

Opinion of the Joint Supervisory Body of Eurojust regarding data protection in the proposed new Eurojust legal framework

On 17 July 2013, the European Commission presented a proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust) together with a proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO)¹. The European Commission came up with both proposals at the same time not only due to the Article 86(1) of TFEU² and complementary competences. The new draft Eurojust Regulation clearly foresees that Eurojust will provide administrative support services to EPPO, including access to its Case Management System (CMS).

During its extraordinary meeting on 29 October 2013, the JSB discussed in detail all elements of the proposals having any impact from the data protection viewpoint. On the basis of this discussion a draft opinion was prepared by the JSB secretariat which was finalised during the meeting of the JSB on 14 November 2013.

Without prejudice to the possibility of further opinions regarding other aspects of these proposals, this JSB Opinion focuses on the possible impact that these new legislative initiatives will have on Eurojust's activities and its data protection regime.

The JSB welcomes the fact that the proposed Eurojust Regulation contains data protection provisions which are very much in line with the existing regime and take on board the core of it. Both Eurojust and its JSB have often underlined the robustness and suitability of its present tailor-made data protection regime, which offers a high level of protection of personal data and legal certainty for individuals, while at the same time respecting the mandate and operational needs of the organisation.

The JSB considers however that certain aspects contained in the proposed Eurojust Regulation should be reconsidered taking into account the data protection implications involved, in particular those related to the proposed application of Regulation 45/2001 to all processing operations at Eurojust as well as to the proposed supervision model.

¹ http://ec.europa.eu/justice/newsroom/criminal/news/130717_en.htm

² OJ C 326, p.47, 26.10.2012

1. The specific nature of Eurojust

The distinctive feature of Eurojust is that each Member State delegates to it one national member in accordance with its legal system, who is a prosecutor, judge or police officer of equivalent competence. The judicial element here is of utmost importance as the College is composed of 28 national members bringing to Eurojust different national judicial systems and legal cultures. It is the Member State's national laws that govern the judicial powers and competences of the national member acting in the territory of the given Member State.

The dual nature of Eurojust is seen through the fact that the appointment, powers and competences of Eurojust national members fall under the national law; Eurojust may however act as a College, according to Article 7 of Eurojust Decision³, but, when acting as College, has no mandatory powers.

The Eurojust Decision lists the judicial powers, which the national member may exercise in his/her capacity as competent national authority in agreement with a competent national authority on a case-by-case basis. Among those the powers executing in their Member State requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition; ordering in their Member State investigative measures considered necessary at a coordination meeting organised by Eurojust to provide assistance to competent national authorities.

According to the Eurojust Decision, in some urgent cases, the national members shall be entitled to authorise and to coordinate controlled deliveries in their Member State; to execute, in relation to their Member State a request for, or a decision on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition. In this context Article 6(2) of the Eurojust Decision is important, laying down the obligation for the Member States to ensure that the competent national authorities respond without undue delay to national members' requests, which implies the obligatory nature of such requests, impacting concrete cases at the national level.

The relationships between Eurojust and the national authorities are indeed very close and of sensitive nature. Articles 13 and 13a of the Eurojust Decision establish a circuit of information from the Member States to Eurojust, and vice versa. This circuit improves the synergy between Eurojust and the Member States by giving an impulse to a closer and fuller exchange of information between the Member States and Eurojust. This circuit of information embodies the special character of Eurojust as judicial cooperation agency, where, on one hand, the Member States are obliged to send all information needed to assist Eurojust to perform its tasks and, on the other

³ 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63 p.1, 6.3. 2003; amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust, OJ L 138 p. 14, 4.6.2009

hand, Eurojust shall provide national authorities with information and feedback on the results of the processing of information, with the possibility to impose a timeframe for such response. This reciprocal flow of the information enables Eurojust to fulfil its tasks and mandate by effectively supporting national judicial proceedings. Further on, the relationships between the Member States and Eurojust are strengthened by the fact that the national authorities are linked to Eurojust via the Eurojust National Coordination System.

The form of cooperation between Eurojust and the Member States is built upon the mutual trust of the partners involved in a concrete criminal case involving an investigation/prosecution. It is the trust in the criminal justice cooperation that is a *condition sine qua non* for a successful fight against serious transborder organised crime. The framework of such cooperation and exchange of voluminous information are based on the powers of the national members and on the existence of a very specific tailor-made Data Protection regime applicable to the processing operations of Eurojust.

It is important to understand that any activity in coordinating the investigations and prosecutions in the Member States, facilitating the execution of mutual legal assistance requests, supporting the national competent authorities of the Member States in order to render their investigations and prosecutions more effective, has a direct influence and dependability on the judicial proceedings at the national level. Such specificity of the Eurojust's structure and the way of working together with the Member States only proves the rationale behind the Declaration 21 of the Lisbon Treaty⁴ acknowledging that: "*[...] specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 B of the Treaty on the Functioning of the European Union may prove necessary because of the specific nature of these fields*".

Article 2 of the proposed Eurojust Regulation lays down that: "*Eurojust shall support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States, or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.*" Annex 1 of the Regulation provides a list of forms of serious crime which Eurojust is competent to deal with. The meaning of the notion "on common bases" is not completely clear. Recital 9 of the preamble of the proposed Regulation states that: "*cases which do not involve two or more Member States, but which require a prosecution on common bases, should be defined. Such cases should include*

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0337:0362:EN:PDF>

investigations and prosecutions affecting only one Member State and a third State, as well as cases affecting only one Member State and the Union."

In any event, it is clear that the main objective of Eurojust's operational functions will continue to be the support to the Member States in the concrete criminal cases at the request of competent national authorities or on its own initiative with a direct effect at the national level.

2. Tailor-made data protection regime at Eurojust

The JSB Eurojust has always underlined the robustness and suitability of the present tailor-made data protection regime of Eurojust, as it is based on the specific mandate and the functions of this organisation. The unique character of Eurojust lays in the fact that it is an agency where 28 national members represent their Member States and execute judicial powers, which are based on the national laws. However, one should bear in mind that, in the area of criminal justice, the substantive and procedural criminal laws are not harmonised throughout the EU. Therefore, in order to be able to operate in this complex legal environment, the operational interests and data protection need to be brought together through specific rules where not only the EU dimension but also the national judicial competencies are taken into account.

The JSB notes, that in this respect, the proposed Eurojust Regulation comes with some crucial changes. The recital 20 of the preamble of the Regulation states that *whilst the processing of personal data at Eurojust falls under the scope of Regulation (EC) 45/2001⁵ of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, the processing of personal data by the Member State's authorities and the transfer of such data to Eurojust are covered by the Council of Europe Convention 108 [to be replaced by the relevant Directive in force at the moment of adoption].*

The proposed change means that Regulation 45/2001, a rather outdated instrument which was purely designed for the first pillar and was adopted for regulating the processing of personal data, mostly staff data, by the Community institutions and bodies, will be applicable to a judicial body, exclusively working within the area of police and criminal justice cooperation. Knowing the specificity of the work in the area of law enforcement cooperation, it is obvious that this ex-first pillar instrument is not suitable for this purpose; in fact even recital 15 of this Regulation acknowledges this fact by explicitly stating that the activities within the ex-third pillar falls outside the scope of this Regulation, which was based on Directive 95/46/EC, another instrument not applicable to the law enforcement area and presently being reviewed.

⁵ OJ L 8/1 of 12.1.2001.

The JSB understands that Eurojust is an agency of the EU and that therefore, it is logical to apply the same rules as other agencies and bodies in what regards similar activities to those such as human resources, budget or other administrative matters. In that context the application of Regulation 45/2001 to purely administrative data is understandable but no argument has been presented to justify its application to the operational work of Eurojust.

It is interesting to see, that the recital 32 of the preamble of Europol Regulation⁶ sets the following: *"Data protection rules at Europol should be strengthened and draw on the principles underpinning Regulation (EC) No 45/2001 to ensure a high level of protection of individuals with regard to processing of personal data. As Declaration 21 attached to the Treaty recognizes the specificity of personal data processing in the law enforcement context, the data protection rules of Europol should be autonomous and aligned with other relevant data protection instruments applicable in the area of police cooperation in the Union, in particular Convention No. 108 and Recommendation No R(87) of the Council of Europe and Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters [to be replaced by the relevant Directive in force at the moment of adoption]."*

The text of the recital 43 of Europol draft Regulation foresees that: *"As Europol is processing also non-operational personal data, not related to any criminal investigations, processing of such data should be subject to Regulation (EC) No 45/2001"*.

The JSB Eurojust was unable to find any arguments to justify why such a different legislative approach has been foreseen in the case of Eurojust and Europol, which are two JHA agencies working closely together in the area of law enforcement. Moreover, taking into account the judicial nature and capacity of Eurojust, it is clear that the "one for all" solution in terms of application of Regulation (EC) No 45/2001 to the processing of operational data would be counterproductive and not in line with the Declaration 21 to the TFEU.

The JSB argues, that although the general data protection principles are the same in the Convention 108⁷ and Regulation 45/2001, there are a number of substantial differences, which make certain provisions of Regulation (EC) No 45/2001 not suitable for this area (for example, the use of consent as a legal ground for processing for police and justice processing operations; the data subject's right to object, etc.).

⁶ Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol) and repealing Decisions 2009/371/JHA and 2005/681/JHA, COM(2013) 173 final http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2013/com_2013_0173_en.pdf

⁷ Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108 <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=108&CM=8&DF=06/11/2013&CL=ENG>

The same remark applies to the present data protection provisions in the Eurojust Decision and Data Protection Rules⁸, both containing all basic data protection principles to be found back in Regulation (EC) No 45/2001. However, the present data protection Rules regulate case-related data processing in much more detail, taking into account the mandate and the operational work of Eurojust.

The combined application of Regulation (EC) No 45/2001 with the data protection provisions of the proposed Eurojust Regulation can also be confusing and create legal uncertainty. Eurojust receives most of its information from the Member States and has to rely exclusively on the information provided by the national authorities, which will be "*covered by the Council of Europe Convention 108 [to be replaced by the relevant Directive in force at the moment of adoption]*"⁹. As the negotiations on the proposed Directive are not moving much forward, it is difficult to foresee now what the implications this will have for Eurojust in terms of the standards of information processing and data protection, how Member States will transpose the Directive in the national law, etc.

One should not forget, that in the framework of the on-going data protection reform, it is expected that, as a second step, the European Commission will make proposals to amend Regulation 45/2001 and to align it to the new elements included in the data protection package. However, it is not clear when this is going to happen.

In this regard, the JSB urges for making the proposed Eurojust Regulation aligned with the new Europol Regulation, limiting the application of Regulation 45/2001 to the administrative processing operations, and regulating the case-related processing operations fully in the text of the new Regulation and the Eurojust Data Protection Rules. This may require developing a bit more some of the data protection provisions in the draft Regulation to ensure that all elements are clearly spelled out.

Eurojust has presently a very comprehensive data protection regime in place, both in the Eurojust Decision itself and reinforced and further developed through the adoption of tailor-made data protection Rules. It is however remarkable that the proposed Eurojust Regulation does not contain a reference to the data protection Rules anymore. The JSB draws attention to the fact, that Eurojust has in place a number of legal instruments, including the Eurojust Security Rules, the Additional rules of procedure on processing and protection of non-case-related personal data and many other internal rules and procedures, which are based on the Eurojust Decision and the Data Protection Rules, which regulate in detail the processing of case-related data in the CMS and manual files (these Rules also cover the non-case related information processing).

⁸ Rules of Procedure on the Processing and Protection of Personal Data at Eurojust (text adopted unanimously by the College of Eurojust during the meeting of 21 October 2004 and approved by the Council on 24 February 2005) (2005/C 68/01), OJ 68, p. 1, 19.3.2005

⁹ Recital 20 of the preamble of the proposed Eurojust Regulation.

The proposed Regulation does not regulate all data processing aspects at the same level of detail than the presently existing data protection rules (for example definitions; entering data in the CMS; procedure for exercise the rights of the data subjects; data management in the temporary work files and index; the procedure for granting authorised access to personal data; the implementation of the time limits for the storage of personal data in the CMS and manual files). The existence of such detailed and well developed rules creates a greater legal certainty for data subjects and it is in their benefit. These rules are also necessary for the proper management of data processing operations, which is the prime objective of the regular inspections carried out by the JSB.

It appears therefore that maintaining the existing Data Protection Rules, with any necessary revisions in the light of the new legal framework, would be of significant added value for the organisation and would enable a much more swift transition between the presently well-established regime and the future one.

Therefore, in order to avoiding causing legal uncertainty and creating difficulties in the application of the provisions of the new Regulation in practice, the JSB strongly calls for maintaining the Data Protection Rules, making them of course subject to a revision clause in a certain timeframe to ensure any necessary alignment with the future Eurojust Regulation and any other applicable EU legal instruments in the area of data protection.

3. Some specific data protection issues arising from the new Regulation

Although the provisions on the processing of personal data in the proposed Eurojust Regulation are to a great extent similar to those in the Eurojust Decision, some of the proposed changes deserve being taken up in further discussions. Those changes will be discussed in this Opinion Article by Article.

3.1 Articles 20-21 (ENCS, exchange of information with the Member States and between national members)

Article 13 of Eurojust Decision will be replaced by Article 21 of the proposed Regulation. Here the exchange of information and interaction between Eurojust and the competent authorities will be even more strengthened, by directly tasking the national members and the national competent authorities to exchange information between them and informing each other about relevant cases, which fall under the competence of Eurojust. In this context the role of Eurojust National Coordination System remains of utmost importance, also in terms of the impact on data protection.

The setting up of the ENCS creates a close link at national level with Eurojust. Article 20 of the proposed Eurojust Regulation keeps the obligation for ENCS to ensure that

the CMS receives information related to the Member State concerned in an efficient and reliable manner. Only if a sufficient information flow is ensured, Eurojust can assist the Member States effectively in their serious and complex cross-border cases.

3.2 Article 24 (Case Management System)

The architecture of the Eurojust Case Management System remains the same. However, there are certain changes, which have to be mentioned. The language used describing the purpose of CMS is much stronger, underlining the role of the CMS - unique information system, containing judicial information, which shall facilitate effectively to support to national authorities in combating serious organised transnational crime.

The Article 24(6) of the proposed Regulation contains a clear mistake. It states that *for the processing of operational personal data, Eurojust may not establish any automated data file other than the Case Management System or a temporary work file*. This is in itself an incorrect statement as the TWF is part of the CMS. Therefore, the JSB suggests deleting the words "or a temporary work file".

The JSB was made aware of the proposals that Eurojust put in front to the Commission re the new Eurojust Regulation some months ago and welcomed in its own submissions to the Commission a good number of the Eurojust's proposals. The JSB is disappointed to see that even those proposals agreed by both Eurojust and its JSB have not been taken on board and regrets in particular that the suggestions made for some minor adjustments regarding the present Article 16.6 and 21.4 of the Eurojust have not been incorporated by the Commission in the present text of the proposed Regulation. The JSB suggests reassessing the proposals put forward by Eurojust. Based on the experience and knowledge gained through the day to day work with Eurojust and regular inspections, the JSB agrees that the proposal for the present Article 16.6 of the Eurojust Decision would be important and could be most useful in practice¹⁰.

¹⁰ The proposal reads as follows: "*For the processing of case related personal data, Eurojust may not establish any automated file other than the Case Management System. Eurojust may however temporarily process data for the purpose of determining whether such data are relevant to its tasks and can be included in the Eurojust Case Management System. The College of Eurojust, acting on a proposal from the Administrative Director and after consulting the Joint Supervisory Body, shall determine the conditions relating to the processing of such data, in particular with respect to access to and the use of the data, as well as time limits for the storage and deletion of the data that may not exceed six months, having due regard to the principles referred to in Article 14.*"

3.3 Article 24(8) (EPPO access to the CMS)

A substantial change in the proposed Regulation is that the CMS and its temporary work files shall be made available for the use by the EPPO (Article 24.7 of the new Regulation). Article 24(8) provides that: “[...] *the provisions on access to the Case Management System and the temporary work files shall apply mutatis mutandis to the European Public Prosecutor's Office. However, the information entered into the Case Management System, temporary work files and the index by the European Public Prosecutor's Office shall not be available for access at the national level*”.

This provision has further implications in terms of data management in the CMS and the way the ENCS will be established at the national level. However, this proposal brings with it also some much more complex issues. The recital 44 of the proposed EPPO Regulation foresees that: “*The data processing system of the European Public Prosecutor's Office should build on the Case Management System of Eurojust, but its temporary work files should be considered case-files from the time an investigation is initiated*”.

First of all, it is not clear what the expression “build on” in this particular context means. Secondly, all the temporary work files in the CMS are case-files; therefore the second part of the sentence is also unclear.

The provisions related to the CMS and data management are copied from the proposed Eurojust Regulation. However, this does not bring more clarity, especially in terms of data management in the CMS. The CMS is established and managed by Eurojust; the Eurojust's Data Protection Rules regulate case-related information processing in the CMS up to which kind of data has to be inserted in index; what data may be accessible to all users; establishes the system of automatic notification to the DPO in a number of cases; establishes the specific registration procedure for the processing of the sensitive information. In addition, the Rules establish the obligation for the DPO to carry regular reviews of the activities done by the Eurojust's authorised users in the CMS.

Article 22(5) of the proposed EPPO Regulation obliges the EPPO to allow its DPO to have access to the TWF; EPPO shall inform its DPO each time a new temporary work file containing personal data is opened. This, on the first place, will mean a number of changes in the technical architecture of the present CMS (including automated notification to the DPO as now there will be two DPOs involved); secondly, it will mean that the access of the DPO of EPPO will have to be limited only to the cases opened by the EPPO; the access of European delegated prosecutors and their staff will also have to be limited to the one regulated in Article 24 of the EPPO Regulation; the responsibility in data protection matters needs to be clarified.

The implementation of this structure seems to be rather complex as there is a risk that a number of areas in terms of the data management and monitoring between Eurojust and EPPO will be overlapping as well as possibly the tasks of both DPOs of Eurojust and the EPPO. It should also be underlined that the responsibility in terms of decision-making re all issues about the data management in the CMS will be with the College of Eurojust; EPPO will only have an observer role in this area. Both the Eurojust and EPPO Regulations should clarify those matters.

3.4 Article 27 (Processing of personal data)

Article 27 of the new Regulation replaces the current Article 14 of the Eurojust Decision, stating that Eurojust may process personal data by automated means or in structural manual files in order to carry out its operational functions and insofar as it is necessary to achieve its explicitly stated tasks.

The JSB regrets, that the legislator, instead of giving some more clarity, leaves this particular area open. On the one hand, this provision matches the working methods, used by the practitioners; on the other it leaves the issue concerning the processing of the same information in the manual files unsolved.

It should be noted that the JSB already in its 2010 inspection report raised the issue of processing of identical data in the CMS or in the manual files. From the operational point of view, it is clear that contrary to the manual files, the automated CMS system enables national desks to perform a number of actions and by this assists them in stimulating, improving and supporting the activities of the competent national authorities. Moreover, the CMS has specific technical facilities and data protection safeguards to ensure the compliance with the legal provisions, hence it is more controllable.

The JSB did not overrule the possibility for the national members to have manual files, subject to specific rules: *When for specific reasons it will be necessary to (also) process data in manual files, Article 14(1) of the Eurojust Decision provides for a legal basis. Eurojust should explore when there is such a necessity taking into account all facilities and data protection safeguards offered by the CMS.*

The JSB invites the legislator to carefully assess the need to have included in the text of Article 27 of the proposed Regulation the possibility of processing personal data in the manual files.

The JSB noted that the list of the data categories, which Eurojust is allowed to process, is now placed by the Annex 2. It is not clear, why the Commission has decided to opt for this, possibly due to the procedure for possible amendments in the future. The list contains the same data categories as currently Article 15(1) of Eurojust Decision, but has one new category: customs and Tax Identification Number. However, the proposed Regulation does not provide any arguments, why this

category has been included. Some explanations would be desirable to understand why this addition has been included.

The list of the categories of the persons, on whom Eurojust is allowed to process personal data, remains the same. Article 27 (3) of the proposed Regulation states, that the data listed in point 2 of Annex 2 (the same list as currently in Article 15(2) of Eurojust Decision) may be processed by Eurojust on persons who, under the national legislation of the Member States concerned, are regarded as witnesses or victims in a criminal investigation or prosecution regarding one or more of the types of crime and the offences referred to in Article 3, or persons under the age of 18. However, the processing of such personal data is made conditional to the fact that it may only take place, if it is strictly necessary for the achievement of the expressly stated task of Eurojust, within the framework of its competence and in order to carry out its operational functions.

The JSB welcomes the safeguards put in place for the processing of such personal data. However, the JSB suggests clarifying that the persons under the age of 18 should, under the national legislation of the Member States concerned, fall within the category of witnesses or victims.

In Article 27(4) of the proposed Eurojust Regulation the reference should be made to par. 2 instead of par. 3 of the same Article.

Article 27(3) of the new Regulation regulates the processing of additional data not listed in Annex 2 stating that *such processing is possible only for a limited period of time which shall not exceed the time needed for the conclusion of the case related to which the data are processed*. It is therefore stricter than the current Article 15(3) of the Eurojust Decision. The new Regulation makes it mandatory to inform immediately the DPO not only of recourse to this paragraph but also of the specific circumstances which justify the necessity of the processing of such personal data. The JSB welcomes this provision.

With regard to the processing of special categories of personal data a new requirement is introduced in Article 27(4) which replaces present Article 15(4) of Eurojust Decision. Now, in order to be allowed to process special categories of personal data, Eurojust will have to prove that such data are strictly necessary for the national investigations concerned as well as for coordination within Eurojust and that they supplement other personal data already processed. The JSB welcomes this amendment.

3.5 Article 28 (Time limits for the storage of personal data)

In terms of the time limits for the storage of personal data Article 28 of the new Regulation replaces the current Article 21 of Eurojust decision and brings in some new

elements. First of all, there is no more general principle retained as in the present Article 21.1 of Eurojust Decision, stating that personal data processed by Eurojust shall be stored by Eurojust for only as long as is necessary for the achievement of its objectives. This is probably done due to the fact that such general principle of necessity exists in Regulation 45/2001 but it would be desirable, as already explained, to limit its application to administrative data and to contain all elements and principles regarding the processing of operational data in the new Eurojust Regulation as such.

The list of the dates beyond which the personal data processed by Eurojust may not be stored are maintained, only in cases of Article 28(1) (d) and (e) of the new Regulation there is no anymore reference to the received information concerning terrorist offences.

Another important change is included in Article 28(2) of the new Regulation, where it is foreseen that in the case the special categories of personal data are stored for a period exceeding five years, the external supervisor shall be informed accordingly. Article 28(3) of new Regulation also introduces a new requirement (which is now in the Eurojust Data Protection Rules) - the reasons for the continued storage must be justified and recorded. If no decision is taken on the continued storage of personal data, those data shall be deleted automatically after three years.

The JSB supports and wishes to bring back to the attention of the legislator the proposal made by Eurojust to the Commission concerning the present Article 21.4 of the Eurojust Decision, which will be Article 27.5 of the proposed Regulation. The proposal amends slightly the present Article 21.4 of the Eurojust Decision in a clearer and more logical way as Eurojust mostly possesses documents, which are available in the Member States as well, and it is therefore not logical to return documents back to the national authorities¹¹.

3.6 Article 29 (Logging and documentation)

The JSB welcomes the new Article 29 of the proposed Eurojust Regulation re logging and documentation. It is similar to what is already regulated by Article 27 of the Eurojust Data Protection Rules. This amendment will enhance the ability to conduct proper monitoring of the lawfulness of the data processing carried out at Eurojust internally by the DPO and by the external supervisor.

¹¹ The JSB backs the mentioned amendment: ~~Where a file exists containing non-automated data and unstructured data, Once the deadline for storage of the last item of automated data from the file has elapsed all the documents in the file shall be returned to the authority which supplied them and any copies shall be destroyed, with the exception of any original documents which Eurojust might have received from the national authorities which would need to be returned to its originator.~~

3.7 Article 31 (Appointment of the DPO)

Article 31 of the new Regulation will replace Article 17 of Eurojust Decision with regard to the appointment and functioning of the Data Protection Officer. The main change is the way the DPO will be appointed and the procedure in case of non-compliance. According to Article 31(1) the Executive Board shall appoint a Data Protection Officer in accordance with Article 24 of Regulation (EC) No 45/2001. Therefore, the implementing rules referred in Article 24(8) of Regulation (EC) 45/2001 shall be adopted by the Executive Board. In relation to the latter, the JSB draws attention, that Article 14(1)(i) of the new Regulation states that one of the management functions of the College shall be the appointment of DPO.

In relation to the previous comments re the applicability of the Regulation (EC) No 45/2001, the JSB understands that the DPO shall be appointed in respect of the principles laid down in Article 24 of Regulation (EC) No 45/2001 but considers that, given the broader mandate of the DPO re operational and administrative data, the function requires a high level of expertise and continuity and therefore does not see the justification to limit the appointment to a maximum of 10 years, as it is presently the case in Regulation 45/2001.

The JSB takes a positive note of the Article 31 (2) of the new Regulation, which now complements the list of the DPO tasks, as well as new provision inserted in Article 31(4) of the new Regulation stating that Eurojust's staff members, assisting the DPO in the performance of his/her duties, shall have access to the personal data processed at Eurojust and to Eurojust premises to the extent necessary for the performance of their tasks.

There will be a change in the terms of the escalation procedure, foreseeing a three steps procedure. In the case the DPO detects a case of non-compliance in terms of data processing, she/he will have first to refer the matter to the Administrative Director, if nothing happens to the College and if the College does not resolve the non-compliance within the specified time, the DPO shall refer the matter to the external supervisor (Article 31(5) of the new Regulation). Such additional step makes sense when it relates to administrative data but, if the non-compliance relates to operational data, it is not clear what the role of the Administrative Director would be.

3.8 Article 32 (Modalities regarding the exercise of the right of access)

The JSB welcomes the amendments made in the proposed Regulation re the data subjects' right of access. First of all, now there is a clear time limit – one month – established during which the national authority shall refer the request to Eurojust. The text of the proposed Regulation does not contain any more the reference to the

national law when dealing with such requests. This is a positive development, which will provide more certainty and uniformity in dealing with the individual requests for access.

The Article 32 of the new Regulation replaces the current Article 19 of Eurojust Decision. Par. 3 of this Article makes it clear that *a decision on access to data shall be conditional upon close cooperation between Eurojust and the Member States directly concerned by the communication of such data*. A new element is introduced in the same paragraph stating that in case when a Member State objects to Eurojust's proposed response, it shall notify Eurojust of the reasons for its objection. Currently under Article 19(9) of Eurojust Decision, *national competent authorities shall be consulted by Eurojust before a decision is taken. They shall subsequently be notified of its contents through the national members concerned*. This amendment implies even closer cooperation with the national authorities and therefore the link between the supervisor and the national supervisory authorities is even of a more crucial importance.

The JSB welcomes Article 32 of the new Regulation. It does not retain anymore the possibility to give a standard answer when access is denied or if no personal data concerning the applicant are processed by Eurojust, which is now the case according to Article 19(7) of Eurojust Decision. The new Regulation contains a new obligation for Eurojust to document the grounds for omitting the communication of the principal reasons on which the restriction is based.

The JSB also suggests considering another important element directly related to the right of access. Article 12(2) of the proposed Data Protection Directive in police and judicial cooperation area states that: *"Member States shall provide for the right of the data subject to obtain from the controller a copy of the personal data undergoing processing"*. The JSB suggests aligning the Article 32 of the proposed Regulation foreseeing the possibility for the data subject to obtain a copy of the personal data undergoing processing at Eurojust.

3.9 Article 34 (Responsibility in data protection matters)

The responsibility in data protection matters will be covered by Article 34 of the new Regulation. An interesting element is contained in par. 2 of this Article stating that *the responsibility for the quality of personal data shall lie with the Member State which provided the personal data to Eurojust and with Eurojust for personal data provided by EU bodies, third countries or international organisations, as well for personal data retrieved by Eurojust from publicly available sources*. The JSB finds this formulation odd.

The JSB notes that all the concluded cooperation agreements by Eurojust with the third States and international organisation include the provisions concerning the duty of each Party to ensure the correctness of the sent information as the liability re any damage as a result of erroneous information, lies on the Party, which submitted the information. The same responsibility attribution is embodied in Article 23 of the Directive 95/46/EC¹², Article 24 of the Eurojust Decision, Article 19(2) of the Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters¹³.

In this regard, the JSB would like to refer to Article 16 of Eurojust Data Protection Rules stating that: *“When information is transmitted to Eurojust by a Member State or an external party in the context of an investigation or prosecution, it shall not be responsible for the correctness of the information received but shall ensure, from the moment of reception, that all reasonable steps are taken to keep the information updated.”* The same Article foresees that in case Eurojust detects any inaccuracy of the data, it shall inform the third party from whom the information was received and shall correct the information. The JSB suggests introducing a similar provision in Article 34 of the proposed Regulation.

Article 34 of the proposed Regulation is silent in terms of responsibility in data protection matters when talking about the information processing in CMS carried out by the EPPO. Par. 4 of Article 34 states that: *“Subject to other provisions in this Regulation, Eurojust shall be responsible for all data processed by it”*. Even though the proposed EPPO Regulation (Article 44) contains the provisions on the responsibility of the EPPO in terms of data protection; however, the reference to this should be made in Article 34 of the Eurojust Regulation.

3.10 Chapter V, Articles 38-47 (Relations with partners)

In terms of common provisions re the relations with partners, the JSB draws attention to Article 38(4)(a) of the proposed Regulation. It foresees that in case of the onward transmission of the data provided by a Member State, Eurojust shall seek that Member State's consent, unless the authorisation can be assumed when the Member State has not expressly limited the possibility of onward transfers. The JSB is of the opinion that such exception goes too far and introduces a certain level of vagueness, as not always the Member States will indicate explicitly the terms of use of the information provided. The JSB notes that in the area of judicial cooperation the exchange of information is based on the mutual trust between the partners. The only assumption possible in this context is that

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:NOT>

¹³ *OJ L 350*, p. 60, 30.12.2008

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:01:EN:HTML>

the Member States, while providing the information to Eurojust, relies on Eurojust and that it will use the provided information accordingly to the purposes and limitations drawn by the Member States. Otherwise, it is logical that the Member State should be always consulted in terms of further use of information.

The JSB wishes to refer to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters ETS No 182¹⁴, more specifically to its Article 26(2), stating that the data received from another Party may however be used for any other purpose if prior consent to that effect is given by either the Party from which the data had been transferred, or the data subject. The Protocol does not foresee any other possibility to use or make an onward transfer of the data originating from another Party based on the assumed consent. In fact, the standard set here is high – the Party has to have a prior consent of the Party from which the data comes. Therefore, the JSB suggests reconsidering Article 38(4)(a) of the proposed Regulation, making it aligned not only with the data protection requirements, but as well with international principles and legal instruments applicable in the criminal justice cooperation area.

Article 40 of the proposed Regulation settles the relations with Europol. Article 40(1) mentions that Eurojust shall take all appropriate measures to enable Europol, within its mandate, to have indirect access on the basis of a hit/no hit system to information provided to Eurojust [...]. In data protection context, the term indirect access is always used when data subject's right of access is exercised by the national DPA, reporting back to an individual. The JSB suggests deleting the word "indirect access" as the access on the basis of hit/no hit may not be considered as an indirect access and such terminology may lead to misunderstandings.

Article 40(2) of the proposed Regulation states that the searches of information shall be made only for the purpose to see whether the information available at Eurojust and Europol matches. One of the main data quality principles, embodied in the Convention ETS No 108, Directive 95/46/EC, Regulation (EC) 45/2001, is that the data should be accurate. Article 16(2) of the Eurojust Data Protection Rules sets, in the case Eurojust detects any inaccuracy affecting data in question, the obligation to inform the third party from whom the information was received and to correct the information accordingly. Such an obligation should be foreseen in Article 40 of the proposed Regulation as well.

Article 41 of the new Regulation regulates the close relations with the EPPO. Such cooperation also entails the exchange of information, including personal data. The Article foresees that any data thus exchanged shall only be used for the purposes for which it was provided, any other usage of data shall only be allowed as long as this falls within the

¹⁴ <http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=06/11/2013&CL=ENG>

mandate of the body receiving the data. From the data protection perspective, such formulation is improper, as all the data exchange should fall within the remit of the two bodies' mandates. The JSB suggests making clear that all the data exchanged between Eurojust and EPPO shall fall within their respective mandates and be used for the purposes for which it was provided. Any other usage of the data, falling within their mandate, shall be subject to the prior authorisation of the body or the Member State, which provided the data.

Further on, Article 41(6) of the proposed Regulation foresees an obligation to Eurojust to designate and inform the EPPO, which staff members will have access to the results of the cross-matching. Such an obligation should be foreseen for the EPPO as well. Eurojust is the data controller of the CMS; it manages the access accounts to the CMS and so forth. Therefore, the information on who is authorised from the EPPO to have access to the CMS is essential for Eurojust to guarantee the lawfulness of the access to the operational information. In order to carry out the proper monitoring of the lawfulness of the data processing carried out by the EPPO's staff members, such logging information will be essential for the EPPO's DPO and its external supervisor and so forth. All the logging is done on the Eurojust side. Therefore, the JSB suggests adding the similar obligation for the EPPO concerning the prior provision of the information to Eurojust on the designated persons with the access to the CMS.

The JSB proposes adding the same provision in Article 41 of the proposed Regulation, which was made in the context of Article 40 concerning the obligation to inform the third party from whom the information was received, in case the inaccuracy was detected, and to correct the information accordingly.

Regarding relations with partners there is a crucial change as, in line with Article 218 of the TFEU, agencies are no longer able to negotiate international agreements themselves. The JSB regrets this change as the present system has allowed the conclusion of a good number of agreements containing extensive and adequate data protection provisions and it is more than doubtful if the envisaged new system could lead to similar good results from the data protection viewpoint.

According to Article 45(1) of the proposed Regulation, Eurojust may transfer personal data to authorities of a third countries or an international organization or Interpol, if necessary to perform its tasks only in one of the following cases:

1. When there is an adequacy decision taken by the Commission on the basis of Article 25 and 31 of Directive 95/46/EC (presently under review).
2. When an agreement exists between the third country or international organisation and the EU adducing adequate safeguards in data protection terms (as defined in Article 26.2 of Directive 95/46/EC) or

3. When there is an existing cooperation agreement concluded between Eurojust and the third country or organisation before the new Regulation enters into force.

The JSB welcomes the last element of this provision allowing the maintenance of the already concluded agreement, which, as already mentioned, contain good data protection provisions. This is however not often the case in the case mentioned as second possibility in this article: so far the existing EU agreements with third states contain very limited data protection clauses and therefore, provide fewer guarantees than the existing Eurojust agreements with third countries.

The JSB also wishes to raise an important question linked to the adequacy decisions mentioned in Article 45(1). Those decisions, as they have been taken so far in the context of a "first pillar" instrument, Directive 95/46/EC, have not taken into account the existence of proper data protection rules, procedures and practices in the former "third pillar" area and would need to be revised in the following period to ensure that they offer the necessary guarantees of adequate protection also in the area of police and judicial cooperation; otherwise it would not make sense to allow the exchange of personal data to Eurojust and Europol on the basis of the existence of such first pillar decisions which are, by the way, not numerous.

In any case, for what regards the possibility of concluding working arrangements (in the above mentioned three cases), the JSB suggests adding in Article 45(1) last paragraph a requirement that, even in the listed cases, the working arrangements of Eurojust with the external partners should have specific data protection conditions included specifying the modalities of the data exchange between the parties in question. Such specific conditions should be beforehand agreed with the external supervisor.

An exception to the cases regulated in the first paragraph of Article 45 of the proposed Regulation is possible in some cases of derogation enumerated in paragraph 2 of Article 45, which need to be applied on a case by case basis (similar to Article 26.1 of Directive 95/46/EC). These derogations are the following: a) the transfer of data is absolutely necessary to safeguard the essential interests of one or more Member States within the scope of Eurojust's objectives; b) the transfer of the data is absolutely necessary in the interests of preventing imminent danger associated with crime or terrorist offences; c) the transfer is otherwise necessary or legally required on important public interest grounds of the Union or its Member States, as recognised by Union law or by national law, or for the establishment, exercise or defence of legal claims; or d) the transfer is necessary to protect the vital interests of the data subject or another person.

It is important to mention in that regard that, in line with the doctrine developed by the Article 29 Working Party, the EDPS and the national data protection authorities, such exceptions need to be applied on a case by case basis and should be interpreted restrictively.

A final additional possibility is offered by paragraph 3 of this Article allowing the College to reach an agreement with the supervisor as to the authorisation of a set of transfers in conformity with the points a) to d) above for a period not exceeding a year, renewable taking into account the existence of safeguards regarding data protection and fundamental rights in that third country. In such cases not only an authorisation of the EDPS is necessary, there is also an obligation to inform the EDPS of every case in which a transfer takes place on the basis of the given authorisation. There is therefore a very extensive control mechanism in place.

In relation to this, the JSB would like to refer one of the conclusions discussed during the seminar recently organised by Eurojust as to this draft Regulation where it was proposed to extend the scope of Article 45(3) of the proposed Regulation, not limiting the possibility of authorising sets of transfers to the cases where exceptions apply (paragraph 2) but to build more in the concept of providing appropriate data protection safeguards, as it is presently regulated in Directive 95/46/EC. It would be good to offer Eurojust a legal and sound way to exchange data in a more structural way in cases where there is no adequacy decision or EU agreement in place but there are operational needs justifying the exchange of data; in such cases, in cooperation with the supervisory authority, solutions offering adequate safeguards by the third party should be explored.

The JSB wants to raise another point in relation to the transmission of data to external partners. The present Article 27 of Eurojust Decision sets the responsibility for Eurojust to ensure the legality of the data transmissions. For this purpose, Eurojust is requested to keep a record of all transmissions of data to the EU institutions/bodies and third States/international organisation and of the grounds for such transmissions. Presently, the national members have to document such transmissions in their manual files; in addition such requirement is implemented technically in the CMS. There all the transmissions are recorded, providing the ground for it and purpose. The JSB regrets that such requirement is not kept in the text of the proposed Regulation. The JSB suggests introducing back the obligation to record all the transmissions to third parties, including the ground and the purpose for such transmissions. The JSB alerts that without keeping such a record, the controllability of the legality of the data transfers will be undermined.

4. Supervision

As the JSB stated earlier in the Opinion, most of the information received by Eurojust comes from the Member States. This is due to the specific dual nature of Eurojust and its way of working through coordination and cooperation with the national competent authorities. The fact, that the information comes from and goes back to the Member States and that Eurojust is a judicial cooperation organisation, impacts the requirements for effective supervision at Eurojust. In that sense, the only way of ensuring consistency

and harmonised application of data protection requirements is by ensuring sufficient involvement of the national supervisory authorities.

The JSB wishes to reiterate the fact that any activity in coordinating the investigations and prosecutions in the Member States, facilitating the execution of mutual legal assistance requests, supporting the national competent authorities of the Member States in order to render their investigations and prosecutions more effective, has a direct influence on the judicial proceedings at the national level. Such specificity only reinforces the Declaration 21 of the Lisbon Treaty, acknowledging the necessity for the specific rules in the area of law enforcement. That is why Article 16 of Lisbon Treaty does talk about independent supervisory authorities in plural.

In the past the JSB Eurojust explored every possibility to express its position regarding the data protection system at Eurojust, including the supervisory mechanism, already at the very beginning of the discussions re general data protection reform¹⁵.

This position has not changed. The JSB does not support the Commission's intentions to replace the JSB Eurojust by the European Data Protection Supervisor. Eurojust has a robust data protection system in place, tailor made to the mandate and tasks of Eurojust, closely and effectively monitored by the DPO and JSB. As the Lisbon Treaty refers to the independent data protection authorities (plural); there is therefore, legally speaking, not a strict need to have all agencies and institutions supervised by the same supervisory authority.

Furthermore and as it was already stated Regulation (EC) No 45/2001 is not workable and was not meant for the processing of information in the law enforcement area. The review of Regulation (EC) No 45/2001 is under its way, therefore the logical step would be to wait and see the results of the evaluation of Regulation (EC) No 45/2001, which the Commission intends to carry out after the adoption of the data protection package. Till that happens, the JSB suggests keeping the present supervision system of Eurojust, especially as the present system proved to be working effectively and efficiently and contributes to the consistent application of the data protection rules.

Supervision of Eurojust activities requires a judicial component, which is presently safeguarded by the composition of the JSB Eurojust, with a big judicial emphasis and proper involvement from the Member States. The members of the JSB are either judges or members of an equal level of independence and, regarding its secretariat and financial resources, they have been given all necessary resources to guarantee the independence of their work.

¹⁵ Letter of the Chair of the JSB to Ms Reding of 31 May 2010; letter of the Chair of the JSB to Ms Reding of 15 December 2010

As the data processed by Eurojust comes from the Member States and goes back to the Member States, effective and consistent supervision requires that national DPAs are involved in supervision and this is already ensured by the JSB appointees. One of the examples is in the case of an appeal, where Article 12(1) of the JSB Act¹⁶ foresees that *if no member of the Member State from which the personal data that form the object of the appeal originate is represented in the Joint Supervisory Body, the person appointed by this Member State in accordance with Article 23(1) to (3) of the Eurojust Decision shall act as ad hoc judge in the Joint Supervisory Body for the duration of the examination of this appeal.*

The circuit of information, established by the Eurojust Decision, proves the involvement of the national DPAs essential. The JSB Eurojust supports the idea expressed by the JSB Europol in its first opinion on the proposed Europol Regulation¹⁷ that such data streams between EU agency and national competent authorities are such that supervision simply cannot be strictly of a European nature. This element was also highlighted by the Conference of the European Data Protection Authorities, which took place on 16-17 May 2013 in Lisbon, Portugal¹⁸.

Article 35 of the proposed Regulation introduces the model of coordinated supervision, where EDPS acts in close cooperation with national data protection authorities with respect to specific issues requiring national involvement. In this context, the JSB Eurojust supports the JSB Europol, which in the same opinion criticized such model as being not vigorous enough and stated that the involvement of the national DPAs is essential due to the fact that a very large majority of the data collected and processed by Europol originates from the Member States and will at a certain point also be sent back to the Member States.

Moreover, the JSB points out, that at the EU level, the European Data Protection Supervisor is not competent to supervise the European Court of Justice when acting in its judicial capacity, as it is clearly stipulated in Article 46c of Regulation (EC) No 45/2001, defining the duties of the EDPS: *The EDPS shall monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body with the exception of the Court of Justice of the European Communities acting in its judicial capacity.*

¹⁶ Act of the Joint Supervisory Body of Eurojust of 23 June 2009 laying down its rules of procedure (*adopted unanimously at the plenary meeting of the Joint Supervisory Body of Eurojust on 23 June 2009*) (2010/C 182/03)

¹⁷ Opinion of the Joint Supervisory Body of Europol (Opinion 13/31) with respect to the proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation and Training (Europol), 10 June 2013, <http://www.statewatch.org/news/2013/jun/europol-jsb-regulation-opinion.pdf>

¹⁸ Resolution of the Conference of European Data Protection Authorities, Lisbon 16-17 May 2013 on ensuring an adequate level of data protection at Europol

Moreover, the EDPS does not have a power and competence to impose instructions at the national level. It is only up to the national DPAs to enforce the data protection requirements on the actors playing at the level of Member States. Precisely due to the lack of enforcement at the national level and lack of the competence to supervise the activities in the judicial area, the model of coordinated supervision is not the best option for Eurojust.

In the respect of the latter, the JSB Eurojust highlights the following elements pertinent to the present supervision system at Eurojust:

- It has necessary expertise in judicial cooperation and data protection areas;
- It is effective: 3 elected members, meeting regularly (4-5 times a year) at Eurojust. It offers a quick and not cumbersome appeal procedure for individuals.
- It carries out on the spot supervision: frequent inspections with direct involvement of national DPAs;
- Full transparency: webpage with regular updates, appeal decisions and reports published and distributed and so forth;
- Decisions of JSB are final and binding on Eurojust: quasi-judicial nature.

It is also relevant to mention that, under the present system of supervisions, data subjects are not deprived of their rights to have judicial review of the decisions taken by Eurojust. This has been evidenced by a recent Court case, where the General Court has praised the way Eurojust was dealing with data subject requests (judgment of 25 November 2010 in case T-277/10AJ *K v Eurojust*): the General Court found that Eurojust not only duly met the requirements of Article 19(7) of the Eurojust Decision but even exceeded them, since it provided a detailed answer to the applicant's allegations revealing that no personal data concerning him was processed by Eurojust¹⁹.

¹⁹ See the following consideration the Court in this

In the present case, it must be concluded that the contested decisions duly fulfil the requirements of that provision and even exceed them, since they provide a detailed answer to the applicant's allegations, which remain rather vague. Indeed, it is apparent from the contested decisions, especially from the decisions of 14 and 21 June 2010, that Eurojust did not merely notify the applicant that it had carried out checks, but specified that it had never been in possession of any data concerning him. Furthermore, it affirmed that the National Member for the United Kingdom at Eurojust had never taken any decision about the applicant and that the information provided to the applicant was based on careful consideration and necessary checks.

case:

Although the Commission might have the wish to introduce a single supervision system for all EU institutions, agencies and bodies, the JSB stresses that effective data protection supervision cannot be achieved by such a one-size-fits-all approach. Effective supervision should take account the judicial nature of the work carried out by Eurojust and all the specificities pertinent to the area of criminal justice cooperation. Both elements are properly ensured in the present supervision system and it would be desirable that the future supervision model takes that into account as well as the expertise and knowledge built during all the years of the JSB work.

The JSB Eurojust pleads for reconsideration of the future supervision system of Eurojust. Although for the processing of administrative data the JSB Eurojust sees the logic in making links with the Regulation (EC) No 45/2001, it urges assessing the possibility for maintaining the present system of supervision, at least till the results of the re-evaluation of Regulation (EC) No 45/2001 are known and properly assessed.

5. Conclusions

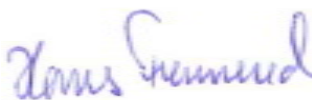
In conclusion, the JSB welcomes the fact, that in general the data protection provisions in the proposed Regulation maintain most of the essential existing data protection elements. It regrets however that certain useful suggestions put forward by Eurojust and supported by the JSB were not introduced in the text.

The JSB invites to reconsider a number of raised issues. This especially applies to the full applicability of Regulation 45/2001 to Eurojust, which is only suited and appropriate for what regards the administrative processing operations of Eurojust, and the change of the supervision model, which takes no account of the judicial nature of the work of Eurojust and its role in coordinating national judicial investigations and prosecutions.

When reassessing those issues, the JSB urges the legislator to focus on the specificity of the Eurojust's mandate, the way of work and possible implications this might have on the Eurojust's operational capacities.

The JSB Eurojust is eager to constructively contribute to the further discussions re the proposed data protection regime in the new Eurojust Regulation in every possible way.

Done at The Hague,
14 November 2013



Hans Frennered
Chair of the Joint Supervisory Body