



EDPS
EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION ON THE DRAFT IMPLEMENTING RULES CONCERNING THE DATA PROTECTION OFFICER OF EUROPOL (Case 2024-0040)

1. INTRODUCTION

1. This Supervisory Opinion relates to the draft Decision of the Management Board of Europol on implementing rules concerning the Data Protection Officer (DPO), pursuant to Article 45(3) of Regulation (EU) 2018/1725¹ ('the Regulation').
2. Europol submitted the request for consultation to the EDPS on 22 December 2023.
3. The EDPS issues this Supervisory Opinion in accordance with Article 41(1) and 57 (1)(g) of the Regulation. As outlined by the [EDPS Position paper on the role of Data Protection Officers of the EU institutions and bodies \(30 September 2018\)](#), the EDPS shall advise all EUIs on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data².

2. EDPS RECOMMENDATIONS

4. Article 1(2) of the draft decision provides that 'Data Protection Officer' shall refer to the function held by a member of the middle management staff of Europol appointed as Data Protection Officer by the Management Board. Additionally, Article 1(3) of the draft decision provides that 'Assistant Data Protection Officer' shall refer to the

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

² Page 16 of the EDPS Position paper on the role of Data Protection Officers of the EU institutions and bodies.

function held by a staff member of Europol appointed as Assistant Data Protection Officer by the Management Board. **The EDPS welcomes this approach since the outsourcing of the DPO and the Assistant DPO functions should be limited to the strict minimum**³. The EDPS is of the opinion that in order to ensure proper knowledge of the functioning of Europol, the DPOs should be staff members.

5. Following the legal obligation stated in Article 44(8) of the Regulation, Article 4 of the draft decision provides that the DPO may be dismissed from his or her post by the Management Board if he or she no longer meets the conditions required for the performance of his or her duties as Data Protection Officer or as Europol staff member, only with the consent of the European Data Protection Supervisor. Indeed, EDPS consent for the dismissal of the DPO is a legal obligation in case of dismissal if he or she no longer fulfils the conditions required for the performance of his or her duties⁴. Additionally, Article 4 of the draft decision establishes that the DPO shall not be dismissed or penalised by the Management Board for performing his or her tasks. The EDPS underlines this approach taken by Europol, as the DPO should thus not suffer prejudice in his or her career development from the mere fact of having been a DPO⁵. However, **the EDPS recommends referring to ‘function’ of the DPO instead of ‘post’**, as referenced throughout the EDPS Position Paper on the role of the DPOs of EUIs. Furthermore, **the EDPS recommends deleting the reference to ‘as Europol staff member’**. Indeed, the EDPS would provide (or not) the necessary consent on the dismissal from the function of the DPO, but it is not within his scope of competence to provide any guidance/consent on the continuation of the employment relationship. **(Recommendation No.1)**.
6. Article 7(3) of the draft decision stipulates that the DPO shall provide advice where requested as regards DPIAs in the area of administrative as well as operational data processing operations and monitor their performance. The EDPS notes that it is the responsibility of the data controllers, not of the DPO, to carry out DPIAs⁶. In this context, the DPO can play an important role in advising Europol on whether to carry out a DPIA. The DPO can also advise on different aspects, for example, the type of methodology to use, or the technical and organisational security measures that Europol could apply to mitigate any risks to the rights and freedoms of the data subjects. Additionally, the DPO can provide guidance on the correct performance of the DPIAs, and on whether its conclusions comply with the Regulation. Therefore, **the EDPS recommends that Europol update Article 7(3) of the draft decision** clarifying also that the DPO shall:

³ Point 3.3 EDPS Position Paper on the role of the DPOs of EUIs.

⁴ Article 44(8) of the Regulation.

⁵ Point 4.3 EDPS Position Paper on the role of the DPOs of EUIs.

⁶ Point 5.2 EDPS Position Paper on the role of the DPOs of EUIs.

- advise on what **methodology** to use on a case-by-case scenario;
 - advise on the **correct implementation of the DPIA** for a particular processing operation.
 - provide support to the responsible staff to **analyse what are the data protection risks** of the processing operations under their responsibility; and,
 - advise on the selection of the necessary **safeguards to mitigate the risks** to the rights and freedoms of data subjects. **(Recommendation No.2).**
7. Article 7(8) of the draft decision provides that the DPO shall respond to requests from the EDPS, within the sphere of his or her competence, cooperate and consult with the EDPS, at the latter's request or on his or her own initiative⁷. **The EDPS recommends Europol to include a cross-reference in Article 17 (Cooperation with European Data Protection Supervisor) to Article 7(8) of the draft decision. (Recommendation No.3).**
 8. Article 7(10) of the draft decision provides that the DPO shall act as the point of contact for the EDPS on issues relating to the processing of personal data, including the prior consultation under Articles 40 (administrative personal data) and 90 (operational personal data) of the Regulation. The EDPS notes that Europol shall submit prior consultations to the EDPS, in line with the requirements provided in Article 40 and 90 of the Regulation respectively. Additionally, the Regulation establishes that the DPO shall provide advice where requested as regards the need of such prior consultation and shall consult the EDPS in case of doubt⁸. The EDPS emphasises that the DPO can play an important role in this matter, given its expertise and experience. Therefore, **the EDPS recommends that Europol complement Article 7(10) of the draft decision indicating that the DPO shall assist responsible staff on the need for prior consultation of the EDPS pursuant to Article 40 of the Regulation. (Recommendation No.4).**
 9. Article 7(12) of the draft decision provides that the DPO shall prepare an annual report and communicate that report to the Management Board and to the European Data Protection Supervisor. **The EDPS recommends Europol consider taking into account such report in the context of the annual performance appraisal of the staff member appointed as DPO (in particular with regard to the specific DPO duties) for which the Director shall ensure an equal and fair treatment. This will serve to measure the performance of the DPO work.⁹ (Recommendation No.5).**

⁷ Article 45(1)(g) of the Regulation.

⁸ Article 45(1)(f) of the Regulation.

⁹ Point 4.3 EDPS Position Paper on the role of the DPOs of EUIs.

10. Article 11(1) of the draft decision provides that the DPO shall assist data subjects in the exercise of their rights within the legally foreseen deadlines. Moreover, Article 11(4) of the draft decision provides that the DPO shall communicate to the data subject any decision taken by the Executive Director, on behalf of Europol, in regards to the response to the data subject's access requests. According to Article 84(1) of the Regulation, the rights of the data subjects may also be exercised through the EDPS. Therefore, **the EDPS recommends that Europol complement Article 11 (4) of the draft provision by making reference to the data subject's possibility to exercise his or her rights through the European Data Protection Supervisor** in line with Article 84 of the Regulation. **(Recommendation No.6).**
11. Article 12(2) of the draft decision provides that the DPO shall keep a Register of records of processing activities for administrative personal data and a Register of all categories of processing activities with operational personal data under Europol's responsibility. The EDPS notes the importance to underline the difference between the concept of record of processing activities and the concept of central register. Furthermore, the EDPS emphasises that it is the controller's task to keep appropriate records. Indeed, the accountability for generating records and for their content remains with the controller¹⁰. While the DPO can help generating the records and supporting documentation, this is a duty of the controller. Then, the controller shall centralise their records in a public register kept by the DPO¹¹. Therefore, **the EDPS recommends:**
- **replace the definition of 'Records of Processing Activities' with 'Register of records of processing activities'** in Article 12 of the draft decision;
 - update Article 12(2) **clarifying that it is the data controller's task to maintain a record of processing operations under its responsibility**¹², seek advice of the DPO to establish such records, and transmit them to the DPO in order to centralise the records in a public register that will be kept by the DPO.
 - include an obligation in Article 12 **to make the Register of records of processing activities for administrative personal data accessible in electronic format and publicly available.**
 - update Article 12(9) of the draft decision indicating that **internal staff may ask for an extract of the register of processing activities for administrative**

¹⁰ Point 5.3 EDPS Position Paper on the role of the DPOs of EUs.

¹¹ Point 2 of the Accountability on the ground Part I: Records, Registers and when to do Data Protection Impact Assessments, available at: https://edps.europa.eu/sites/edp/files/publication/18-02-06_accountability_on_the_ground_part_1_en_0.pdf

¹² Article 31.1 of the Regulation.

personal data in writing to the DPO, who shall reply within a defined period (for example, 15 working days). **(Recommendation No.7)**

12. Article 13(3) of the draft decision provides that the DPO shall participate in the Security Committee on all issues related to the protection of personal data. **The EDPS welcomes this approach and advises to include a reference in Article 13(3) of the draft decision to the possibility of the DPO proposing topics in the agenda of the Security Committee** that he or she considers relevant. **(Recommendation No.8).**
13. Article 15 of the draft decision provides that to the extent that ‘... data protection matters are concerned, full responsibility shall lie with the DPO’. The EDPS notes that such provision aims to ensure DPO’s tasks and powers in relation to the Fundamental Rights Officer (‘FRO’), but the expression “full responsibility” can be misleading. In order to clarify this provision, **the EDPS recommends that Europol clarify the second sentence of Article 15 of the draft decision.** It should be clear that Europol is the data controller and that only within the cooperation between Europol’s DPO and the FRO the DPO is in charge of the data protection tasks mentioned in the draft decision. **(Recommendation No.9).**
14. Article 16(2) of the draft decision provides that the DPO shall foster a high level of data protection compliance in the organisation by cooperating with Europol staff responsible for procedures, training and advice on data processing and fundamental rights protection. The EDPS notes that the DPO plays an important role in developing knowledge on data protection issues inside Europol. The EDPS welcomes this approach and the consequence in terms of stimulating an efficient preventive approach rather than repressive data protection supervision. Indeed, the EDPS welcomes the idea that ensuring application notably starts by raising awareness. Therefore, **the EDPS recommends completing Article 16(2) of the draft decision indicating that the DPO should also provide advice to Europol staff on practical recommendations for improvement of data protection within Europol**, or concerning the interpretation or application of the Regulation¹³. **(Recommendation No.10).**
15. Article 17 of the draft decision provides that the DPO shall take account of guidelines and opinions as well as any other measures taken by the EDPS in monitoring and ensuring the application of the Europol Regulation and Regulation 2018/1725 on all issues related to the protection of personal data. The EDPS supports the fact that cooperation between the DPO and the EDPS is highly important. Indeed, such cooperation helps Europol ensuring compliance, as well as the right enforcement of the Regulation. Needless to say, the EDPS is not in a position of evaluating the day-

¹³ Point 6.1 of the EDPS Position Paper on the role of DPOs of EULs.

to-day work of the DPO and his input would only cover areas where there is direct cooperation with the EDPS (for example, collaborations in working groups, inspections or accountability/compliance visits)¹⁴. Therefore, **the EDPS recommends to complete Article 17 of the draft decision clarifying that the DPO shall cooperate with the EDPS**, and to indicate that the main goal is to ensure compliance from the inside and to advise or to intervene at an early stage, thereby avoiding possible intervention from the supervisory authority¹⁵. **(Recommendation No.11)**.

16. Article 18 of the draft decision provides that the DPO may issue opinions on data protection related matters, such as actual or proposed processing operations, on the measures required in order to ensure that such operations are lawful and on the effectiveness of data security safeguards. Additionally, Article 19 of the draft decision provides that the DPO may carry out compliance checks of Europol's processing operations in order to ensure compliance with the Europol Regulation, with Regulation 2018/1725, with other Union or national data protection provisions and with the policies of Europol in relation to the protection of personal data. The EDPS observes Europol DPO shall ensure in an independent manner Europol's compliance with data protection provisions applicable for the processing of both operational and administrative personal data. Therefore, **the EDPS recommends including a reference in both mentioned articles of the draft decision, Articles 18 and Article 19, clarifying that the DPO may issue opinions on data protection related matters and carry out compliance checks in relation to all Europol processing activities containing both, operational and administrative personal data. (Recommendation No.12)**.
17. Article 20 of the draft decision provides that the DPO may make recommendations to the Management Board, the controller and the processor for the practical improvement of data protection and advise them on matters concerning the application of data protection provisions. The EDPS welcomes the idea that the DPO shall ensure in an independent manner the internal application of the Regulation and to advise the data controller and the processor on fulfilling their obligations, as this is part of his or her assurance and general advisory role¹⁶. Article 7 of the draft decision provides for the specific tasks of the DPO. Therefore, **the EDPS recommends including a final paragraph in Article 7 of the draft decision specifying that the controller and processor, the staff committee members and any individual, may consult the DPO without going through the official**

¹⁴ Point 4.6 of the EDPS Position Paper on the role of DPOs of EUIs.

¹⁵ Point 6 of the EDPS Position Paper on the role of DPOs of EUIs.

¹⁶ Point 5.2 of the EDPS Position Paper on the role of DPOs of EUIs.

channels, on any matter concerning the interpretation or application of the Regulation. **(Recommendation No.13).**

18. Article 21(4) of the draft decision provides that in the event of obvious misuse of the right to request an investigation, in particular in cases of repeatedly unsubstantiated requests of the same data subject, the DPO shall not be obliged to report back to the requester. The EDPS notes that in such event of manifest abuse of the right to request an investigation, for example where it is repetitive, abusive and/or pointless, the DPO should inform the applicant that they would not pursue his or her request and give account of the reasons. Therefore, **the EDPS recommends that Europol update Article 21(4) of the draft decision by deleting the sentence indicating ‘the DPO shall not be obliged to report back to the requester,’** and to clarify that the DPO shall ensure to inform the requester about the underlining reasons why the request would not be pursued. **(Recommendation No.14).**
19. Article 24(1) of the draft decision provides that Europol shall provide the DPO with staff and resources necessary to carry out his or her tasks. Additionally, Article 24(3) of the draft decision provides that, taking into account the scale, complexity and sensitivity of data processing operations, Europol shall care for qualifications and the necessary level of training for the DPO and his or her staff. The EDPS welcomes the fact that Europol shall support the DPO in performing their tasks by providing resources necessary to carry out those tasks¹⁷. The EDPS notes that this implies that the DPO should be provided not only with adequate support in terms of financial resources, infrastructure (premises, facilities, equipment) and staff where appropriate, but also that the senior management actively supports the DPO function. Nevertheless, **the EDPS recommends including another obligation in Article 24 of the draft decision indicating the need of communicating the designation of the DPO officially**¹⁸ to all staff to ensure that everyone knows about the DPO existence and function within Europol. **(Recommendation No.15).**
20. The EDPS notes that the draft decision does not include any obligation related to joint controllers. Pursuant to the Regulation, there is a need to conclude formal arrangements with joint controllers¹⁹ to allocate responsibilities for compliance with the Regulation. Therefore, **the EDPS recommends including an obligation in the draft decision indicating that responsible staff members shall consult the DPO on those draft agreements.** **(Recommendation No. 16).**

¹⁷ Article 44.2 of the Regulation.

¹⁸ Point 4.2 of the EDPS Position Paper on the role of DPOs of EUIs.

¹⁹ Article 28 of the Regulation.

3. CONCLUSION

In light of the accountability principle, the EDPS expects Europol to implement the above recommendations accordingly and has decided to **close the case**.

Done in Brussels