

Note on the interparliamentary scrutiny of Europol

1. Introduction

Article 88 TFEU provides for a unique form of scrutiny on the functioning of Europol. It lays down that the [regulations re Europol] shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.

Such a procedure is now laid down in Article 51 of the Europol Regulation (Regulation (EU) 2016/794), which provides for the establishment of a "specialised Joint Parliamentary Scrutiny Group (JPSG)", which will play the central role in ensuring this scrutiny. The Europol Regulation shall apply from 1st of May 2017.

Article 51 of the Europol Regulation also closely relates to Protocol (1) of the Lisbon Treaty on the role of national parliaments in the EU. Article 9 of that protocol provides: "The European Parliament and national Parliaments shall together determine the organisation and promotion of effective and regular interparliamentary cooperation within the Union."

Article 51 (2) does not only lay down the basis for the political monitoring of Europol's activities (the democratic perspective), but also stipulates that "in fulfilling its mission", it should pay attention to the impact of the activities of Europol on the fundamental rights and freedoms of natural persons (the perspective of the rule of law).

The Meijers Committee takes the view that improving the interparliamentary scrutiny of Europol, with appropriate involvement of both the national and the European levels, will by itself enhance the attention being paid by Europol on the perspectives of democracy and the rule of law, and more in particular the fundamental rights protection. It will raise the alertness of Europol as concerns these perspectives.

Moreover, the scrutiny mechanism could pay specific attention to the fundamental rights protection within Europol. This is particularly important in view of the large amounts of – often sensitive – personal data processed by Europol and exchanged with national police authorities of Member States and also with authorities of third countries.

The implementation of Article 51 into practice is currently debated, e.g. in the interparliamentary committee of the European Parliament and national parliaments.¹ As specified by Article 51 (1) of the Europol regulation, the organisation and the rules of procedure of the JPSG shall be determined.

The Meijers Committee wishes to engage in this debate and makes, in this note, recommendations on the organisation and rules of procedure.

¹ See, e.g., <https://polcms.secure.europarl.europa.eu/cmsdata/upload/cdd1c9b7-498c-4c74-a69b-134dca63b761/draft-programme.pdf>

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2. Context

Europol as an EU agency operates “in between” the European and the national jurisdictions. It is a general feature of EU agencies that they are a body under EU law with executive tasks and as such subject to judicial oversight by the Court of Justice. However, their organisational and operational structures provide for important national influences.² The common governance structure of EU agencies with a Management Board with representatives of national governments (and the Commission) is a clear illustration.

In the case of Europol, the connection with the national jurisdiction is even more pronounced. As regards Europol, the formalised cooperation between the EU and the Member States takes place at various instances.

Article 5 provides for the participation of Europol's staff in joint investigation teams, whereas Article 7 (2) lays down that each “Member State shall establish or designate a national unit, which shall be the liaison body between Europol and the competent authorities of that Member State”.

Article 10-15 specify the establishment and the functioning of Europol's Management Board, composed of one representative of each Member State and one representative of the Commission. Contrary to the practice of many other EU agencies, the European parliament has no seat in the Management Board, not even as an observer.

Specific attention is given to the cooperation between the European and the national level in the domain of data protection. Article 44 of the Europol Regulation seeks to ensure that the European Data Protection Supervisor – when it supervises the processing of personal data by Europol - acts in close cooperation with national supervisory authorities in the area of data protection and Article 45 establishes a Cooperation Board with an advisory function.

These mechanisms for cooperation emphasise the shared responsibilities for Europol's functioning and at the same time – precisely because of these shared responsibilities – they make the democratic accountability of Europol more complex.

The interparliamentary scrutiny mechanism of Article 51 of the Europol Regulation is therefore a *conditio sine qua non* for a proper democratic control on Europol, which - as said – includes the scrutiny of fundamental rights protection.

3. Objectives

The main objective of the joint parliamentary control is to ensure the democratic accountability of Europol and to create trust. Europol is a body of experts exercising public tasks and should, as such, be subject to adequate supervision of a democratically elected body. This parliamentary control is even more crucial in view of the tasks of Europol which operates in the police area and processes and exchanges large amounts of personal data, quite often of a sensitive nature. Europol's activities are also

² See more in general, Michelle Everson, Cosimo Monda, and Ellen Vos (eds), 2014, EU Agencies in between Institutions and Member States, Kluwer Law International, 2014, particularly Chapter 1 thereof.

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of a technically complex nature, for instance where fighting cybercrime or counterterrorism are the objectives.

Europol's activities are situated in a core area of a democratic society, subject to the rule of law, and the judicial protection of the individual. Appropriate parliamentary control may enhance the transparency of a sector which has inherent characteristics of secrecy. It may also enhance the confidence people have in the European Union.

It is therefore crucial that Europol's activities are scrutinized in an effective manner. This requires, for instance, that:

- The scrutiny extends to the multiannual programming and the annual work programmes of Europol and does not, a priori, exclude Europol's operational activities.
- Special attention is given to Europol's operations in the EU external context, in view of the particularly sensitive nature of these operations, as for instance demonstrated by the role of Europol in the TFTP agreement between the EU and the United States.

4. Key features of joint parliamentary control

Europol is an EU agency and should as such be subject to parliamentary scrutiny by the European Parliament. Scrutiny by the European Parliament is essential, if only because operations of Europol at EU level may have a direct impact on individuals. At the same time, Europol is a body for the cooperation of national police authorities and should be subject to control by the parliaments of the Member States. The control by national parliaments should extend to the activities of national authorities when cooperating with Europol and should provide a clear overview of the (effectiveness of the) cooperation between Europol and national police authorities. The same applies to the functioning of the representatives of the national governments in the Management Board and to the functioning of the representatives of the national supervisory authorities for data protection in the Cooperation Board under Article 45 Europol Regulation (see below).

In view of this "in between" nature of Europol, joint parliamentary control is a prerequisite for Europol's legitimacy and for the legitimacy of the parliamentary role.

Joint parliamentary control should also enhance the effectiveness of the parliamentary role, of course provided that cooperation between MEPs and members of national parliaments is practiced in a spirit of sincere cooperation.

This can also have as an effect that members of national parliaments and MEPs better understand each other's' roles and contributions. The contributions of both levels could reinforce the quality of the parliamentary control and would be more than a zero sum game.

However, this requires that:

- Responsibilities are clearly divided. Joint parliamentary scrutiny should not lead to a situation where neither the EP, nor national parliaments take responsibilities and take proactive action.
- The conditions are set for quick (re-)action.

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The Meijers Committee would, in these perspectives, favour an organisational structure of the JPSG which includes a small group of parliamentarians (from both the European and the national levels) that would be able to act effectively and rapidly. It therefore pleads for the setting up of an operational core group within the JPSG. It is in that particular context crucial that the different levels and fields of expertise are sufficiently represented in this core group. The precise numbers of participants from both levels or the division of voting rights is of lower importance.

5. The relations with (the Cooperation Board for) data protection supervision

The Europol Regulation creates a new mechanism for data protection supervision, which should create a strong cooperation mechanism between the EDPS and the national supervisory authorities. According to Article 44 thereof, the EDPS shall act in close cooperation with the national authorities and shall use the expertise and experience of these authorities. In some cases, where data originate from one or more Member States, consultation of the national authorities is compulsory.

A structural cooperation is also set up. Article 45 provides for a Cooperation Board composed of representatives of the EDPS and the national supervisory authorities, with an advisory function.

This cooperation in the area of data protection is an additional reason why the JPSG can have added value. Although independent, the DPAs are not exempted from any parliamentary influence.³ Since the parliamentary scrutiny vis-à-vis the EDPS is a task of the EP, and the national parliaments play their role in relation to national DPAs, the JPSG could help to ensure coordination.

Moreover, the Meijers Committee advises that not only the EDPS (Article 51 (2)(b), but also the Chair of the Cooperation Board appears regularly before the JPSG. The main content of these meetings should be included in the summary conclusions submitted to the EP and the national parliaments (Art 51(5)). These could be requirements that could be laid down in the rules of procedure.

The above could enhance the democratic scrutiny on the data protection supervision, but also ensure that there is structural attention for the respect of fundamental rights by Europol.

6. Transparency and secrecy

The various cooperation mechanisms - and the JPSG in particular - have as important features that they serve as structures for information exchange between Europol, the national police authorities and the various instances tasked with the scrutiny of Europol's performance. These mechanisms may enhance the transparency of governments and are subject to the rules on access to documents (see Articles 15 TFEU and 42 Charter).

The Meijers Committee takes the view that under Article 51 of the Europol Regulation transparency should be the rule and discretion and confidentiality the exception. Article 51 (2)(a) provides for a framework which requires Europol's management to appear before the JPSG and discuss a wide range of subjects. The rules of procedure should specify in a restrictive manner the occasions where the management of Europol may invoke discretion and/or confidentiality. We propose that the rules of procedure limit these notions to sensitive case related information. The rules of procedure could also

³ CJEU, Case C-518/07, Com/Germany, at 43.

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provide for the possibility of members of the JPSG to have access to this type of information on the basis of confidentiality. Limited access may also require security clearance.

Transparency should also be the rule as far as the external tasks of Europol are concerned, for instance activities in relation to the operational and strategic agreements with third countries and with international organisations and in relation to the implementation of the EU-US TFTP Agreement. This should also be made explicit in the rules of procedure.

In the interest of transparency, it could also be provided that the JPSG organises hearings with stakeholders and develops common views by way of resolutions or other policy interests.

7. Data protection

The Meijers Committee takes the view that the JPSG should also be used as a forum for discussing matters of data protection. Article 51(2)(b) lays down that the EDPS shall appear before the JPSG to discuss general matters of data protection. The rules of procedure should specify subjects that should in event be discussed are the transfers of personal data with EU bodies, international organisations and private parties, as well as the experiences with personal data breaches. Specific attention should be paid to the application of Europol of the purpose limitation principle.

In view of the large scale and the sensitive nature of the processing of personal data by Europol, data protection should not only be discussed in the exchanges with the EDPS, but should also be a structural subject of the meetings with Europol's management under Article 51(2)(a). The rules of procedure should specify this.

8. The application of the Charter

Europol's activities have direct implications for fundamental rights protection, also outside the area of data protection. The Meijers Committee recommends the JPSG to pay attention to the fundamental rights aspects of the functioning of Europol in a structured manner. The rules of procedure could lay the foundation of this.

In substance, the scrutiny by the JPSG could deal with the subjects discussed in the European Parliament Report of 24 November 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)), as far as Europol's activities have direct implications for fundamental rights. The JPSG could ask Europol's management a regular overview of the fundamental rights implications of its activities, particularly in domains where human rights are at the core such as the combat of trafficking in human beings and the protection of its victims, including migrants, and the fight against terrorism.

9. Organisation and rules of procedure

Article 51 of the Europol Regulation provides for an assignment to the European Parliament and the national parliaments to determine the organisation and the rules of procedure of the JPSG.

The Meijers Committee advises to clearly lay down in the rules of procedure or in its recitals:

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- the main objectives of parliamentary scrutiny, which should consider both the democratic perspective and the perspective of the rule of law.
- That parliamentary scrutiny should be based on the principle of effectiveness and should serve to enhance the legitimacy of Europol's functioning. The effectiveness could be enhanced if the JPSG would be able to act effectively and rapidly. This pleads for the setting up of an operational core group within the JPSG.
- The relation with data protection supervision (by the EDPS, the national data protection authorities and the Cooperation Board of Article 45).
- The effective protection of fundamental rights as an element of the monitoring by the JPSG.
- The application of the principle of transparency and the strict exceptions to this principle.

Furthermore, in the same spirit, the Rules of procedure should include procedural arrangements. This note contains examples of such procedural arrangements.

10. Finally

The issue of parliamentary scrutiny extends beyond Europol. The TFEU also refers to joint parliamentary oversight of Eurojust. Moreover, the considerations in this note may also apply to other EU agencies established in the Area of Freedom, Security and Justice and even, further, to agencies in other domains of EU law.

The organisation and the rules of procedure of the JPSG could therefore be developed into a model for parliamentary oversight on EU agencies in general.

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About

The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation.

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