e-Justice Portal.

**(STILL MISSING)** *the amended Regulation 45/2001 on the EDPS.*

## Possible future scenarios for the EU criminal justice and law enforcement area data protection architecture

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- The “Unified Model” approach: the draft Police and Criminal Justice Data Protection Directive **replaces** the agency-specific data protection provisions
  - Least likely to occur, due to current wording of the Directive and legal restrictions (not clear whether a Directive can regulate EU agencies).
- The “Segregated Model” approach: The draft Police and Criminal Justice Data Protection Directive **does not replace** the agency-specific data protection provisions
  - Fragmentation, concerns on adequate data protection, particularly with regard to “independent” supervision.

## **Possible future scenarios for the EU criminal justice and law enforcement area data protection architecture**

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- An “interim Segregated Model”: the draft Police and Criminal Justice Data Protection Directive places a time limit for the replacement/adaptation of the agency-specific data protection provisions
  - Preferred to-date by the Parliament, but faces important pragmatic and legal difficulties (whether a Directive can regulate EU agencies, new Europol / Eurojust / EPPO instruments being negotiated right now only to be replaced soon).
- Regulation 45/2001 as an “alternative Unified Model”: an agency-specific data protection model that is however aligned under the EDPS?

## **Possible future scenarios for the EU criminal justice and law enforcement area data protection architecture**

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- Preserving the current data protection architecture (the “segregated model” continued): Regulation 45/2001, amended or not, does not apply to the EU criminal justice and law enforcement agencies
  - Risk of (continued) fragmentation while it is not certain that, even under revised legal regimes, the agencies themselves will warrant “independent” data protection supervision.
- Regulation 45/2001 is not revised; agency-specific data protection provisions supplement its current text
  - Most likely to occur in the immediate future: problematic, because Regulation 45/2001 is not a suited instrument to this end.

## Concluding remarks

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- Current fragmentation, legal problems and the new Art. 16 TFEU make **change imperative**;
- **The architecture proposed by COMM** (Regulation 45/2001 and its successor to be “*particularized and complemented*” by agency-specific data protection regulations; EDPS to hold the general monitoring role in cooperation with agency-appointed data protection officials) **makes sense**;
- The Parliament might need to examine closer Art. 16 TFEU:
  - Article 16 TFEU “**frees**” the Parliament thinking of data protection;
  - Article 16 TFEU asks for **effective, independent** oversight;
  - Data protection, and Article 16 TFEU, are **neutral** towards fragmentation;
  - Perhaps more importantly, Article 16 TFEU asks for **simple and straightforward individual access to justice**: clear and direct replies to questions of legal standing (who can sue data controllers in court), scope of judicial review (what can the judge assess), remedies available (monetary indemnity) and cost of the whole process.