



# Computer & Communications Industry Association

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## CCIA comments on the extension of the Europol Mandate

### Cooperation with private parties

9 July 2020

CCIA welcomes the opportunity to provide comments on the Europol mandate inception impact assessment. Over the years, many CCIA Members<sup>1</sup> have built a trusted relationship with Europol and regularly assist the agency in tackling cross-border criminal activities, particularly counter-terrorism, child exploitation imagery and cybercrimes.

We take note of the call from Member States of “the urgent operational need for Europol to request and receive data directly from private parties, while respecting the supporting role of Europol with regard to the actions carried out by the competent authorities of the Member States”.

As the Commission contemplates additional purposes of processing for Europol to better support national competent authorities, **CCIA recommends formalising the existing voluntary cooperation between Europol and private parties** to minimise the chances of overlaps or conflicts with existing instruments (EIO, e-Evidence) and to ensure that Europol continues to support the competent law enforcement authorities.

Our comments focus on data requests and cooperation with private parties (“problem 1” as referred in the inception impact assessment), as well as the expansion of the scope of processing purposes by Europol to the extent that the said processing pertains to private parties’ customer data:

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<sup>1</sup> CCIA’s membership is available on <https://www.ccianet.org/about/members/>

## 1) Europol data requests directly addressed to private parties

CCIA kindly invites the Commission to clarify from the outset the nature of a Europol request to private parties, i.e. either formalising the existing framework through voluntary cooperation procedures and operational improvements or creating a new obligation for private parties. While we briefly consider both options, our comments primarily focus on formalising the existing voluntary cooperation between Europol and private parties, in line with the December 2019 EU Council Conclusions.

### a) Direct requests to private parties should remain voluntary

**CCIA considers that formalising the existing voluntary cooperation between Europol and private parties could best address the calls from Member States.**<sup>2</sup> It would also incentivise private parties to share more data than they currently do, minimise the chances of overlaps or conflicts with existing and future data access instruments (European Investigation Orders, European Production Orders), without fundamentally altering Europol's supporting and coordination role vis-a-vis the competent law enforcement authorities in Member States.

**CCIA would strongly caution against conferring Europol with binding investigatory powers and the ability to obtain data directly from private parties.**

Should the EC and Member States consider expanding Europol's powers to create a future regime whereby data disclosure would be obligatory, it will be important that Europol be required to utilise the European Production Order (EPO) process, as established in the proposed e-Evidence Regulation.

The scope of any future Europol binding order would need to be limited to crimes uniformly defined at EU level, and the conditions of application would also require severe restriction to avoid (a) overlaps with the execution of European Production Order, (b) bypassing the safeguards of the e-Evidence Regulation (including possible notification to the affected Member State(s)) and (c) duplicating orders to a service provider.

Lastly, and as per the EU acquis, the execution of new investigatory powers would necessarily require some form of review and approval by an *independent judicial authority* particularly if data pertains to sensitive data. It is unclear which body could qualify as such and authorise a Europol binding order requesting access to sensitive data.

### b) Private parties' legal grounds to transmit data

**CCIA generally believes the current voluntary cooperation remains fit for purpose. However, companies seeking to voluntarily share relevant data with Europol would benefit from clarity as to when, and in what circumstances, doing so has sufficient basis in EU law.** In that respect, CCIA agrees with the Council that a voluntary data sharing regime "should provide for a sufficient legal basis for the transmission of personal data by private parties to Europol."<sup>3</sup>

Such a legal basis could derive from the General Data Protection Regulation (GDPR) to ensure a high standard of protection for fundamental rights.

## 2) Additional processing purposes of private parties' customer data

Assuming the Commission only seeks to formalise the existing voluntary cooperation between Europol and private parties, CCIA could support the introduction of provisions allowing Europol to process

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<sup>2</sup> "[The Council of the European Union:] acknowledges the urgent operational need for Europol to request and receive data directly from private parties, while respecting the supporting role of Europol with regard to the actions carried out by the competent authorities of the Member States", Council Conclusions 14745/19, 2 December 2019

<sup>3</sup> Ibid.

private parties' customer data for other purposes than identifying the relevant competent authorities,<sup>4</sup> providing the following guiding principles are met:

- The purposes of processing are clearly defined, disclosed, and justified to the receiving private parties at the time of the request, and
- The range of additional new purposes of processing is limited to Europol's *support and coordination* mandate, and
- Additional safeguards commensurate to the risks are in place (e.g. restrictions on onward transfers to third countries), consistent with the general spirit of EU's data protection principles and with Europol's supporting and assistance mandate, and
- The voluntary regime fits with logic of the proposed e-Evidence Regulation (e.g. possible notification to one or more affected Member State).

CCIA could support Europol's processing of personal data voluntarily provided by private parties for purposes defined in Article 18(2)(a)-(d) of the current Europol Regulation (2016/794) providing that clear and distinct retention and further processing safeguards are in place, and in line with Article 23(1)(a)-(d) of the General Data Protection Regulation.

We invite the Commission to further consult stakeholders for any other purposes it may consider.

### 3) Additional considerations

Given our Members' existing cooperation with Europol, CCIA is keen to understand the scope and ambition of the new cooperation regime between private parties and the agency. In addition to the above consideration on the processing purposes, the following clarifications would be helpful in the run up to a new proposal:

- The **general purpose** that Europol's data requests would serve – investigative or broader intelligence gathering activities?
- The **criminal activities** that may be covered by a data request – are the requests intended to be generally limited to issues where private parties and Europol have a proven track-record of cooperation e.g. counter-terrorism (CT) and child exploitation imagery (CEI), or will they be issued in relation to any crimes listed in Annex I of Regulation 2016/794?
- The **service providers** who may receive a data request – service providers who provide a service in the Union (similar to the e-Evidence package), or any service providers?
- The **type of data** that Europol could request that it does not already today
- The **jurisdictional threshold** that would trigger a Europol request to assist a criminal investigation. Would requests cover international criminal investigation (suspect, victim and service provider located in different Member States / countries) or be used as a proxy for domestic investigations?
- **Europol's resource capabilities** to handle more ambitious cooperation with the private sector. Private parties are always willing to further cooperate with Europol providing that it receives additional resources to appropriately handle additional referrals.

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<sup>4</sup> Article 26(2) Regulation 2016/794