



Report on the conditions for Europol National Units in relation to data processing in Europol's Information System

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I. Introduction

Considering the results of its annual Europol inspection in March 2011, the JSB decided on 14 March 2012 to explore the possibilities of developing guidelines for Europol National Units (ENU). The aim of the guidelines is to enhance the level of national control over data to be inputted into the Europol Information System (EIS) and to ensure that the data entered into the system are checked for relevance..

A survey was carried out, using a set questionnaire.

Contributions were received from 26 delegations: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovak Republic, Slovenia, Spain, Sweden, The Netherlands and the United Kingdom.

II. Purpose of the survey

In its 2011 report, the JSB recommended that effective mechanisms should be developed to guaranteeing EIS users that data processed actually covers crimes for which Europol is competent. The JSB also recommended developing harmonised data input criteria.

The aim of the survey was to gain an overview of how ENUs are organised and imbedded in national structures allowing them to fulfil the tasks and comply with the responsibilities defined in the Europol Council Decision (ECD)¹.

Although ENUs have various tasks and responsibilities concerning data processing at Europol or via Europol, this survey is limited to the role ENU's have with data processing in the EIS as defined in Art. 11 ECD.

III. Set up of the survey

The tasks and responsibilities of ENU's are divided into two: : (i) before transmission of data to the EIS and (ii) while data are processed by Europol.

The following elements of the tasks and responsibilities of the ENUs form the basis of the survey:

1. The ENU shall ensure compliance with the law (Art. 8(4g)).
2. The ENU/Member State is responsible for the legality of the collection, the transmission to Europol and the input of data, as well as their accuracy, their up-to-date nature and the verification of the storage limits. (Art. 29(1)).
3. Europol's competence shall cover organised crime, terrorism and other forms of serious crime as listed in the Annex affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences.
4. The ENU shall supply Europol with information for storage (Art. 8(4f)).
5. The ENU shall keep the data up to date (Art.8 (4c)).
6. The ENU is responsible for reviewing its data processed by Europol (Art. 11(3)).

¹ OJ L121, 15.5.2009, page 37

7. The ENU is responsible for the proper implementation in other (not the Article 20 review and security) respects.
8. The ENU shall ensure that if proceedings against the person concerned are definitively dropped, or if that person is definitively acquitted, the data relating to the case in respect of which either decision has been taken shall be deleted. (Art. 12(5))
9. The ENU shall review the need for continued storage (Art. 20(1))
10. The ENU shall decide on the need for continued storage (Art. 20(2))
11. To inform Europol when it has deleted in national files data that were also sent to Europol (Art. 20(3)).

IV Results

Principal responsibilities for the ENU's are ensuring compliance with the law and acting as point of contact with Europol, filling in the responsibility of a Member State for the legality of the collection, the transmission to Europol and the input of data, as well as their accuracy, their up-to-date nature and the verification of the storage limits. Through the survey, checks were made as to how this responsibility is translated into formalising the position of the ENU, its competences and practice.

Responsibilities at national level

According to Art. 29(1) ECD, the Member State is responsible for the legality of the collection, the transmission to Europol and the input of data, as well as their accuracy, their up-to-date nature and the verification of the storage limits. A specific role in this is dedicated to the ENU: it shall ensure compliance with the law (Art. 8(4g)). It is clear from the survey responses that the actual implementation of these responsibilities differs between the Member States. As a basic rule, all competent authorities providing the data to be transmitted to Europol are responsible for these data. The role of the ENU as defined in Art. 8 ECD varies between the Member States. Of the Member States responding to the survey, one state's ENU holds no responsibility, whilst another state's ENU holds full responsibility.

In general, the reactions received demonstrate that there is a shared responsibility between the authority providing the data and the ENU. But to exactly what extent a ENU is responsible varies between the Member States. One state specified the different responsibilities as follows: the ENU is accountable to other Member States for the accuracy and up-to-date character of the data, the authority providing the data is accountable in accordance with the national data protection legislation.

Formal position ENU

The results are presented based on the description of the tasks and responsibilities of the ENU. The official status of a ENU is important to allocate tasks and responsibilities.

All answers received indicate that all ENU's are incorporated in the national law enforcement structures by either

- specific national laws or regulations;
- incorporation as an entity within an existing structure; or
- a combination of both.

A less uniform approach was indicated in the answers received to the question of whether the ENU has a formal task to check data that should be transmitted to Europol.

Some ENUs have such tasks, others do not. In some Member States a differentiation is made between how data is transmitted to Europol. For example, when an automatic data loader is used for inputting data into the EIS, the ENU might have the formal role, but the responsibility for checking the data is left to the inputting competent authority.

A. Practice before data is transmitted to Europol

Competences in practice

In order to fulfil their responsibilities, an ENU must have the opportunity to actually check data before it is transmitted to Europol. In this respect, the contributions show that most ENU's have access (direct or indirect) to the national files of law enforcement authorities. Two Member States do not provide for such access. Access to judicial files is limited or non-existent.

Another important aspect for checking the data to be transmitted to Europol is the possibility to compare various sources of information (police and judicial files). Most answers indicate that the ENU has such a competence. However, it became clear that those competences are not always regularly used, partly in view of the volume of data transmitted to Europol.

All answers indicate that in case of doubt, the ENU may refuse the transmission of data to Europol.

Data may not be inputted into the EIS if proceedings are definitely dropped or if the person is definitely acquitted. The check on data to be transmitted could thus also involve a check as to whether one of these conditions is applies, preventing data from being inputted into the EIS. Most answers received indicate that such a check does not take place. Some indicate that this check is done in the review period after three years, others when additional information is requested. In one Member State such a check does not take place since the data inputted into EIS is not related to suspected persons of a crime but only on persons whom it is believed will commit a crime (Art. 12(1)(b) ECD). Answers also indicate that such a check does not take place as it is expected that the judicial process is not expected to begin within the period of registration of the data in EIS.

Procedures

Part of ensuring that the task of a ENU is clear and sufficiently defined, involves developing and implementing procedures. All answers indicate that such procedures exist in the form of internal regulations, normative acts or desk guides. The content of these procedures were not checked by the JSB, but by the national data protection authorities (being member of the JSB). In one case it was reported that the procedures are under review.

Criteria for inputting in EIS

All answers indicate that the formal criteria referred to in the ECD are used. Sometimes these criteria are also included in internal regulations. One Member State mentions that the check also includes a check as to whether a person is a victim, or a child under the age of 15.

Europol's competence covers organised crime, terrorism and other forms of serious crime as listed in the Annex to the ECD affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offence.

On the question of whether specific criteria are used to establish whether the crime affects two or more Member States in such a way as to require a common approach, it became clear that in general no specific criteria are used.

The assessment of the crime involved is done on a case by case basis. Some Member States specifically mention categories of crime that by their very nature are trans-border and specific aspects of the crime, such as nationality of perpetrator(s), place of origin/flow/destination of goods, and victims' place of residence.

Data loader

Data may be transmitted to Europol and inputted into the EIS using an automatic data loader. Not all Member States use a data loader. Those that do input data in the EIS with a data loader have advised that there is not always an automatic link between the data loader and the national files used as source for the information to be transmitted to Europol. The group of Member States using data loaders do not have the same internal procedures for checking the data. In one Member State there is no check by the ENU; in others the check is done before data are inputted into the data loader; and others check the data when processed in the data loader.

B. When data is processed at Europol

Practice

According to Article 8(4)(c) ECD, the ENU shall keep information and intelligence up to date. To fulfil this role, ENUs should have the necessary tools. It is deemed very important that it is registered which data are transmitted to Europol to be inputted into the EIS. Otherwise, it would be difficult to comply with Article 8(4)(c).

Except for two Member States in which no registration takes place, all answers received indicate a registration of information transmitted to Europol. Where the registration takes place differs: at the ENU's; at the law enforcement authority providing the data; and/or in the system used to send data to Europol. Sometimes the data transmitted to Europol is identical to the data in a national data base. Any change in that database will automatically lead to a change in the EIS.

Reviewing

The ENUs have various responsibilities when data is processed in the EIS. Apart from the responsibilities referred to under chapter A, and a more general responsibility for the proper implementation of the ECD, ENUs are responsible for reviewing data of their Member State processed by Europol.

The reviewing process may be divided into two parts: (i) the process to decide after the three-year retention period whether further processing is still necessary and (ii) the deletion of data when proceeding against the person concerned are definitely dropped or if that person is definitely acquitted.

Concerning the three-year review, most answers indicate that the ENU has a role, but that role varies between states: sometimes it is the ENU that decides, sometimes it is the national authority providing the data, sometimes it is a mixed form.

The criteria reported to be used to assess whether data should be further processed are: the continuation of the investigation, new outcomes in the investigation, recent convictions, the gravity of the crime and recent criminal activity. There is no specific format for a decision to maintain the data in the EIS.

Concerning the deletion when proceedings are dropped or the person is acquitted, most answers made a link to the three-year review process. Most answers indicated that there is no obligation for judicial authorities to inform law enforcement authorities about the outcome of proceedings. Without such an obligation the responsible police authorities might not be aware of the judicial decision in their cases. There is certainly no such link with the ENUs. There is no specific check within the three-year period of the judicial files.

Informing Europol when data are deleted in national files

The answers received demonstrate that when authorities delete records, they will inform the ENU. Practice shows variations, depending on whether an automatic data loader is used or when there is a direct link between the content of a national file and the EIS or whether registration took place of the data transmitted to the EIS. One Member State makes a check every two years. In another Member State data are kept until the person involved reaches 100 years of age, making this provision obsolete. Where the data transmission is registered by the authority providing the data, most answers indicate that there is an obligation to inform the ENU.

V. Conclusions

The results of this survey demonstrate that the position, role and responsibility of ENUs are not harmonised in the Member States. For example the obligation of Art. 8(3) ECD that Member States must grant access to relevant national data for ENUs, is not implemented correctly in all Member States. The results on responsibility for data to be transmitted to EIS show a wide variety of types of involvement, ranging from no role for a ENU to a specific role of checking all data to be transmitted. In relation to data input criteria - the reason for organising this survey - the survey shows that decisions are made on a case by case basis using the formal criteria of the ECD as guideline. Only one Member State mentions a specific check on the age of a person. The specific guidelines developed by Europol and the Heads of the ENUs after a recommendation of the JSB on suspects of trafficking in human beings, membership of a criminal organisation and the specific rules on minors were not mentioned by any respondent.

As the decision to input data into the EIS is taken on different levels (ENU/police authority) there is a clear risk of using different criteria or standards to assess compliance with the ECD. This conclusion is supported by the outcome of various inspections of the content of the EIS by the JSB in the past years. This survey demonstrates the need to develop harmonised criteria to be used by all Member States, enabling the ENUs and other competent authorities to have a uniform check on data to be inputted into the EIS.

VI. Recommendations

- i) Criteria should be developed for assessing whether data to be inputted into the EIS relate to crimes for which Europol is competent and comply with the provisions on which data may be inputted into the EIS.
- ii) These criteria should also include the criteria already agreed upon between Europol and the JSB in respect of processing data on minors, persons related to trafficking in human beings and persons who are member of an organisation which is considered to be a criminal organisation in only some Member States.
- iii) Europol and the Heads of the ENUs should develop these rules as soon as possible. The JSB needs to be involved in this process.
- iv) On national level procedures should be developed ensuring that the inputting authority is informed when proceedings are dropped or the person involved is acquitted.
- v) The national data protection authorities, the JSB and Europol should closely monitor the proper implementation of these rules in the procedures and data processing in the Member States.