



**JUSTICE**

**JUSTICE briefing to the House of Lords Select Committee on the  
European Union, Sub-Committee F (Social Affairs, Education and  
Home Affairs)**

**on**

**Supplemental Agreement between Europol and the United States of  
America on the exchange of personal data and related information  
(docs. 13689/02 Europol 82 and 13689/02 Europol ADD 1)**

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**Supplemental Agreement between Europol and the United States of America on the  
exchange of personal data and related information (docs. 13689/02 Europol 82 and  
13689/02 Europol ADD 1)**

1. JUSTICE is an independent all party law reform and human rights organisation which aims to improve British justice through law reform and policy work, publications and training. It is the British section of the International Commission of Jurists.
2. This supplemental agreement would extend existing co-operation between Europol and the US (based on an Agreement signed in December 2001) to include the exchange of personal data. This draft Agreement raises a number of issues relating to the rights of the individual and data-protection, many of which are exacerbated rather than resolved by the Exchange of Letters between the US and Europol contained in Doc 13996/02 Europol 95.

**A – Scope of Information to be Exchanged**

I – Europol's Remit

3. The purposes for which personal data may be requested and exchanged under the agreement are set out in Article 5.1.(a) of the draft Agreement. These are:  
“for the purpose set forth in the request, which shall be deemed to include the prevention, detection, suppression, investigation and prosecution of any specific criminal offences, and for any specific analytical purposes, to which such information relates. Where the receiving Party seeks the use of such information for other purposes, it shall ask for the prior consent of the Party that furnished the information.”
4. This statement of the purpose for which personal data may be requested is extremely wide. Firstly it applies to “any specific criminal offences” rather than to those European type offences included in Europol's current remit under the Europol Convention or to “serious international crime” as put forward in the amendment to the Europol Convention proposed by the Danish Presidency earlier this year. Secondly the purpose of the request “**shall be deemed to include** the prevention, detection, suppression,

investigation and prosecution of any specific criminal offence” making this list of possible purposes non-exhaustive and open to extension. Finally, the last sentence allows for the possibility of the information to be used for any other purpose with the consent of the Party that furnished the information without specifying in any way the grounds on which that party may consent or refuse to consent to such use.

5. These problems are exacerbated by the Exchange of Letters between Europol and the US which states at point 5 that the wording in Article 5.1(a):  
“includes, *inter alia*, exchange of information pertaining to immigration investigations and proceedings, and to those relating to *in rem* or *in personam* seizure or restraint and confiscation of assets that finance terrorism or form the instrumentalities or proceeds of crime, even where such seizure, restraint or confiscation is not based on a criminal conviction.”
6. This statement clearly identifies non-criminal proceedings as potentially forming the basis of exchange of personal data between Europol and the US. Immigration is not within Europol’s remit and as such, Europol should not be in possession of information, nor should it be requesting information relating to immigration investigations and proceedings where those are not related directly to an offence within its remit according to the terms of the Europol Convention.
7. Personal data relating to immigration, now a Community issue, should come within the rules relating to data protection within the first pillar including the *Regulation (EC) No 45/2001 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*. Europol is not a Community institution and as such is not governed by this Regulation. The exchange of personal data relating to immigration can in no way be considered to be a function of Europol.
8. **JUSTICE recommends that the purposes for which personal data may be exchanged under this Agreement should be explicitly restricted to criminal proceedings within the remit accorded to Europol under the Europol Convention. There should be no possibility for data to be exchanged under this Agreement for purposes not directly related to a specific serious international crime.**

## II – Special Categories of Personal Data

9. The transmission of personal data revealing race, political opinions, or religious or other beliefs, or concerning health and sexual life is permitted under Article 6 of this draft Agreement where the transmitting party determines that such data is “particularly relevant to a purpose set forth in Article 5.1”. Such sensitive types of data are covered by Article 6 of the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data of 28 January 1981 which specifies that such personal data “may not be processed automatically unless domestic law provides appropriate safeguards”.

10. The Europol Convention states in Article 10 on the collection, processing and utilization of personal data:

“The collection, storage and processing of the data listed in the first sentence of Article 6 of the Council of Europe Convention of 28 January 1981 with regard to Automatic Processing of Personal Data shall not be permitted unless strictly necessary for the purposes of the file concerned and unless such data supplement other personal data already entered in that file. It shall be prohibited to select a particular group of persons solely on the basis of the data listed in the first sentence of Article 6 of the Council of Europe Convention of 28 January 1981 in breach of the aforementioned rules with regard to purpose.”

**11. JUSTICE recommends that Article 6 of the draft Agreement should mirror the wording contained in Article 10 of the Europol Convention for the sake of clarity. In particular, the words “particularly relevant” should be replaced with the term “strictly necessary”. This is the sense given to the term in the Exchange of Letters and there seems to be no justification for the broader wording in the draft Agreement. Specific safeguards for the transmission of such data should be contained in the Agreement to reflect the sensitive nature of this type of data as recognised in the Council of Europe Convention. Without such clearly outlined safeguards transmission of such data should not be permitted.**

## **B – Wide Range of Authorities in the US Authorised to Receive Europol Data**

12. Article 7 of the draft Agreement allows data supplied by Europol to be used by competent US federal, state or local authorities. It also allows for onward transmission of data to international institutions or third states (Article 7.3) with the prior written permission of the transmitting party. Data received by Europol will only be made available to the

“competent law enforcement authorities of Member States of the European Union or for use within Europol”.

13. The wide range of purposes allowed under Article 5.1 (see above) leaves it unclear exactly what authorities in the US would be “competent”. There seems also to be an inequality between Europe and the US as to which authorities may use data transferred under this agreement.

**14. JUSTICE recommends, in the interests of clarity and in order to ensure that the purpose for which data is transferred and used under this Agreement is purely in relation to serious international crime, that only federal or state law enforcement authorities in the US should be competent to receive information. In the light of the response of the JSB and the Exchange of Letters on Article 7 JUSTICE recommends the removal of Article 7.3 relating to onward transmission of data to third countries or international institutions for the avoidance of doubt.**

#### **C – Data Protection Safeguards in the US**

15. Data protection standards in the US are an unknown quantity. The Exchange of Letters does little to clarify the US safeguards regarding data protection at federal, state or local levels. Countries outside the EU and Council of Europe are not obliged to conform to the same high data protection standards in force in Europe. If Europol is allowed to exchange data with the US without requiring compliance with EU data protection standards in the treatment of that data, this would render EU protections meaningless in effect. All negotiations must be conducted in the light of the lack of judicial or political accountability by the US for any breaches of European or international human rights standards or of European data protection provisions.

**16. JUSTICE recommends that the specific nature of data protection standards applicable to exchanges of data made under this Agreement including a list of the competent authorities monitoring compliance should appear on the face of the Agreement.**

#### **C – Conclusion and Recommendations**

17. There is little or no democratic supervision of the negotiation process for this type of agreement and there is no clear line of recourse to justice for an individual in the event

that such agreements affect his or her fundamental rights. An agreement of this type which may have a great impact on individual rights should, as a minimum, be considered by the Article 29 Data Protection Working Party at EU level before signature is authorised to ensure that it complies with EU standards of data protection.

#### **18. Recommendations:**

- **Article 5.1 of the draft Agreement should make it clear that personal data will only be exchanged for the purposes of the prevention, detection, suppression, investigation and prosecution of serious international crime and that, under no circumstances, will personal data be exchanged under this Agreement in non-criminal proceedings;**
- **Article 6 should allow for the transmission of special categories of personal data only where “strictly necessary” and not just where “particularly relevant”;**
- **Only federal or state US law enforcement authorities should be competent to receive data under the terms of this Agreement;**
- **Article 7 paragraph 3 should be removed to prevent onward transmission of data;**
- **Applicable data protection standards and the independent authorities set up to oversee compliance with those standards should be specified on the face of the Agreement or in an annexe thereto;**
- **The Agreement should be approved by the Article 29 Data Protection Working Party prior to signature to ensure that it complies with EU data protection standards.**

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