

EUROPEAN DATA PROTECTION SUPERVISOR

Executive summary of the Opinion of the European Data Protection Supervisor on the package of legislative measures reforming Eurojust and setting up the European Public Prosecutor's Office ('EPPO')

(The full text of this Opinion can be found in English, French and German on the EDPS website (www.edps.europa.eu))

(2014/C 244/08)

A. INTRODUCTION

A.1. Context of the opinion

1. On 17 July 2013, the Commission adopted a package of legislative measures setting up the European Public Prosecutor's Office ('EPPO') and reforming Eurojust. This package consists of:
 - the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions entitled 'Better protection of the Union's financial interests: Setting up the European Public Prosecutor's Office and reforming Eurojust' ⁽¹⁾ (hereinafter the 'EPPO and Eurojust Communication'),
 - the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (hereinafter the 'Eurojust Proposal') ⁽²⁾,
 - the Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office ⁽³⁾ (hereinafter the 'EPPO Proposal'), and
 - the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions entitled: 'Improving OLAF's governance and reinforcing procedural safeguards in investigations: A step-by-step approach to accompany the establishment of the European Public Prosecutor's Office' ⁽⁴⁾ (hereinafter the 'OLAF Communication').
2. Before the adoption of the package, the EDPS had the opportunity to provide informal comments. The EDPS welcomes the fact that the Commission has taken some of these comments into account.
3. The EDPS also welcomes the fact that the Commission has consulted the EDPS and that a reference to the consultation is included in the preambles of both proposals.

A.2. Aims of the package

4. The reform of Eurojust and the creation of a European Public Prosecutor's Office aim at fighting fraud, at making prosecution at EU level more accountable and at raising the level of protection for those involved in investigations ⁽⁵⁾.
5. The Eurojust Proposal is based on Article 85 TFEU and has the following objectives:
 - increase Eurojust's efficiency by providing it with a new governance structure,
 - improve Eurojust's operational effectiveness by homogeneously defining the status and powers of National Members,
 - provide for a role for the European Parliament and national Parliaments in the evaluation of Eurojust's activities, in line with the Lisbon Treaty,

⁽¹⁾ COM(2013) 532 final.

⁽²⁾ COM(2013) 535 final.

⁽³⁾ COM(2013) 534 final.

⁽⁴⁾ COM(2013) 533 final.

⁽⁵⁾ The EPPO and Eurojust Communication, point 1.

- bring Eurojust's legal framework in line with the Common Approach, whilst fully respecting its special role regarding the coordination of ongoing criminal investigations,
 - ensure that Eurojust can cooperate closely with the European Public Prosecutor's Office, once this is established.
6. The EPPO Proposal is based on Article 86 TFEU and has in particular the following objectives:
- contribute to the strengthening of the protection of the Union's financial interests and further development of an area of justice, and to enhance the trust of EU businesses and citizens in the Union's institutions, while respecting the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union ('EU Charter'),
 - establish a coherent European system for the investigation and prosecution of offences affecting the Union's financial interests,
 - ensure a more efficient and effective investigation and prosecution of offences affecting the EU's financial interests,
 - increase the number of prosecutions, leading to more convictions and recovery of fraudulently obtained Union funds,
 - ensure close cooperation and effective information exchange between the European and national competent authorities,
 - enhance deterrence of committing offences affecting the Union's financial interests.
7. Both proposals are of great importance from the perspective of data protection since the processing of personal data is part of the core activities carried out by Eurojust and will be part of the core activities of EPPO.

A.3. Aim of the Opinion

8. This opinion will focus on the changes to the legal framework of Eurojust which are most relevant to data protection. It will also make recommendations on provisions that are similar to the existing ones with the aim of further strengthening the data protection regime applicable to Eurojust.
9. As regards the EPPO Proposal, the EDPS would note that, in terms of data protection, the proposal is extensively based on the Eurojust Proposal. The opinion will therefore analyse this Proposal in conjunction with the Eurojust Proposal whilst also pointing to some specificities where relevant. The EDPS would emphasise that this analysis is restricted to data protection aspects. It does not assess whether the provisions contained in the EPPO proposal are in conformity with other fundamental rights⁽¹⁾.

D. CONCLUSIONS

122. The EDPS broadly welcomes the provisions for data protection in the Proposals on Eurojust and the EPPO, since the processing of personal data is part of the core activities carried out by Eurojust and will be part of the core activities of EPPO. Regulation (EC) No 45/2001 is rightly the point of reference under the Proposals, which provide for a consistent and homogeneous application of the data protection rules to all EU bodies whilst taking into account the specificities of police and judicial cooperation in criminal law.
123. Since the activities of Eurojust and EPPO cannot be assimilated to genuine judicial activities, the processing of personal data by these bodies should be subject to supervision by an independent supervisory authority. In view of the principle that supervision should follow the controller, an EU authority should guarantee the supervision of Eurojust and EPPO, controllers which are EU bodies. In this respect, it is logical and consistent that the EDPS, the independent EU authority established to supervise all the EU institutions and bodies, should carry out this role.

⁽¹⁾ See for analysis of other fundamental rights in particular the opinion of the European Union Agency for Fundamental Rights ('FRA') on a proposal to establish a European Public Prosecutor's Office, Vienna, 4 February 2014, available on the website of FRA: <http://fra.europa.eu/en>

124. Moreover, since much of the data processed by Eurojust and the EPPO will originate from Member States, it is necessary to provide for the active involvement of national data protection authorities by way of close cooperation with the EDPS in order to ensure comprehensive supervision at both EU and national level. However at EU level the notion of independent and effective supervision requires full and sole responsibility for the EDPS, subject to review by the CJEU.
125. There are however a number of both general and specific provisions which need to be corrected or improved. In view of the importance of the Proposals for data protection the EDPS has therefore set forth a number of recommendations designed to ensure that the Proposals achieve the necessary standard of comprehensive and effective protection of personal data by Eurojust and the EPPO.
126. The EDPS recommends:
- providing in the Eurojust Proposal a clear conceptual distinction between operational data (case-related data) and administrative data (non-case-related data) and redrafting Article 27(5) of the Eurojust Proposal in line with these definitions,
 - defining in the Eurojust and EPPO Proposals the following terms: competent authorities, Union bodies, third countries, international organisations, private parties and private persons,
 - clearly and precisely defining the field of competences of EPPO,
 - clarifying whether personal data may be processed in files outside the Case Management System,
 - replacing the wording ‘case-related personal data’ by ‘operational personal data’ in Article 22(6) of the EPPO Proposal to ensure consistency with the definitions provided in Article 2(e) of the EPPO Proposal,
 - clarifying in Eurojust and EPPO Proposals the purposes of the processing of personal data with regard to the index, the temporary work files and, if applicable, any other files containing operational data which include personal data,
 - removing from Articles 24(2)(c) of the Eurojust Proposal and 22(2)(c) of the EPPO proposal that the CMS facilitates the monitoring of lawfulness and compliance with data protection rules and mentioning this in a distinct paragraph,
 - explaining the reasons for the category of data on ‘customs and tax identification number’ or deleting it from Annex 2,
 - adding in Article 37(3) of the EPPO Proposal that the data protection officer shall be informed of the specific circumstances which justify the necessity of the processing of such personal data and providing in Article 27(3) of the Eurojust Proposal and in Article 37(3) of the EPPO Proposal that the justification shall be properly documented,
 - also adding the persons under the age of 18 in last sentence of Articles 27(3) and 27(4) in the Eurojust Proposal and in last sentence of Article 37(4) of the EPPO Proposal.
 - deleting Article 28(4) of the Eurojust Proposal and Article 38(4) of the EPPO Proposal since the obligation to review the data is already mentioned in another paragraph and the review should be carried out by the controller (i.e. Eurojust or EPPO) and not by the EDPS,

- including in Article 28 of the Eurojust Proposal and Article 38 of the EPPO Proposal, a paragraph providing for the continued storage of data in the following situations:
 - when necessary to protect the interests of a data subject who requires protection,
 - when their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data,
 - when the personal data have to be maintained for purposes of proof,
 - when the data subject opposes their erasure and requests the restriction of their use instead,
- adding in the Eurojust Proposal a specific provision listing all the sources of information processed by Eurojust,
- amending Article 31 of the Eurojust Proposal to ensure that the data protection officer is appointed by the College,
- replacing in Article 31(2) of the Eurojust Proposal and Article 41(2) of the EPPO Proposal the wording ‘When complying with the obligations set out in Article 24 of Regulation (EC) 45/2001’ with ‘In addition to the obligations set out in Article 24 of Regulation (EC) 45/2001’,
- providing in Article 31(3) of the Eurojust Proposal and Article 41(3) of the EPPO Proposal that the DPO staff members shall have access to all data processed by Eurojust and to all Eurojust premises in the performance of their tasks and adding that such access is possible at any time and without prior request,
- adding in Article 31 of the Eurojust Proposal and Article 41 of the EPPO Proposal the task of keeping a register of such incidents affecting both operational and administrative personal data processed by Eurojust,
- deleting Article 32(4) of the Eurojust Proposal and Article 42(4) of the EPPO Proposal since Article 20 of Regulation (EC) No 45/2001 — which is applicable to Eurojust and EPPO — already covers these provisions,
- deleting the second sentence of Article 32(6) of the Eurojust Proposal, which mentions the time limit, as it is redundant with Article 32(2) of the Eurojust Proposal,
- deleting Article 32(7) of the Eurojust Proposal and Article 42(4) of the EPPO Proposal since they are redundant with Regulation (EC) No 45/2001,
- adding in the title of Article 33 of the Eurojust Proposal and Article 43 of the EPPO Proposal the following wording ‘Modalities regarding’,
- providing for rules on the rectification, erasure or restriction of data provided by EU bodies in Article 33 of the Eurojust Proposal,
- replacing the current wording in Article 34(1) of the Eurojust Proposal and in Article 44(1) of the EPPO Proposal by the following: ‘Eurojust shall process personal data in such a way that its source can always be established’,
- in Article 34(3) of the Eurojust Proposal and Article 44(2) of the EPPO Proposal, separating the two sentences in distinct paragraphs since they deal with different topics,

- amending the first sentence of Articles 34(3) of the Eurojust Proposal and of Article 44(3) of the EPPO Proposal, to clarify responsibilities,
- redrafting the last sentence of Article 36(1) of the Eurojust Proposal and of Article 46(1) of the EPPO Proposal, to ensure that the EDPS takes utmost account of the opinion of competent national supervisory authorities,
- adding the word ‘including’ between ‘international organisations’ and ‘the International Criminal Police Organisation (Interpol)’ at the end of Article 38(1) of the Eurojust Proposal, and replacing ‘international organisations or Interpol’ by ‘international organisations including Interpol’ in Article 40(1) and 45(2) of the Eurojust Proposal,
- removing the possibility for Eurojust to assume Member States’ consent by deleting Article 38(4)(a) of the Eurojust Proposal and adding that the consent should be given ‘prior to the transfer’, in the second sentence of Article 38(4) of the Eurojust Proposal,
- adding to Article 38 of the Eurojust Proposal a paragraph requiring that data shall be transferred only if the recipient gives an undertaking that the data shall be used for the sole purpose for which they were transmitted,
- adding to Article 38 of the Eurojust Proposal a paragraph requiring that Eurojust should keep detailed records of the transfers of personal data as well as of the grounds for such transfers, in line with Article 31(2)(a) of the Eurojust Proposal. The same recommendations applies to Article 56 of the EPPO Proposal,
- clarifying the title of Section II (Relations with partners) of Chapter V of the Eurojust Proposal and of Section II of Chapter VIII of the EPPO Proposal,
- specifying in Article 40(5) of the Eurojust Proposal that Eurojust shall share the information in accordance with the decision of the Member State, Union body, third country or international organisation that provided that information to Eurojust,
- adding in a recital of the Proposals a justification as to the need for an automatic and systematic exchange of information between Eurojust and EPPO,
- moving Article 42(1) to Article 39, which deals with the cooperation with the European Judicial Network and other networks of the EU involved in cooperation in criminal matters,
- deleting in Article 43 of the Eurojust Proposal the reference to Article 38(1) and enumerating instead the entities with whom Eurojust may establish working arrangements (third countries and international organisations),
- specifying in Article 43 of the Eurojust Proposal that this article is without prejudice of the conditions provided in Section IV of the Eurojust Proposal for the transfer of personal data to third countries and international organisations,
- adding in Article 44 of the Eurojust Proposal that the latter applies without prejudice to Articles 40-42,
- including in Article 44 of the Eurojust Proposal and Article 61 of the EPPO Proposal the obligation for Eurojust/EPPO to publish on their website a regularly updated list of the EU institutions and bodies with whom they share information,

- deleting in Article 45 of the Eurojust Proposal and in Article 61 of the EPPO Proposal the reference to Directive 95/46/EC and including in the Proposal the criteria and procedure to be followed by the Commission for the adoption of an adequacy decision,
- adding to Article 45(1) of the Eurojust Proposal in fine and to Article 61(1) in fine of the EPPO Proposal that the EDPS should be consulted in a timely manner during the negotiation of any international agreement between the EU and a third country or an international organisation, and in particular before adoption of the negotiating mandate as well as before the finalisation of the agreement,
- adding to Article 45(1) of the Eurojust Proposal and to Article 61(1) of the EPPO Proposal a transitional clause on existing cooperation agreements regulating personal data transfers by Eurojust, which provides for a reassessment of these agreements in order to ensure their compliance with the requirements of the Eurojust Proposal, within a deadline of no longer than two years after the entry into force of the Eurojust Proposal,
- including in Article 45(1) of the Eurojust Proposal and in Article 61(1) of the EPPO Proposal the obligation for Eurojust and EPPO to publish on their website a regularly updated list of its international and cooperation agreements with third countries and international organisations,
- adding expressly in Article 45(2) of the Eurojust Proposal and in Article 61(2) of the EPPO Proposal that derogations are applicable to occasional transfers and not to frequent, massive or structural transfers (sets of transfers),
- deleting Article 45(2)(a) of the Eurojust Proposal/Article 61(2)(a) of the EPPO Proposal and replacing it with Article 45(2)(c) of the Eurojust Proposal/Article 61(2)(c) of the EPPO Proposal as first derogation,
- amending Article 45(3) of the Eurojust Proposal and Article 61(3) of the EPPO Proposal,
- providing in Article 45 of the Eurojust Proposal and in Article 61 of the EPPO Proposal that any transfers based on derogations should be specifically documented.

Done at Brussels, 5 March 2014.

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