



EDPS
EUROPEAN DATA PROTECTION SUPERVISOR

EDPS SUPERVISORY OPINION ON THE PROCESSING OF PERSONAL DATA RELATING TO ‘ASSOCIATES’ AND ‘CONTACTS’ AS CATEGORIES OF DATA SUBJECTS PROCESSED BY THE EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX) FOR THE PURPOSES OF IDENTIFYING SUSPECTS OF CROSS-BORDER CRIMES PURSUANT TO ARTICLE 90 OF REGULATION (EU) 2019/1896 (Case 2023-0118)

1. INTRODUCTION

1. This Supervisory Opinion relates to the processing of personal data relating to ‘associates’ and ‘contacts’ as categories of data subjects processed by the European Border and Coast Guard Agency (Frontex) for the purposes of identifying suspects of cross-border crimes pursuant to Article 90 of Regulation (EU) 2019/1896¹ (‘EBCG Regulation’).
2. The European Data Protection Supervisor (EDPS) issues this Supervisory Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725², (‘Regulation 2018/1725’).

¹ Regulation (EU) 2019/896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) No 1052/2013 and (EU) 2016/1624, OJ, L 295, 14.11.2019, pp.1-131.

² 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. FACTS

3. On 7 June 2022, the EDPS issued an opinion on the Management Board Decision 69/2021 of 21 December 2021 adopting the rules on processing operational personal data by Frontex (the ‘MB Decision 69/2021’).³
4. In his opinion, the EDPS recommended deleting any reference to ‘associate’ throughout the Decision as Article 90(1) of the EBCG Regulation does not mention ‘associate’ as a category of data subject about whom Frontex may process operational personal data.
5. On 27 January 2023, Frontex formally consulted the EDPS on whether Frontex could process personal data on ‘associates’ (as defined in MB Decision 69/2021) and on ‘contacts’ (currently not defined in the MB decision 69/2021) under Article 90 of the EBCG Regulation.

3. LEGAL ASSESSMENT

3.1. Legal basis

6. Article 90 of the EBCG Regulation provides that where Frontex ‘in the performance of its tasks under Article 10 (1) (q) processes personal data, which it has collected while monitoring migratory flows, carrying out risk analyses or in the course of operations for the purpose of identifying suspects of cross-border crime, it shall process such personal data in accordance with Chapter IX of Regulation (EU) 2018/1725. Personal data processed for that purpose (...) shall relate 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.’
7. Pursuant to Article 10 (1) (q) of the EBCG Regulation, Frontex shall ‘within the respective mandates of the agencies concerned, cooperate with Europol and 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.’

³ Case 2022-0147.

8. Article 73 of (EU) 2018/1725 Regulation mandates the controller, where applicable and as far as possible, to make a clear distinction between the operational personal data of different categories of data subjects, such as the categories listed in the legal acts establishing Union bodies, offices and agencies.
9. While Article 90 EBCG Regulation only refers to persons for whom there are reasonable grounds to suspect they are involved in cross-border crimes, as well as victims and witnesses, the legal founding acts of Europol⁴ and Eurojust⁵ not only list suspects, victims and witnesses but also other data subject categories such as ‘potential future criminals’⁶, ‘informants’⁷, ‘contacts’ and ‘associates’^{8,9}.
10. The Europol Regulation provides a definition of what these categories entail. Annexes II.B (3) of the Europol Regulation refer to ‘contacts’ and ‘associates’ as persons through whom there is sufficient reason to believe that information, which relates to suspects and which is relevant for the analysis, can be gained.¹⁰ ‘Contacts’ are those persons who have a sporadic contact with suspects, while ‘Associates’ are those persons who have regular contact with them.
11. In the absence of a reference, and consequently, a definition of ‘contacts’ and ‘associates’ in the EBCG Regulation, Frontex provides, in the MB Decision 69/2021, its own definition of ‘associate’ as any ‘natural person who the competent authorities of the Member State(s), Europol, Eurojust or the Agency have reasonable grounds to suspect is cooperating with a suspect in the commission of a cross-border crime, in particular by aiding, abetting or inciting an offence’. This definition differs from the definition contained in the Europol Regulation. The MB Decision 69/2021 does not provide a definition of ‘contacts’.
12. In light of the above, Frontex asks whether Article 90 of the ECBG Regulation can be interpreted as allowing Frontex to process personal data on ‘associates’ and ‘contacts’ it has collected in the context of its activities directed at monitoring migratory flows, carrying out risk analyses or in the course of operations.

⁴ Regulation (EU) 2016/764 of the European parliament and of the Council of 11 May 2016 on the European 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, 24.05.2016, pp 53-114 (the ‘Europol Regulation’).

⁵ 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, OJ, L. 295, 21.1.2018, pp. 138-182 (the ‘Eurojust Regulation’)

⁶ Annex II.A (1)(b) and Annex II.B(1)(b)

⁷ Annex II.B (1)(f)

⁸ Annex II.B(1)(e)

⁹ Annex II (A) and (B) of Europol Regulation and Article 27 of Eurojust Regulation.

¹⁰ Annex II (B) (3) of Europol Regulation.

3.2. Analysis

13. As a preliminary remark, the EDPS would like to stress that Frontex's mandate must be interpreted in line with the Treaty on the Functioning of the European Union ('TFEU').
14. As highlighted in his opinion on the MB decision 69/2021, the EDPS recalls that the legal founding act of Frontex (i.e. the EBCG Regulation) is based on Article 77 (2) (b) and (d) and Article 79 (2) (c) of the TFEU. These Articles refer to measures related to:
 - the checks to which persons crossing external borders are subject (Article 77 (2) (b)),
 - the gradual establishment of an integrated management system for external borders (Article 77 (2) (d)) and,
 - illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation (Article 79 (2) (c)).
15. Pursuant to Article 88 of the TFEU, Article 3 (1) of the Europol Regulation and as recalled in Recital 41 of the EBCG Regulation, the European Union Agency for Law Enforcement Cooperation (Europol) is the EU agency responsible in the area of preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime, which affect a common interest covered by a Union policy. In this context, the EU legislator specifically tasked Europol to collect, store, process, analyse and exchange information, including criminal intelligence to support cooperation among law enforcement authorities in the Union (Article 4 (1) (a) of the Europol Regulation).
16. The European Union Agency for Criminal Justice Cooperation (Eurojust) is the EU agency responsible to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases (Article 87 of the TFEU and Article 2 (1) of the Eurojust Regulation).
17. Law enforcement, investigating and prosecuting authorities of the EU Member States should be understood as those entrusted by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.¹¹

¹¹ See in this regard Article 2(a) of the Europol Regulation, Article 3 (11) of Regulation 2018/1725 and Article 3 (7) of Directive (EU) 2016/680 of the European Parliament and of the Council 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, OJ, L. 119, 4.5.2016, pp. 89-131 (the 'LED').

Their tasks include searching for crimes, gathering evidence, informing the competent authorities, seizing, arresting and placing at the disposal of the prosecuting authority the perpetrators, in the manner and in the forms determined by the national law.

18. Article 90 of the EBCG Regulation read in light of the provisions defining Frontex's mission (Article 77 (2) (b) (d) and 79 (2) (c) of the TFEU and Article 1 of the EBCG Regulation) and tasks (Article 10 of the EBCG Regulation) should thus be understood as limiting Frontex's processing of personal data for the purposes of the fight against cross-border crime and terrorism to a strict role of support to Member States' law enforcement authorities and of cooperation with Europol and Eurojust within their respective mandates. It is not within Frontex's mandate to search for or investigate cross-border crimes or to perform any kind of criminal analysis.
19. It follows that Article 90 should be interpreted as only allowing the processing of operational personal data by Frontex (i.e. personal data about individuals suspected of involvement in cross-border crime, as well as data about victims and witnesses) for the purposes of cooperating with Europol and Eurojust and of supporting Member States in the fight against cross-border crime and terrorism.
20. Considering that Article 73 EUDPR refers to the categories listed in the legal acts establishing Agencies, and that Article 90 EBCG Regulation does not include a reference to the categories of 'contacts' and 'associates', it is thus necessary to determine whether these categories can be included under the concept of 'persons for whom there are reasonable grounds to suspect that they are involved in a cross-border crime'.
21. As mentioned above, the Europol Regulation provides a definition of 'contacts' and 'associates' as persons through whom there is sufficient reason to believe that information, which relates to suspects and which is relevant for the analysis, can be gained.¹² 'Contacts' are those persons who have a sporadic contact with suspects, while 'Associates' are those persons who have regular contact with them. Suspects are defined as persons who, in accordance with the national law of the Member State concerned, is suspected of having committed or having taken part in a criminal offence or who has been convicted of such an offence.¹³ The EDPS notes that contrary to the definition of 'suspects', the definition of 'contacts' and 'associates' does not contain a reference to an involvement of these persons in the perpetration of a crime.
22. The EDPS notes that the definition of 'associates' provided by Frontex in MB Decision 69/2021 (i.e. any 'natural person who the competent authorities of the Member State(s), Europol, Eurojust or the Agency have reasonable grounds to suspect is

¹² Annex II (B) (3) of Europol Regulation.

¹³ Annex II (A) (1) (a) and Annex II (B) (1) (a) of the Europol Regulation

cooperating with a suspect in the commission of a cross-border crime, in particular by aiding, abetting or inciting an offence’) does include an element of involvement in a cross-border crime. Such definition of ‘associates’ is unknown to the EBCG, Europol, Eurojust, or even the EPPO Regulations. Further, it rather seems to refer to forms of participation to a crime such as ‘accomplices’, ‘accessories’ and ‘agent provocateurs’, which are concepts defined under national criminal law.

23. In light of the above, the EDPS considers that the wording of Article 90 of the EBCG Regulation, i.e. ‘persons on whom Europol, Eurojust or the Agency have reasonable grounds to suspect are involved in cross-border crime’ must be interpreted as excluding the processing of data about ‘contacts’ and ‘associates’, as defined under the Europol Regulation as they do not imply an involvement in cross-border crime. Frontex cannot use a definition of ‘associates’ that would deviate from the one already provided for under the Europol Regulation, in particular as these data are meant to be shared with Europol.

4. CONCLUSION

24. In light of the above, the EDPS considers that the wording of Article 90 of the EBCG Regulation limiting the processing of operational data to ‘persons on whom Europol, Eurojust or the Agency have reasonable grounds to suspect are involved in cross-border crime’ must be interpreted as excluding the processing of data about ‘contacts’ and ‘associates’, as defined under the Europol Regulation, as these data subjects categories do not imply an involvement in cross-border crime.
25. The definition of ‘associates’ provided for in Frontex MB Decision 69/2021 is misleading and rather seems to refer to forms of participation to a crime such as ‘accomplices’, ‘accessories’ and ‘agent provocateurs’, which are concepts defined under national criminal law. The definition of the term ‘associate’ should mirror the one provided by the legislator under the Europol Regulation.

Done at Brussels on 11 May 2023

[e-signed]

Wojciech Rafał WIEWIÓROWSKI