

## **GERMANY**

### **Germany's follow-up comments to the LEWP meeting on 8 February 2021 (Revision of the Europol Regulation)**

Please find below Germany's written comments both on the first revised version of the text of the Commission proposal (changes to the provisions pertaining to thematic blocs 1 and 3) and – in addition to the comments already made at the last LEWP meeting on 8 February 2021 – on thematic blocs 5 and 7. Further comments may be raised following ongoing scrutiny of the proposal.

#### **Thematic bloc 3: research and innovation**

##### **Article 4(4a):**

The proposed new Article 4(4a) should be deleted. In line with the Agency's core mandate, measures to strengthen Europol in the area of innovation and research should be focused on supporting Member States' law enforcement authorities and not the Commission. The proposal would create a paradoxical situation to the detriment of Member States. Excluding Europol from funding in the areas where it assists the Commission would at the same time limit its own possibilities to implement innovation projects. Therefore, the proposed new Article 4(4a) would have a negative impact on one of the very objectives of the legislative proposal, namely to strengthen Europol's capacity to effectively support Member States in the field of innovation. Neither Europol nor the Commission have been able to demonstrate that the ability to support the Commission would better serve this objective than if Europol could continue to benefit from funding in its innovation activities. Furthermore, from a governance perspective, giving the Commission a right to issue instructions to Europol would undermine the independence of the Agency, thus contradicting the clear position of Home Affairs Ministers in their Joint Declaration on the Future of Europol.

##### **Article 4(4b):**

Considering that screening mechanisms based on Regulation (EU) 2019/452 are conducted by Member States at national level and that the said Regulation does not foresee a role for Europol, the proposed new Article 4(4b) should be deleted.

## **Thematic bloc 5: cooperation with third countries**

Cooperation with third countries is essential to the success of Europol's work, as successfully fighting terrorism and organised crime requires cooperation beyond the European level. If Europol is to properly fulfil its role as EU criminal information hub, more effective mechanisms must be put in place through which it can exchange information with third countries. Of course, this goes hand in hand with appropriate safeguards, e.g. a high level of data protection. Therefore, the Home Affairs Ministers in their Joint Declaration on the Future of Europol have called for strengthening Europol's ability to cooperate effectively with third countries.

We would like to thank the Commission for taking up this demand in their proposal. The COM proposal provides for the possibility for the Executive Director of Europol to authorise "categories of transfers" of personal data to third countries. This possibility is limited to the specific situations laid down in Article 25(5) and shall be carried out "on a case by case basis". We would appreciate an explanation how the authorisation of "categories of transfers" can be brought in line with the required assessment "on a case by case basis". Furthermore, please clarify the difference between such "categories of transfers" and "a set of transfers" dealt with in Article 25(6).

Beyond the original proposal, we have the following comments:

First of all, from our point of view the revision of the Europol Regulation would be a good opportunity to put the Schengen-associated countries on an equal footing with Member States when it comes to the legal basis for the exchange of personal data. The Schengen-associated countries have the same level of data protection in the JHA field as the Member States, as they have implemented and apply the Directive on data protection in the area of police and justice (Directive (EU) 2016/680). In view of this, an adequacy decision under Article 36 of the Directive in relation to Schengen-associated countries is out of the question. Also, an international agreement under Article 218 TFEU to establish the required level of data protection ("adequate safeguards") appears neither necessary nor appropriate. In line with the aim of strengthening Europol's cooperation with third countries, it rather seems justified to treat Schengen-associated countries in the same way as Member States. We therefore consider adding a paragraph to the proposed new Article 27a stating that Article 25 would not apply to Schengen-associated countries. Instead, data transfers to these countries would be subject to the requirements of Article 19(2) and (3) and Article 67. We would appreciate an opinion of the GSC legal service regarding this question.

Secondly, when it comes to the structural exchange of data, the Europol Regulation in Art. 25(1) – aside from existing cooperation agreements – only foresees the possibility of an adequacy decision or an international agreement pursuant to Art. 218 TFEU. Unlike Directive (EU) 2016/680 (cf. Art. 35(1)(d) thereof) or the Eurojust Regulation (Art. 56(2)(a) thereof), the Europol Regulation lacks reference to "appropriate safeguards". Practical experience shows that the scope of application of the options foreseen in the Europol Regulation is very limited: As of yet, no adequacy decision for the JHA area has been rendered. Although an adequacy decision for the UK will in all likelihood be reached, further decisions for other third countries or international organisations are not to be expected for the time being, according to the Commission itself. It is therefore doubtful that adequacy decisions for the JHA area will be of practical relevance in the future. The same applies to international agreements under 218 TFEU. No significant progress has been made so far in the ongoing negotiations. On the contrary, Europol has described the legal regime for structural cooperation with third countries as dysfunctional. Against this background, it seems incomprehensible that Europol should not have any additional possibilities for a structural exchange of information with third countries. Therefore, we propose to give Europol the possibility, in the same way as the Directive (EU) 2016/680 and the Eurojust Regulation, to base the exchange of data also on "appropriate safeguards".

For this purpose, we have worked out the following proposals for wording:

Art. 25(1)(a):

- “(a) decision of the Commission adopted in accordance with Article 36 of Directive (EU) 2016/680, finding that the third country or a territory or a processing sector within that third country or the international organisation in question ensures an adequate level of protection (‘adequacy decision’) **or in the absence of such a decision, appropriate safeguards have been provided for or exist in accordance with paragraph 4a of this Article, or in the absence of both an adequacy decision and of such appropriate safeguards, a derogation applies pursuant to paragraph 5 or 6 of this Article;**”

new Art. 25(4a):

- “**4a. In the absence of an adequacy decision, Europol may transfer operational personal data to a third country or an international organisation where:**
- (a) appropriate safeguards with regard to the protection of operational personal data are provided for in a legally binding instrument; or**
- (b) Europol has assessed all the circumstances surrounding the transfer of operational personal data and has concluded that appropriate safeguards exist with regard to the protection of operational personal data.”**

Art. 25(8): “... Where a transfer is based on paragraph **4a** or 5, ...”.

Furthermore, we have some specific remarks and questions on certain provisions:

Article 25(1)(a) refers to Article 36 of Directive (EU) 2016/680: In this respect, Regulation (EU) 2018/1725 (in Art. 94(1)(a)) refers more specifically and correctly to Article 36(3) of the Directive. The reference in Article 25(1)(a) should be worded accordingly.

Article 25(1)(b) and Article 25(6) both refer to “adequate safeguards”, which corresponds to the terminology of Regulation (EU) 2018/1725 (cf. Art. 94(1)(b) thereof), but deviates from the language used in the Directive (EU) 2016/680 (cf. Art. 37(1) thereof: “appropriate safeguards”). From our point of view, it is unclear whether this refers to different legal standards. In particular, the question arises whether “adequate safeguards” are stricter than “appropriate safeguards” due to a conceptual proximity to the “adequacy decision”? If it is only a matter of different terminology but the same meaning, harmonising the terminology would be desirable in order to prevent ambiguities. We would appreciate an opinion of the GSC legal service regarding this question.

### **Thematic bloc 7: ability to request the initiation of an investigation of a crime affecting a common interest covered by a Union policy**

In their Joint Declaration on the Future of Europol, Home Affairs ministers have explicitly emphasised that the exclusive executive power including the initiation and conducting of investigations lies with the law enforcement authorities of the Member States. Against this background, we see no need to amend Article 6. On the contrary, we would like to remind you that Europol, according to its own statement, has not made formal use of Article 6 in a single case so far. Neither the Commission nor Europol could demonstrate that there is a real need for the amendment of Article 6.

Following the clear rejection of this proposal by the Member States at the meeting on 8 February 2021, we ask the Presidency to delete the proposal in the next revision of the text.

