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Subject: Formal consultation on the interpretation of the legal basis for exchange of operational data between Eurojust and European Border and Coast Guard Agency (Frontex)

Dear ,

On 20 January 2020 the EDPS received your request for an opinion on the interpretation on several provisions of Eurojust Regulation and Frontex Regulation in respect of the possibility to exchange operational data between the two agencies.

In your request, you referred predominantly to the interpretation challenge stemming from the potential incoherence between **Article 51(3) of the Eurojust Regulation**¹ and **Article 90 of the Frontex Regulation**². You subsequently underlined that while there is “the wish of Eurojust and Frontex to enhance their cooperation”, such cooperation can only take place in full compliance with their applicable legal frameworks.

We have analysed the issue at stake and, following internal consultations, we have come to the following conclusions.

¹ Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA.

² Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

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1. Legal analysis

The question you asked is, in essence, twofold: whether Eurojust can transmit operational data to Frontex and whether Frontex can transmit operational data to Eurojust. In other words, does the legal framework allow for exchange (i.e going two ways) of operational personal data?

Since both Eurojust and Frontex may process operational personal data in accordance with Chapter IX of Regulation (EU) 2018/1725 and in line with the specific tasks and mandates given to them in their founding regulations, in the view of the EDPS both questions should be answered separately with due respect to specific provisions of both founding regulations.

1.1. Eurojust Regulation

Article 27 and Annex II of the Eurojust Regulation explicitly define the categories of data subjects and categories of personal data, which the Agency is allowed to process. These conditions apply to all forms of operational personal data processing by Eurojust, including transmission to other entities. As underlying principle, Eurojust may process operational data necessary to perform its task, within the framework of its competence and in order to carry out its operational functions.

Subsequently, when it comes to transmission of personal data to other Union institutions, bodies, offices or agencies, specific provisions of the Eurojust Regulation apply, namely in Article 47(5) and Article 55.

Firstly, Article 47(5) lays down the following requirements:

- (i) to be necessary for the performance of Eurojust tasks and
- (ii) to be in accordance with Articles 55 and 56 and
- (iii) (where relevant) prior authorisation by the Member States which provided the data.

Similarly to Article 27, these conditions are general and should be met in all cases of data transfer, regardless of the recipient.

Subsequently, Article 55 of Eurojust Regulation provides that Eurojust “shall only transmit operational personal data to another Union institution, body, office or agency if the data are necessary for the legitimate performance of tasks covered by the competence of the other Union institution, body, office or agency.” Moreover, Eurojust “shall be required to verify the competence of the other Union institution, body, office or agency and to make a provisional evaluation of the necessity of the transmission of the operational personal data. If doubts arise as to this necessity, Eurojust shall seek further information from the recipient.”

On top of that, the transfers may be subject to further restrictions pursuant to Eurojust Regulation, in particular Articles 21(8)³, 47(5) and 76⁴ thereof.

In the view of the EDPS, the abovementioned provisions set out the conditions for transfer of data to other EU institutions, agencies and bodies. They enshrine general principles guiding the processing of operational data and its potential subsequent transfer. As such, **they allow for transfer of personal data to Frontex**, as long as all the specifically provided conditions are met.

³ Article 21(8) refers to bilateral or multilateral agreements or arrangements between Member States and third countries, including any conditions set by third countries concerning the use of information once supplied.

⁴ Article 76 deals with the rules on the protection of sensitive non-classified information and classified information.

Article 51(3) of the Eurojust Regulation

At the same time the Eurojust Regulation includes a specific provision regarding the cooperation between Eurojust and Frontex. Article 51 (3) of the Eurojust Regulation states that “The European Border and Coast Guard Agency shall contribute to Eurojust’s work including by transmitting relevant information processed in accordance with its mandate and tasks under point (m) of Article 8(1) of Regulation (EU) 2016/1624 of the European Parliament and of the Council (21). The European Border and Coast Guard Agency’s processing of any personal data in connection therewith shall be regulated by Regulation (EU) 2018/1725.”

The wording of this provision, to the EDPS’ understanding, has triggered some doubts regarding its implications for the possibility to transfer operational data from Eurojust to Frontex. Namely, the doubts about the lawfulness of such transfers are based on the use of the term “transmitting”, as meaning only one-way transmission from Frontex to Eurojust.

In order to clarify this issue, the relationship between Article 51(3) of the Eurojust Regulation and other, previously cited articles, should be defined. Namely, whether said article is a *lex specialis* towards abovementioned general rules on the transfer of personal data to other Union institutions, bodies, offices or agencies. Alternatively, whether its scope remains within the remit of such general rules and if so, whether it modifies them.

In this context, it should be assessed whether the provision of Article 51(3) represents a restriction in the sense of Article 55(1) of Eurojust Regulation (“Subject to any further restrictions pursuant to this Regulation...”).

Looking from the systemic point of view, it needs to be stated that Article 51(3) systematically belongs to Section II “Relations with partners within the Union” and not to the specific section on personal data transfers. In the light of systemic interpretation, this provision should not be treated as *lex specialis vis-a-vis* abovementioned provisions on the transfer of operational data.

Moreover, Article 51(3) of Eurojust Regulation uses the expression “including by”, thus meaning that the forms of contribution of Frontex to the works of Eurojust referred to in this Article are not exhaustive. Therefore, one cannot consider this Article as limiting the possibility for transfer described under Article 47 and Article 55 of Eurojust Regulation.

In the light of the above, the EDPS considers that **specific forms of cooperation foreseen under Article 51(3) of Eurojust Regulation remain without prejudice to applicable rules of Eurojust Regulation on transfer of personal data.**

1.2. Frontex Regulation

In the case of Frontex, Regulation (EU) 2019/1896 explicitly authorises Frontex to process operational personal data when carrying out activities that fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three TFEU. However, it should be borne in mind that these law enforcement activities are auxiliary to the main tasks of the Agency.

Pursuant to Article 90 of its establishing Regulation, Frontex can process operational personal data related to the performance of its tasks under point (q) of Article 10(1) of its Regulation:

“(q) within the respective mandates of the agencies concerned, [to] cooperate with [...] Eurojust and provide support to Member States in circumstances requiring increased

technical and operational assistance at the external borders in the fight against cross-border crime and terrorism”.

Article 90 of the EBCG Regulation further states that the Agency shall only exchange personal data with Europol or Eurojust *where they are strictly necessary for the performance of their respective mandates and in accordance with Article 68*. The latter further elaborates cooperation duties of the EBCG vis-a-vis Eurojust “*within their respective legal frameworks*” while restating that the Union agencies referred to in its paragraph 1 - which include Eurojust - “*shall use information received from the Agency only within the limits of their competence and insofar as they respect fundamental rights, including data protection requirements*”.

Furthermore, the operational personal data have to be related to natural persons whom the competent authorities of the Member States, Europol, Eurojust, or the Agency have reasonable grounds to suspect are involved in cross-border crime. Such personal data may include personal data of victims or witnesses where those personal data supplement the personal data of suspects processed by the Agency in accordance with this Article.

In the light of the above, **Eurojust’s possibility to transfer personal data to Frontex should be defined by the scope of competence of Frontex and therefore limited accordingly.**

2. Conclusions

To conclude, the EDPS believes Eurojust **can transfer operational personal data** to Frontex **only if the general and specific conditions and requirements of Articles 27, 47(5) and 55 of Eurojust Regulation as well as Article 90 of EBCG Regulation are met.**

In practice, this means that the following conditions should be cumulatively fulfilled:

- the transfer has to be **necessary for the performance** of Eurojust tasks provided for in Eurojust Regulation;
- the transfer should be **within the limited law enforcement competence** of Frontex, i.e. related to the performance of its tasks under point (q) of Article 10(1) of Regulation (EU) 2019/1896;
- **all other conditions** included in relevant legal provisions should be met, e.g. possible restrictions on processing imposed by the Member State which has provided the data;
- the transfer should be **proportionate** to the envisaged purpose in accordance with the Union law.

Yours sincerely,



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