EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION ON EUROPOL'S MANAGEMENT BOARD DECISIONS ADOPTED PURSUANT TO ARTICLES 11(1)(q), 18 AND 18a of the EUROPOL REGULATION

(Case 2022-0923)

1. INTRODUCTION

1. This Opinion relates to the draft Management Board Decisions (hereinafter, 'MB Decisions') on the conditions related to the processing of personal data on the basis of Articles 18, 18(6), 18(6a) and 18a of Regulation (EU) 2016/794[1], as amended by Regulation (EU) 2022/991 as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation[2] (hereinafter, 'amended Europol Regulation').

2. The EDPS issues this Opinion in accordance with Articles 11(1)(q), 18 and 18a of the amended Europol Regulation, which provide that:

   Article 11(1)(q): '*The Management Board shall: (...) (q) adopt guidelines further specifying the procedures for the processing of information by Europol in accordance with Article 18, after consulting the EDPS*;'

   Article 18(6b): '*The Management Board, acting on a proposal from the Executive Director, after consulting the EDPS and having due regard to the principles referred to in Article 71 of Regulation (EU) 2018/1725, shall specify the conditions relating to the processing of the data referred to in paragraphs 6 and 6a of this Article, in particular with respect to the*

[1] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.
[2] Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, PE/8/2022/REV/1, OJ L 169, 27.6.2022, p. 1–42.

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provision of, access to and the use of those data, as well as the time limits for the storage and deletion of such data, which shall not exceed those set out in paragraphs 6 and 6a of this Article.'

Article 18a(5b): '*The Management Board, acting on a proposal from the Executive Director and after consulting the EDPS, shall specify the conditions relating to the provision and processing of personal data in accordance with paragraphs 3 and 4.*'

2. FACTS

3. On 15 September 2022, the Chairman of Europol's Management Board ('EMB') filed a request for consultation pursuant to Articles 11, 18(6b) and 18a(5) of the amended Europol Regulation, communicating to the EDPS four draft decisions.

   The draft decisions have as their objective to specify:
   - the procedures for the processing of information for the purposes listed in Article 18(2) of the Europol Regulation[3];
   - the conditions related to the processing of personal data on the basis of Article 18(6) of the Europol Regulation[4];
   - the conditions related to the processing of personal data on the basis of Article 18(6a) of the Europol Regulation[5]; and
   - the conditions related to the processing of personal data on the basis of Article 18a of the Europol Regulation[6].

4. The draft MB Decision on Article 18(2) (EDOC #1252127v2) contains 17 Articles with provisions on scope (Article 1), Personal data provided by the Member States, Unions bodies, international organisations and third countries (Article 2), on Personal data provided by private parties, private persons or retrieved directly by Europol from publicly available sources (Article 3), Processing for the purpose of cross-checking (Article 4), Processing for the purpose of analyses of a strategic or thematic nature (Article 5), Processing for the purpose of operational analyses (Article 6), Processing for the purpose of facilitating the exchange of information (Article 7), Processing for the purpose of research and innovation projects (Article 8), Processing for the purpose of supporting Member States, upon their request, in informing the public about

[3] EDOC #1252127v2.
[4] EDOC #1252123v2.
[5] EDOC #1252125v2.
[6] EDOC #1252126v2.

wanted suspects or convicted individuals (Article 9), Access to the data for Europol staff (Article 10), Access by Member States and Europol staff to information stored by Europol in accordance with Article 20(2a) of the Regulation (Article 11), Time limits for processing (Article 12), Forwarding personal data received directly from private parties to national units concerned (Article 13), Technical guidelines (Article 14), Replacement and repeal (Article 15), Review (Article 16) and Entry into force (Article 17).

5. The draft MB Decision on Article 18(6) (EDOC #1252123v2) contains 8 Articles with provisions on scope (Article 1), Provision of data (Article 2), Access to data for Europol staff (Article 3), Use of the data (Article 4), Time limits for the processing (Article 5), Technical guidelines (Article 6), Review (Article 7) and Entry into force (Article 8).

6. The draft MB Decision on Article 18(6a) (EDOC #1252125v2) contains 10 Articles with provisions on scope (Article 1), Personal data provided by the Member States, Union bodies, international organisations and third countries (Article 2), Personal data provided by private parties and private persons (Article 3), Personal data retrieved by Europol from publicly available sources (Article 4), Access to data for Europol staff (Article 5), Use of the data (Article 6), Time limits for the processing (Article 7), Technical guidelines (Article 8), Review (Article 9) and Entry into force (Article 10).

7. The draft MB Decision on Article 18a (EDOC#1252126v2) contains 11 Articles with provisions on scope (Article 1), Personal data provided by the Member States, the EPPO, Eurojust and third countries (Article 2), Additional requirements for processing personal data in accordance with Article 18a of the Regulation (Article 3), Personal data provided by third countries (Article 4), Access to data for Europol staff (Article 5), Use of the data (Article 6), Time limits for the processing (Article 7), Storage for the purpose of ensuring the veracity, reliability and traceability of the criminal intelligence process (article 8), Technical guidelines (Article 9), Review (Article 10) and Entry into force (Article 11).

3. LEGAL ANALYSIS AND RECOMMENDATIONS

3.1. The amended Europol Regulation and the empowerments to adopt Management Board Decisions - General observations on Articles 18 and 18a and on the submitted draft MB Decisions

8. The draft MB Decisions raise important concerns that are analysed in detail below, in particular as regards:

- the scope of application of new Article 18a of the amended Europol Regulation. In the opinion of the EDPS, this article provides for a derogation to the general rule limiting Europol to process data with an attributed data subject category, in line with Article 18(5) and Annex II, and hence its scope of application should be interpreted restrictively, in line with criteria for interpretation adopted by the Court of Justice of the European Union (CJEU)[7];
- the unlawful delegations of powers granted to the EMB contrary to the case law of the CJEU;
- the lack of concrete specification of the rules of the amended Europol Regulation, in many instances failing to give concrete effect to the requirements as called for by the amended Europol Regulation.

3.1.1. New Articles 18(6a) and 18a of the amended Europol Regulation

9. The amended Europol Regulation entered into force on 28 June 2022 (Article 2 of Regulation (EU) 2022/991) and introduced structural amendments with regard to the way Europol processes personal data and in particular data lacking a Data Subject Categorisation (hereinafter, 'DSC' or 'Categorisation').

10. 'Categorisation' means the process of verifying whether a given dataset contains personal data belonging to the categories of data subjects listed in Annex II to the amended Europol Regulation. Annex II part A lists exhaustively the categories of personal data and categories of data subjects whose data may be collected and processed for the purpose of cross-checking as referred to in point (a) of Article 18(2). Annex II part B exhaustively lists the categories of personal data and categories of data subjects whose data may be collected and processed for the purpose of analyses of a strategic or thematic nature, for the purpose of operational analyses or for the purpose of facilitating the exchange of information as referred to in points (b), (c) and (d) of Article 18(2).

11. The outcome of a concluded categorisation is that personal data not found to belong to the categories of individuals falling under Annex II needs to be permanently erased upon conclusion of the process. By way of contrast, personal data belonging to those categories can continue to be processed for the purposes laid down in Article 18(2) points (a), (b), (c) and (d).

[7] See e.g. Judgment of the Court (Grand Chamber) of 16 July 2020, C- 311/18, Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems, ECLI:EU:C:2020:559, paragraphs 84, 176; Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraphs 140 and 141.

12. Under Article 18(6a) of the amended Europol Regulation, Europol is able to verify whether personal data received in the context of preventing and combating crimes that fall within its objectives relate to one of the categories of data subjects listed in Annex II of the amended Europol Regulation. To that end, with the amendments brought about by Regulation (EU) 2022/991, Europol has been made able to carry out a pre-analysis of personal data received. Such a pre-analysis has the *sole purpose* of determining whether such data relate to any of the categories of data subjects foreseen in Annex II by checking those personal data against data it already holds, without further analysing them. Europol is allowed to process personal data, as described above, only where it is *strictly necessary* and *proportionate*[8] for the sole purpose of determining the categories of data subjects to which the data in question relate to and for a period of up to 18 months from the moment Europol ascertains that those data fall within its objectives. Europol is also able to extend that period up to three years in duly justified cases and provided that such an extension is necessary and proportionate.

13. Under Article 18a of the amended Europol Regulation, Europol can process datasets without an attributed data subject category for the *purpose* of supporting a specific ongoing criminal investigation upon request of a Member State, EPPO, Eurojust or a third country, and only where the Agency assesses that it is not possible to support the specific criminal investigation without processing those personal data. Europol may process such data for the whole duration of the investigation. After the investigation has been concluded, Europol may store investigative data and the outcome of its processing for the purpose of ensuring the veracity, reliability and traceability of the criminal intelligence process upon request of the provider of the data and for as long as the judicial proceedings concerning the specific criminal investigation are ongoing.

14. As the processing operations provided in Articles 18 and 18a of the amended Europol Regulation are particularly intrusive for data subjects that have no link to a criminal activity, the legislator empowered the EMB to adopt implementing measures to further specify the conditions relating to the processing of such data. In more detail, the implementing measures to be adopted aim at:

    a) Specifying the conditions relating to the processing of data referred in Article 18(6) and 18(6a) of the amended Europol Regulation, i.e. data lacking a DSC processed for the purpose of either determining whether such data are relevant for Europol's tasks or for the sole purpose of determining the DSC and hence for determining compliance with Annex II of the amended Europol Regulation. The implementing measures should specify the conditions of

[8] Article 18(6a) read in the light of recital 21.

processing in particular with respect to the provision of, access to and the use of those data, as well as the time limits for the storage and deletion of such data (Article 18(6b) of the amended Europol Regulation);

b) Specifying the conditions relating to the provision and processing of personal data in accordance with paragraphs 3 and 4 of Article 18a of the amended Europol Regulation (Article 18a(5) of the amended Europol Regulation). Paragraph 3 provides for the processing of investigative data for as long as Europol supports the ongoing specific criminal investigation for which the investigative data were provided to Europol, while paragraph 4 provides for the further storage of investigative data and the outcome of its processing for the purpose of ensuring the veracity, reliability and traceability of the criminal intelligence for as long as the judicial proceedings concerning the specific criminal investigation are ongoing;

c) Specifying the procedures for the processing of information by Europol in accordance with Article 18, i.e. the article defining all the lawful purposes for Europol's processing activities (Article 11(1)(q) of the amended Europol Regulation).

15. In all the above provisions the legislator requires the EMB to take specific actions. In doing so it specifically framed the administrative autonomy that all EU Institutions and bodies enjoy, indicating how to further regulate certain aspects, related to the processing of personal data. It required the EMB in particular to specify the procedures and/or the conditions of processing of personal data. In essence, under these three empowerments, EMB is under a legal obligation ('shall') to give concrete effect to the requirements made explicit in the amended Europol Regulation, to specify procedures and conditions for processing.

16. Three consequences stem from the above: *First*, the EMB is under a duty to give full effect to the provisions introduced by the legislator framing and orienting its autonomy. *Second*, the existence of specific mandates given to the EMB does not mean that this latter cannot take any other decisions which are necessary to implement more generally the new provisions of the amended Europol Regulation. *Third*, in the absence of explicit authorisation by the legislator of the Union, the EMB is not allowed to further delegate this power to another office or body (formal or informal) of Europol[9].

[9] Judgment of 13 June 1958 Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coaland Steel Community, C-9/56 and C-10/56.

3.1.2. Unlawful delegation of powers granted to the EMB and need to clarify the term 'deletion'

17. The EDPS after analysing the draft MB Decisions submitted to him considers that those articles of the draft MB Decisions[10] providing that the technical procedures for the provision, indications, verifications, and assessments referred in the Decisions shall be laid down in technical guidelines to be developed by the Heads of Europol National Units ('HENUs') cannot be considered compliant with the amended Europol Regulation. As referred to above, the legislator empowered the EMB to further regulate certain aspects, related to the processing of personal data, in order to give concrete effect to the requirements made explicit in the amended Europol Regulation. This empowerment does not and cannot include the possibility to further delegate the adoption of such measures to another office or body (formal or informal) of Europol and thus this delegation cannot be considered lawful. Such delegation could only be lawful in case the conditions of the processing were regulated in the body of the MB Decisions and only purely technical issues were to be in the scope of the technical guidelines issued by the HENUs. However, the broad wording of the scope of these guidelines together with the lack of specification on the procedure and conditions of these processing operations suggest that this delegation is not merely technical but will de facto also regulate the conditions of the processing as well.

18. The EDPS, thus, deems necessary that Europol

    a) delete Article 9 the MB Decision on 18a,

    b) delete Article 8 of the MB Decision on 18(6a),

    c) delete Article 14 of the MB Decision on 18(2) and

    d) delete Article 6 of the MB Decision on 18(6) and

    e) regulate the technical procedures for the provision, indications, verifications, assessments and reporting requirements referred to in the respective draft MB Decisions in the body of the MB Decisions.

19. Moreover, the EDPS notes that the draft MB Decisions should clarify that the term '*deletion*' – included in all four of them[11]– means the permanent erasure of the data, which cannot be retrieved by any means anymore. The principle of '*storage limitation*', according to which personal data processed by Europol are to be stored only for as

[10] Article 9 of the MB Decision on 18a, Article 8 of the MB Decision on 18(6a), Article 14 of the MB Decision on 18(2) and Article 6 of the MB Decision on 18(6).
[11] Article 3(3), 4(2), 7 and 8(4) of the MB Decision on 18a, Article 7(4) of the MB Decision on 18(6a), Article 6(12) of the MB Decision on 18(2) and Article 5(2) of the MB Decision on 18(6).

long as is necessary and proportionate for the purposes for which the operational personal data are processed, is provided in Article 31 of amended Europol Regulation and in Article 71(1)(e) of Regulation (EU) 2018/1725. It applies to all processing operations of Europol. The legislator, in Articles 18(6), 18(6a) and 18a specified the retention period for the processing operations provided therein (six months, up to eighteen months to three years, as long as Europol supports an ongoing investigation and as long as the judicial proceedings concerning the specific criminal investigation are ongoing respectively). It follows, that when the respective retention period is concluded, Europol cannot process the data lawfully anymore under whatsoever form (i.e. including storage) and hence the data should be permanently erased[12]. Specific exceptions are provided in the amended Europol Regulation, such as the exception of Article 18a(4) for data processed under Article 18a and the provision of Article 31(6) for data processed under Article 18(6a).

20. The EDPS, therefore, deems necessary that Europol clarify the term '*deletion*' in the four draft MB Decisions to reflect the above reading in line with the principle of storage limitation.

3.1.3. The lack of concrete specification of the rules

21. The EDPS, after analysing the draft MB Decisions submitted to him, deems that in some instances they merely repeat or at most paraphrase the provisions of the amended Europol Regulation. They do not provide further specifications on the procedures and conditions with the level of detail that the legislator required and hence they do not give full effect to them. This will be further detailed in the following section 3.2.2. of this Opinion.

3.2. Specific observations regarding the draft Management Board Decision on the conditions related to the processing of personal data on the basis of Article 18a

3.2.1. Scope of Article 18a

22. Article 1 of the draft MB Decision on the conditions related to the processing of personal data on the basis of Article 18a[13] provides that '*This Decision shall apply to the processing of personal data provided, pursuant to points (a) or (b) of Article 17(1) of*

[12] Judgment of 7 May 2009 College van burgemeester en wethouders van Rotterdam v. Rijkeboer, C-553/07, EU:C:2009:293, recital 33, or recently Judgment of 20 October 2022 Digi Távközlési és Szolgáltató Kft. v. Nemzeti Adatvédelmi és Információszabadság Hatóság, C-77/21, EU:C:2022:805, recital 54.
[13] EDOC#1252126v2.

the Regulation, by Member States, the European Public Prosecutor's Office ("EPPO"), Eurojust or third countries in support of an ongoing specific criminal investigation in accordance with Article 18a of the Regulation for which the categories of data subjects are not yet identified in accordance with Annex II of the Regulation'.

23. Article 18a cannot be interpreted in such a way that it only applies to data lacking a DSC: that would mean that as soon as Europol assigns a DSC and extracts the relevant information, the data could be further injected into the Europol Analysis System (hereinafter, 'EAS') under the relevant Analysis Project (hereinafter, 'AP') and processed under Article 18(2) of the amended Europol Regulation.

24. By way of contrast, the EDPS considers that Article 18a is a stand-alone provision which is meant to apply to specific cases ('*ongoing specific criminal investigations*') that require the processing of large and complex datasets, for which Europol is better placed to detect cross-border links, and thus under specific conditions laid down to that purpose by the legislators. The EDPS understands that this provision is meant to address extraordinary situations such as the ones that prompted to the creation of operational taskforces Fraternité, EMMA, LIMIT or Greenlight. In those cases, Europol was provided by Member States (hereinafter, 'MSs') with large amounts of uncategorised information. The scope of Article 18a is thus not defined by the nature of the datasets received (with or without a DSC) but rather by the need to support a specific ongoing criminal investigation at the request of the contributor.

25. This is confirmed by the wording of Article 18(5) of the amended Europol Regulation which explicitly excludes Article 18a from its scope of application. Article 18(5) states that '*without prejudice to [...], Article 18a, [...], categories of personal data and categories of data subjects whose data may be collected and processed for the purposes of paragraph 2 of this Article are listed in Annex II*'. This wording excludes the application of Article 18 (5) and thus of Annex II to the processing falling under Article 18a. This is also further confirmed by the fact that the legislators kept Article 18 as a provision coming *before* the new Article 18a, thus indicating a logical prevalence of Article 18 over 18a.

26. This means that even if Article 18a authorises Europol to '*process personal data that do not relate to the categories of data subjects listed in Annex II*' (Article 18a(1)), it does not prevent Europol to process personal data with an attributed DSC for that very purpose, as this is ultimately the goal of the operational analysis.

27. Therefore, the application of Article 18a can be triggered once compliance with the following cumulative criteria is ensured:

a) The dataset is provided for the support of an ongoing specific criminal investigation within the scope of Europol's objectives ('*investigative data*'[14]);

b) A MS/Eurojust/EPPO requests Europol to support that investigation by way of operational analysis pursuant to Art. 18(2)(c) or in exceptional and duly justified cases by way of cross-checking pursuant to Art. 18(2)(a);

c) Europol assesses that it is not possible to carry out the operational analysis pursuant to Article 18(2)(c) or the cross-checking pursuant to Article 18(2)(a) in support of that investigation without processing personal data that do not comply with Article 18(5).

28. Recitals 22 and 23 of Regulation (EU) 2022/991 provide further indications as to the types of '*ongoing specific criminal investigations*' for which MS can request support to Europol under this article.

29. Recital 22 clarifies that such support can only be requested when Europol can detect cross-border links (also with other ongoing investigations) more effectively than the MSs through their own analysis of the data. This recital explains that MSs now have the need to submit large and complex datasets to Europol because the amount of data collected in criminal investigations have been increasing in size and datasets have become more complex. They thus request Europol to conduct operational analysis to identify links to crimes other than that which is the subject of the investigation in the context of which they were collected and to criminals in other MS and outside the Union.

30. Recital 23 further clarifies that Article 18a should only apply to processing operations which are deemed necessary and proportionate. In order to make this assessment, MSs should consider the scale and complexity of the data processing involved and the type and importance of the investigation.

31. Finally, Article 18a(3) adds an additional criterion to limit the scope of application of this provision. It only allows Europol to process '*investigative data*' for the purpose of supporting a specific ongoing investigation. This means that the data processed under Article 18a should be functionally separated (e.g. by being part of a specific AP, which

[14] Article 2(q) of the amended Europol Regulation defines "investigative data" as data that a Member State, the European Public Prosecutor's Office ("the EPPO") established by Council Regulation (EU) 2017/1939 , Eurojust or a third country is authorised to process in an ongoing criminal investigation related to one or more Member States, in accordance with procedural requirements and safeguards applicable under Union or national law, that a Member State, the EPPO, Eurojust or a third country submitted to Europol in support of such an ongoing criminal investigation and that contain personal data that do not relate to the categories of data subjects listed in Annex II; data that contain personal data that do not relate to the categories of DS listed in Annex II B.

will be in place for the specific operational taskforce) and processed only for that purpose.

32. It follows from all the above considerations that Article 18a is a stand-alone provision which is meant to apply to specific cases that require the processing of large and complex datasets, which refers to investigations of specific importance as justified by the MS submitting the request, for which Europol is better placed to detect cross-border links. Decisively, the application of this article is also submitted to a second assessment by Europol justifying the impossibility to process these data under the general regime of Article 18. Such data should then only be processed for the sole purpose of supporting the ongoing investigation. This again shows the nature of Article 18a as a narrowly framed derogation to the rule of processing for operational purposes based on categorised data, as provided for in Article 18. Contrary to the interpretation by Europol, its scope is thus not defined by the nature of the datasets received (with or without DSC).

33. Thus, the EDPS deems necessary that Europol amend the draft MB Decision on the conditions related to the processing of personal data on the basis of Article 18a[15] in order to align with the above interpretation of the scope of application of Article 18a and in particular Articles 1, 2(4) and 6 of the draft MB Decision. In the next section the EDPS will detail how the draft MB Decision in question should be completed in order to give effect to the empowerment received from the legislator and thus to give full effect to Article 18a under a correct reading, so as to fulfil the three cumulative criteria mentioned above in paragraph 27.

3.2.2. Elements that should be further specified in the draft MB Decision

34. As analysed under Sections 3.1.1 and 3.1.3, the EMB is under a duty to give concrete effect to the requirements made explicit in the amended Europol Regulation. This is of particular importance with regard to Article 18a as it will ensure that the exceptional processing of data lacking a DSC for an extended time period (introduced by the legislator) will take place only where the conditions laid down by this latter are fulfilled. Such conditions are important to ensure effective protection of personal data, given the extent of the interference that is allowed (data of persons not necessarily having a link with the crime will be processed by Europol for ongoing criminal investigations until the latter are concluded) and also given the fact that control by the EDPS may only take place ex-post, once Europol ceases to support the related specific criminal investigation. In order for the EDPS supervision to be

[15] EDOC#1252126v2.

effective it should be based on the verification of clear and precise rules provided in advance.

35. With regard to the first (a) criterion mentioned in paragraph 27, the EDPS therefore deems necessary that Europol provide a definition for the term '*specific criminal investigation*' in order to give full effect to Article 18a.

36. Under the amended Europol Regulation, the Agency, in order to apply Article 18a is obliged to assess that it is not possible to support the specific criminal investigation as requested by the data provider, without processing personal data for which the categories of data subjects are not yet identified in accordance with Annex II of the Regulation. The draft MB Decision provides in that regard that '*Such assessment shall take into account the specific circumstances for processing required for the support of the specific criminal investigation(s) concerned*'. This is not sufficient, in the EDPS view, to give effect to the fundamental criterion allowing for the application of Article 18a.

37. To this end, the EDPS considers essential that objective criteria be provided in the draft MB Decision for conducting the assessment of the impossibility of supporting the investigation without data which do not comply with Article 18(5). This should be done on the basis of the previous experience of Europol in the aforementioned operational taskforces. For instance, the way to assess elements such as the scale, nature or complexity of the datasets should be further detailed in the decision to convincingly justify that it is not possible to provide the support requested by applying the standard rule of Article 18. It is up to Europol with its knowledge and competence to lay down in a clear and foreseeable manner the criteria allowing to determine in a demonstrable manner how the investigation could not be supported only through processing of data categorised in accordance with Article 18.

38. As mentioned, any ex-post control by the EDPS could not be usefully performed in the absence of stable and foreseeable criteria against which the conduct of Europol may be checked. This is all the more important in relation to the key condition that must be fulfilled for Article 18a to apply. The legislator clearly required the MB to specify the applicable rules so as to facilitate control; its intention certainly was not to render that control by the EDPS excessively difficult or impossible because of the vagueness of the applicable rules.

39. With regard to the third (c) criterion mentioned in paragraph 27 above, the EDPS therefore deems necessary that Europol complement Article 3 of the draft MB Decision[16] in the way analysed above.

[16] EDOC#1252126v2.

3.2.3. Comments on specific data protection aspects

Functional separation of the datasets

40. Article 18a(5) requires Europol to ensure the functional separation of datasets made of personal data that do not relate to the categories of data subjects listed in Annex II from the datasets processed in the context of the ongoing specific investigation. In the EDPS view, this is a safeguard intended to ensure compliance with the purpose limitation principle. It is meant to prevent further incompatible uses (i.e. processing for other purposes than the ones of providing support to an ongoing specific criminal investigation and of ensuring the veracity, reliability and traceability of the criminal intelligence process). In that regard the measures provided in the draft MB Decision: (a) labelling the data as '*DSC not completed*' (partly stemming from the incorrect interpretation of Article 18a endorsed by Europol in the draft decision), (b) limiting access rights to staff members on a '*need-to-know basis for the performance of their duties*' and (c) the general obligation of Europol to implement appropriate technical and organisational measures in order to ensure and verify that the processing of personal data is limited to the lawful use (as defined in Article 6 of the draft MB Decision) do not appear sufficient to ensure that such key data protection principle is complied with.

41. The provision of concrete technical and organisational measures should be done in the MB Decision, as it is the Management Board that is empowered by the legislator to adopt such measures and not any other body of the Agency. Hence, the abovementioned measures should be further complemented by concrete measures, such as: (a) the clear separation of duties between Europol's staff, i.e. dedicated analysts are assigned with the processing of non DSC data under Article 18a; (b) appropriate logging that would allow internal checks and therefore identification of possible abnormalities.

42. Thus, the EDPS deems necessary that Europol complement the draft MB Decision by providing directly in it the MB Decision concrete technical and organisational measures that will ensure the functional separation of the non DSC data processed under Article 18a.

Storage of investigative data beyond the ongoing specific criminal investigation

43. Article 18a(4) provides for the storage of investigative data and the outcome of its processing of those data beyond the processing period set out in paragraph 3 upon the request of the provider for the purpose of ensuring the veracity, reliability and traceability of the criminal intelligence process. In order to implement the data

minimisation principle, the draft MB Decision should have provided for a procedure to be put in place in order to be decided in every specific case that only the data which are adequate, relevant and not excessive in relation to this purpose will be stored for a longer period.

44. Paragraph (4) constitutes an exception to the rule on processing periods provided for in paragraph (3). Therefore, the MB Decision in question should detail how data responding to the purpose of ensuring the veracity, reliability and traceability of the criminal intelligence process has been selected, it being clear that not all datasets provided to Europol under Article 18a can be automatically retained for the above purpose. A verification conducted according to clear and foreseeable criteria as to whether they are necessary in relation to the purpose stated by the legislator is necessary. Also in this case the existence of clear and foreseeable criteria laid down in advance in the MB Decision is required in order to ensure a meaningful ex-post control by the EDPS.

45. Furthermore, the draft MB Decision should also provide where this data will be stored (e.g. in the archive) and how (from a technical and organisational point of view) the access to these data will be limited.

46. Article 8(5) of the draft MB Decision provides that '*Personal data stored for the purpose of this Article shall be further functionally separated and will only be strictly accessible by specifically designated staff referred to in paragraph 3*'. However, this provision does neither provide where the data will be stored nor the technical and organisational measures to limit access. Moreover, in line with the analysis in paragraphs 40 and 41, the abovementioned provision of the MB Decision does not appear sufficient to ensure that the purpose limitation principle is complied with.

47. Thus, the EDPS deems necessary that Europol complement the draft MB Decision by setting up a procedure to select which data should be further stored in order to ensure the veracity, reliability and traceability of the criminal intelligence process, by providing where the data will be stored and by providing concrete technical and organisational measures that will ensure the '*further functional separation*' of these datasets.

3.3. Specific observations regarding the draft Management Board Decision on the conditions related to the processing of personal data on the basis of Article 18(6a)

48. The EDPS acknowledges that according to Articles 18(5) and 18(6a) of the Europol Regulation, Member States (MSs) are allowed to send personal data lacking a DSC to

Europol. Nevertheless, the EDPS recommends that Europol reminds MSs to carry out the categorisation in line with the data minimisation principle and the national provisions transposing the Law Enforcement Directive[17].

Requirement of functional separation

49. The requirement in Article 18(6a) of functional separation of these datasets from datasets processed under the general regime (Article 18(2)) is a safeguard intended to ensure compliance with the purpose limitation principle and to prevent further incompatible uses (i.e. processing for other purposes than the one of determining whether personal data are in compliance with Article 18(5)). In line with the analysis in paragraphs 40 and 41 with regard to the functional separation of non DCS data processed under Article 18a, the EDPS considers that the measures of labelling the data as '*DSC not completed*', limiting access rights to staff members on a '*need-to-know basis for the performance of their duties*' and implementing appropriate technical and organisational measures in order to ensure and verify that the processing of personal data is limited to the lawful use, should be further complemented by concrete measures. For instance such measures could include: (a) the clear separation of duties between Europol's staff, i.e. dedicated analysts are assigned with the processing of data under Article 18(6a); (b) technical limitations in terms of importing non-DSC datasets into the Europol Analysis System by blocking such import; (c) appropriate logging that would allow internal checks and therefore identification of possible abnormalities.

50. Thus, the EDPS deems necessary that Europol complement the draft MB Decision by providing concrete technical and organisational measures that will ensure the functional separation of the non DSC data processed under Article 18(6a).

Requirement to set up criteria for defining the retention period and to inform the EDPS of the extension of the processing period

51. The requirement to inform the EDPS of any extension of the processing period of '*up to*' 18 months is a key safeguard to ensure that the processing period is only extended in justified cases. Europol should thus clarify in the MB Decision the criteria which will be used in order to determine the storage period concretely necessary in a given case, given that the legislator clearly established a range '*up to*' 18 months, and

[17] Directive (EU) 2016/680 of the European Parliament and of the of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

therefore the maximum period of 18 months cannot be considered automatically applicable in every case.

52. Furthermore, Europol should also clarify the criteria used to justify the necessity of prolonging a storage period beyond 18 months. Indeed the MB Decision provides in Article 7(2) that when considering the extension of the temporary processing period up to the maximum of three years, Europol shall define the *reasonable grounds* or *factual indications* for believing that a prolongation will facilitate the determination of compliance with Article 18(5) of the Regulation. However, the amended Europol Regulation requires that this extension is only decided when it is *necessary* and *proportionate* for the purpose of determining the categories of data subjects to which the data in question relate to (Article 18(6a) read in the light of recital 21). The test of necessity and proportionality is clearly different from the stated requirement to provide '*reasonable grounds*' or '*factual indications*' '*facilitating*' compliance with Article 18(5). The prolonged retention must be necessary and proportionate to the aim pursued. To this end, additional criteria must be provided in the MB Decision for conducting this assessment, such as the specific sensitivity of the investigation, the importance of the specific datasets for the purpose of paragraph 2 or the nature of the data which would have made technically not feasible to analyse them within a deadline falling before the 18 months period.

53. Therefore, the EDPS deems necessary that Europol:

    a) adjust the wording of Article 7(1) of the MB Decision to provide for concrete criteria that will be used in order to determine the storage period concretely necessary in each specific case within the 18 months range;

    b) adjust the wording of Article 7(2) of the MB Decision to provide for concrete criteria to justify the necessity of prolonging a storage period beyond 18 months (as the ones mentioned above) and to reflect that the extension to the maximum period of three years is lawful only when it is necessary and proportionate and not when it only facilitates compliance with Article 18(5).

54. Furthermore, given that Article 7(3) of the draft MB Decision does not provide for a deadline to provide the justification for the extension, the EDPS recommends, to allow for meaningful supervision, that the draft MB Decision clarify that Europol informs the EDPS of the extension of the processing period and provides the EDPS with the justification for the extension, without undue delay and in any event within one week after the day on which Europol decided to extend the temporary processing period beyond the initial period of 18 months.

3.4. Specific observations regarding the draft Management Board Decision further specifying procedures for the processing of information for the purposes listed in Article 18(2) of the Europol Regulation

55. Article 5(3) of the draft MB Decision[18] provides that '*Unless explicitly stated otherwise, all contributions to a specific operational analysis project as well as data submitted for cross-checking under Article 18(2)(a), shall be deemed also to be submitted for the purpose of strategic and thematic analysis*'. A similar provision was included in Articles 6(13)(c) and 10(7) of Europol's Integrated Data Management Guidelines. The EDPS already in 2017, recalling the importance of the purpose limitation principle has recommended that Europol adopts technical measures to ensure that the data providers are specifically informed of the '*default*' dual purpose in due time to decide whether or not they wish to object to this dual purpose.

56. The EDPS, thus, reiterates his recommendation that Europol adopts technical measures to ensure that the specific information is provided at the moment of the transmission of the data to Europol.

4. CONCLUSION

57. After careful analysis of the MB Decisions submitted to the EDPS for prior consultation, the EDPS considers that there exist several shortcomings that Europol should address to avoid risks of non-compliance with the amended Europol Regulation.

58. In particular the EDPS deems necessary that Europol amend:

    I. The draft MB Decision on the conditions related to the processing of personal data on the basis of Article 18a of the Europol Regulation (EDOC#1252126v2) as follows:

        a) in particular Articles 1, 2(4) and 6 so as to reflect the correct scope of application of Article 18a, i.e. that this article is a stand-alone provision which is meant to apply to specific cases that require the processing of large and complex datasets, for which Europol is better placed to detect

[18] EDOC #1252127v2.

cross-border links, and that its scope is not defined by the nature of the datasets received (with or without DSC);

b) by adding a definition of the term '*specific criminal investigation*';

c) by completing Article 3 of the draft MB Decision in order to provide for specific criteria for assessing when it is not possible to support the specific criminal investigation, without processing personal data for which the categories of data subjects are not yet identified in accordance with Annex II of the amended Europol Regulation;

d) by completing Article 2 of the draft MB Decision by providing concrete technical and organisational measures that will ensure the functional separation of the non DCS data processed under Article 18a;

e) by completing Article 8 of the draft MB Decision so as to provide a procedure to select which data should be further stored in order to ensure the veracity, reliability and traceability of the criminal intelligence process, by providing where the data will be stored and by providing concrete technical and organisational measures that will ensure the '*further functional separation*' of these datasets.

f) by adding the necessary clarifications that the term '*deletion*' included in Articles 3(3), 4(2), 7 and 8(4) means the permanent erasure of the data, which cannot be retrieved by any means anymore;

g) by deleting Article 9 and regulating the technical procedures for the provision, indications, verifications, assessments and reporting requirements referred to in the draft MB Decisions in the body of the MB Decision.

II. The draft MB Decision on the conditions related to the processing of personal data on the basis of Article 18(6a) of the Europol Regulation (EDOC #1252125v2) as follows:

a) by completing Article 2 of the draft MB Decision by providing concrete technical and organisational measures that will ensure the functional separation of the datasets processed under Article 18(6a) of the amended Europol Regulation;

b) by completing Article 7(1) of the draft MB Decision by providing for concrete criteria that will be used in order to determine the storage period concretely necessary in each specific case;

c) by completing Article 7(2) of the draft MB Decision by providing for concrete criteria to justify the necessity of prolonging a storage period beyond 18 months and to reflect that the extension to the maximum period of three years is lawful only when it is necessary and proportionate and not when it only facilitates compliance with Article 18(5);

d) by adding the necessary clarifications that the term '*deletion*' included in Article 7(4) means the permanent erasure of the data, which cannot be retrieved by any means anymore;

e) by deleting Article 8 and regulating the technical procedures for the provision, indications, verifications, assessments and reporting requirements referred to in the draft MB Decisions in the body of the MB Decision.

III. The draft MB Decision further specifying procedures for the processing of information for the purposes listed in Article 18(2) of the Europol Regulation (EDOC #1252127v2) as follows:

a) by adding the necessary clarifications that the term '*deletion*' included in Article 6(12) means the permanent erasure of the data, which cannot be retrieved by any means anymore;

b) by deleting Article 14 and regulating the technical procedures for the provision, indications, verifications, assessments and reporting requirements referred to in the draft MB Decisions in the body of the MB Decision.

IV. The draft MB Decision on the conditions related to the processing of personal data on the basis of Article 18(6) of the Europol Regulation (EDOC #1252123v2) as follows:

a) by adding the necessary clarifications that the term '*deletion*' included in Article 5(2) means the permanent erasure of the data, which cannot be retrieved by any means anymore;

b) by deleting Article 6 and regulating the technical procedures for the provision, indications, verifications, assessments and reporting

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requirements referred to in the draft MB Decisions in the body of the MB Decision.

59. Furthermore, the EDPS recommends that Europol amends:

I. The draft MB Decision on the conditions related to the processing of personal data on the basis of Article 18(6a) of the Europol Regulation (EDOC #1252125v2) as follows:

a) by clarifying in Article 7 of the draft MB that Europol informs the EDPS of the extension of the processing period and provides the EDPS with the justification for the extension, without undue delay and in any event within one week after the day on which Europol decided to extend the temporary processing period beyond the initial period of 18 months; and

II. The draft MB Decision further specifying procedures for the processing of information for the purposes listed in Article 18(2) of the Europol Regulation (EDOC #1252127v2) as follows:

a) by completing Article 5 of the draft MB Decision by providing for the adoption of technical measures to ensure that the specific information of the '*default*' dual purpose (operational analysis or cross checking plus strategic and thematic analysis) is provided to the data providers at the moment of the transmission of the data to Europol.

60. Finally the EDPS requests that Europol provides the EDPS with a copy of the adopted MB Decisions following their adoption.

Done at Brussels on 17 November 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI