



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS OPINION ON A PRIOR CONSULTATION REQUESTED BY EUROPOL

on a pilot project for a European Police Records Index System (EPRIS)

25 April 2022

(Case 2022-0265)

According to Article 39 (1) of Regulation (EU) 2016/794 (the ‘Europol Regulation’ or the ‘ER’)¹, any new type of processing operations to be carried out shall be subject to prior consultation with the EDPS where special categories of data as referred to in Article 30(2) are to be processed or where the type of processing, in particular using new technologies, mechanisms or procedures, presents specific risks for the fundamental rights and freedoms, and in particular the protection of personal data, of data subjects.

Having performed a data protection impact assessment, Europol has consulted the EDPS regarding certain specific risks identified by the agency in relation to its participation in a pilot project for a European Police Record Index System (‘EPRIS’). The EDPS issues this Opinion in accordance with Article 39(2) of the Europol Regulation.

The focus of this pilot project is to prepare the roll-out of EPRIS, which is currently being discussed as part of the European Commission’s proposal for a Regulation of the European Parliament and of the Council on automated data exchange for police cooperation (the ‘Prüm II proposal’, or ‘Prüm II’)². The EDPS was already consulted on the Prüm II proposal by the European Commission as part of the Police Cooperation Code package³ and has published its Opinion on the proposal⁴.

The EDPS is of the opinion that Europol’s prior consultation and appended documentation insufficiently identify, allocate and mitigate the various risks related to the EPRIS pilot, and has marked several areas which need to be further assessed.

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 Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on automated data exchange for police cooperation (“Prüm II”), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council, COM/2021/784 final.

³ More information available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6645.

⁴ Section 3.5 of EDPS Opinion 4/2022 on the Proposal for a Regulation on automated data exchange for police cooperation (‘Prüm II’), 2 March 2022, available on https://edps.europa.eu/system/files/2022-03/22-03-07_opinion-4-2022_prum_en.pdf.

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1. PROCEEDINGS

On 25 February 2022, the EDPS received a request for prior consultation from Europol under Article 39 of the Europol Regulation on a new processing operation, namely a pilot project for a European Police Record Index System (or 'EPRIS' abbreviated).

The prior consultation request contained the following:

- the formal notification of the prior consultation, with an identification of three risks and a filled-out questionnaire by Europol's staff⁵;
- a copy of the Prüm II proposal;
- a copy of Europol's letter of support to the EPRIS pilot project, dated 22 November 2019⁶;
- the SIENA Use and Management Policy⁷;
- a business process model, containing references to the draft Prüm II proposal⁸; and
- the ADEP Pilot Implementation and Evaluation Report by MS, version 1.0 of 26 February 2019⁹.

On 7 March 2022, the EDPS met with Europol's Data Protection Function (DPF) to inquire whether this consultation should be understood as a prior consultation of Europol's implementation of the Prüm II proposal, ahead of its adoption.

On 8 March 2022, Europol clarified that the EDPS was not in fact consulted on the implementation of EPRIS under the Prüm II proposal, which is not yet adopted, but rather on Europol's participation in a pilot project preparing for the possible deployment of EPRIS, should the legal basis be adopted.¹⁰

According to Article 39(3) of the Europol Regulation, the EDPS is to issue his Opinion to the Europol Management Board within a period of two months following the receipt of the notification of the prior consultation. That period may be suspended for a maximum period of two additional months, after which it shall be deemed favourable. As the EDPS did not exercise his possibility to suspend, the deadline within which the EDPS shall issue his Opinion is **25 April 2022**.

2. DESCRIPTION OF THE PROCESSING

2.1. The EPRIS Pilot Project

2.1.1. Organisation of the pilot project

The EPRIS pilot project is organised by the EPRIS project consortium consisting of Germany (the project lead), Belgium, Finland, France, Ireland, Spain and Europol itself as full Members.¹¹ The underlying technology of the EPRIS pilot (ADEP - Automation of Data Exchange Processing) has been previously developed and tested in the EU funded EPRIS-

⁵ EDOC#1209557.

⁶ EDOC#1080835v1.

⁷ EDOC#720481v3.

⁸ EDOC#1217242v1.

⁹ EDOC-#1080815-v1

¹⁰ EDOC#1209557, page 3: 'The project is focused on developing and testing a rollout capable EPRIS system.'

¹¹ Hungary and the Netherlands are observers to this project.

ADEP Pilot Project between 2017 and 2018.¹²

From the documentation provided by Europol, it is unclear whether this consortium has identified and assigned data protection responsibilities among themselves or whether any of its other members have conducted a data protection impact assessment on the project, in line with their national law implementing Article 27 of the Law Enforcement Directive (LED), or similarly consulted the competent national supervisory authority in accordance with Article 28 of the LED.¹³

2.1.2. Functioning of EPRIS in the pilot project

The EPRIS pilot project aims to establish the capability for the automated searching of police records indexes between its participating Member States, in preparation of the possible adoption of the Prüm II proposal.

According to the prior consultation form¹⁴, the EPRIS pilot process consists of 2 phases.

In Phase 1, law enforcement of one Member State would locate which other participating Member States in EPRIS (likely) hold relevant data on a person of interest in its police records, using the ADEP technology.

The ADEP technology does so via the following: whenever a query would be initiated in one Member State, the identifying personal data – search parameters - (e.g. names and date of birth) are pseudonymised. After the pseudonymisation, the data is sent out to initiate a search in the indexes of the selected Member State. The pseudonymised data of the query is compared with the pseudonymised data of the respective ADEP indexes.

One feature of the ADEP Technology is that the comparison, in dependency of the search profile, will not only produce exact matches but also similarities, which are also reported as hits within a pre-defined threshold. The result of the query is a hit/no-hit result which is automatically returned to the requester. Other results could be an error or time-out message (if the addressed Member State does not answer within a certain time).

Phase 2 can be initiated by the requesting law enforcement officer after assessing the hits obtained in phase 1. Using SIENA, a request is sent to the relevant Member State holding information on the data subject (the Member State where the matching of the pseudonymised data resulted in a hit). The issuance of follow-up requests is not mandatory.

Europol's role in the EPRIS pilot project would be to provide a dedicated private network (the EPRIS network) configured, managed and monitored by Europol using the Europol Operations Network (EON) infrastructure including ServiceDesk support and Service Level Agreements (SLAs) for the EPRIS network. Europol would also support participating Member States in connecting to the network, deploy and manage the EPRIS central services required for the functioning of EPRIS.¹⁵

¹² EDOC#1209557, page 3, footnote 2.

¹³ 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, p. 89–131.

¹⁴ EDOC#1209557, page 3.

¹⁵ EDOC#1209557, page 4.

These central services include:

- A. The central configuration management service for the management of pseudonymisation parameters, search parameters and stop word lists (further clarified by Europol as ‘lists of words omitted by the search mechanism’);
- B. EPRIS software release management and repository; and
- C. [REDACTED]

The EPRIS Central Services are meant to provide the technical support for the functioning of EPRIS in accordance with the functional requirements expressed by the participating Member States.

As part of its regular services, Europol would also provide SIENA access for phase 2.

As such, it is worth noting that Europol’s role in the pilot project mirrors Article 64(4) of the Prüm II proposal, under which Europol would be responsible for the development of EPRIS in cooperation with the Member States, and for the technical management (and provision of training on the technical use) of EPRIS.

Based on the information above, Europol would play a central role in the EPRIS pilot project. However, other than the listing of the central services, little further information on these services is included in the prior consultation. As such, it remains unclear how Europol will operate the central configuration management services, and to what extent Europol will act upon the instructions of Member States when doing so.

2.1.3. Personal data processing in the pilot project

According to the prior consultation mentions, EPRIS would not only use test or ‘dummy’ data, but also operational data from the participating Member States.¹⁶

More specifically, during the Business Acceptance Test phases of the EPRIS project, Member States will use national operational production data for the purpose of validating the EPRIS system, in accordance with their national law.¹⁷ As such, the EDPS understands that this production data would be processed as if the Prüm II framework has already been adopted - despite that neither the Prüm II proposal nor any of its implementing decisions under Article 44 are in place.

Each EPRIS participant has to identify the data sources (e.g. national crime databases, national police and other law enforcement records), which would be suitable to be used when creating the EPRIS.ADEP index. The EPRIS.ADEP index would be built based on all national data sources that are currently queried by the Europol National Unit in order to answer a standard SIENA request from another Member States (‘Please provide any police information available regarding this person.’). Therefore, the pseudonymised person data sent in each EPRIS query and the EPRIS.ADEP index entries must refer to person subjects that could be subject of international data exchange via SIENA.¹⁸

¹⁶ EDOC#1209557, page 19.

¹⁷ EDOC#1209557, page 19. The EPRIS request and the EPRIS index in the receiving Member State contain a restricted set of fields (first name, family name/alias, place of birth (not presently used), date of birth and gender).

¹⁸ EDOC#1209557, page 21 and 22.

Upon entry into operation of EPRIS, Europol notes that a document describing the data source(s) used by the different EPRIS participants to establish their index will be drafted and published at a central point.¹⁹ Europol expressed its preference to be the central point in that regard and noted that this document would be made available to the EDPS for transparency. There was however no mention made of a similar document that would be used for the duration of the pilot project, meaning that the EDPS does not have assurance that there is a clear overview of the police record databases (or parts thereof) being indexed for the pilot project.

3. LEGAL AND TECHNICAL ASSESSMENT

3.1. Need for prior consultation pursuant to Article 39 of the Europol Regulation

Article 39 of the Europol Regulation subjects some processing operations to prior consultation by the EDPS. According to Article 39(1) of the Europol Regulation, the scope of application of the prior consultation requirement covers:

- (a) processing of special categories of personal data as referred to in Article 30(2); or
- (b) types of processing, in particular using new technologies, mechanisms or procedures, presenting specific risks for the fundamental rights and freedoms, and in particular the protection of personal data, of data subjects.

Furthermore, according to Recital 50 of the Europol Regulation: ‘the prior consultation mechanism is an important safeguard for new types of processing operations. This should not apply to specific individual operational activities, such as operational analysis projects, but to the use of new IT systems for the processing of personal data and any substantial changes thereto.’

The EPRIS pilot project will give way to “new processing operations” in so far as it relates to the development of a new IT system for the processing of personal data, namely an automated querying system of police record indexes.

While Europol has clarified that this prior consultation does not concern the final development of EPRIS under the Prüm II proposal, its participation in the pilot project is intended to largely develop the infrastructure of EPRIS, preparing for a later roll-out once the legal basis is adopted.

In its Opinion on the Prüm II proposal,²⁰ the EDPS has already anticipated that **specific risks for the fundamental rights and freedoms of data subjects will arise in the EPRIS.**

The EDPS has highlighted that the risks for fundamental rights of the affected individuals by the processing of data in national police records have been examined by the ECtHR, which has found in a number of cases violations of Article 8 ECHR.²¹ For instance in *Khelili*

¹⁹ EDOC#1209557, page 15.

²⁰ Section 3.5 of EDPS Opinion 4/2022 on the Proposal for a Regulation on automated data exchange for police cooperation (‘Prüm II’), 2 March 2022, available on https://edps.europa.eu/system/files/2022-03/22-03-07_opinion-4-2022_prum_en.pdf.

²¹ See ECtHR case *Khelili v. Switzerland*, judgment of 18 October 2011, ECtHR case *Segerstedt-Wiberg and Others v. Sweden*, judgment of 6 June 2006, ECtHR case *Cemalettin Canli v. Turkey*, judgment of 18

v. Switzerland, where the Court found that the tenuous classification of a French woman as a prostitute in the computer database of the Geneva police (an issue of low data quality) could damage her reputation and make her day-to-day life more problematic, which the Court stated was made even more significant because the personal data were subject to automated processing. **The EDPS has called in its Opinion on the Prüm II proposal for a more detailed and thorough impact assessment of the EPRIS.** The EDPS has also stressed that the voluntary nature of the participation in the exchange of police record is not sufficient to mitigate the risks for the data subject.

Given that these risks identified for the proposed EPRIS would also appear in a pilot project preparing for its implementation, the EDPS confirms Europol's participation in this pilot to be subject to prior consultation with the EDPS.

3.2. Europol's legal basis for participating in the pilot project

In the prior consultation notification, Europol bases its involvement in the pilot project on **Article 4(1)(h) ER**. This provision states that Europol shall support Member States' cross-border information exchange activities, operations and investigations, as well as joint investigation teams, including by providing operational, technical and financial support.

For the processing of personal data in the pilot project, Europol has indicated that the processing operation would serve the purpose listed under **Article 18(2)(d) ER**, that is to facilitate the exchange of information between Member States, Europol, other Union bodies, third countries and international organisations.

While the EDPS believes that generally Europol can support Member States' pilot projects under Article 4(1)(h) ER, it cannot overlook that a specific legal basis is currently being legislated, whose proposal was shared by Europol in the context of this notification for a prior consultation.

Indeed, Europol' involvement at this stage of the pilot project would not be to perform research on whether or not the ADEP technology would be suitable to use within the eventual EPRIS. Rather, with this pilot project Europol is laying the groundwork for how it will operate within the final EPRIS, using existing Europol infrastructure, ahead of the proposed legal framework and its implementing decisions setting out the technical requirements.²² The EDPS notes that this contradicts the normal process of performing a data protection impact assessment, where the Agency would first explain its real need for the processing in order to achieve the aims of the legal basis, and following this assess whether the processing effectively addresses this need and that the processing is the least intrusive alternative (from the perspective of fundamental rights) to achieve this aim (necessity).²³

November 2008.

²² Article 44(7) of the Prüm II Proposal states that the Commission shall adopt implementing acts to specify the technical procedure for EPRIS to query Member States' databases and the format of the replies. These implementing acts shall then be adopted in accordance with the procedure referred to in Article 76(2) of the Prüm II proposal.

²³ See in this respect the EDPS accountability on the ground toolkit, part II, page 8 and following. The accountability on the ground toolkit can be found on the EDPS' website at: https://edps.europa.eu/sites/edp/files/publication/18-02-06_accountability_on_the_ground_part_2_en.pdf.

The EDPS reiterates that as the current pilot project for EPRIS takes place before the adoption of a specific legal framework, including the data protection safeguards contained therein, an overarching data protection risk assessment of the system, including a justification of the necessity and proportionality of the system, appears even more crucial. **Europol should explicitly demonstrate the necessity and proportionality of its involvement in the pilot project at this stage.** Not doing so creates a risk of non-compliance with Article 28(1) of the Europol Regulation.

As this is a joint project between Europol and the participating Member States, it is also crucial that each user has a clear legal basis to exchange personal data. While the documentation mentions that for all participating Member States national law allows for the processing operation, no overview was provided of the provisions in national law allowing the automatic cross-checking of police records.

3.3. Division of the roles and responsibilities in the pilot project

Considering Europol's active role in this consortium, including providing Europol's infrastructure and hosting management services for the configuration of central elements of the system, Europol should ensure a clear allocation of roles and responsibilities in the context of the pilot project. It is not clear from the documentation provided whether Europol will only act as processor or whether it should qualify as a (joint) controller. This analysis is key to ensure that the right arrangement exists between the parties in the consortium on who tackles which essential data protection elements.

Under Articles 21 and 22 of the Law Enforcement Directive, national authorities are already formally required to draw up either a controller-processor agreement or a joint controllership agreement, depending on who decides on the purpose and the essential means of the processing operation. The EDPS reminds as well that under the proposal for the amended Europol Regulation,²⁴ similar provisions would explicitly apply to Europol as well.

As such, the EDPS considers that a clear data protection arrangement should exist between Europol and the other participating Member States in the consortium, prior to the processing of operational personal data in the pilot project.

Such an arrangement is also paramount in view of the data protection risk assessment that should be conducted. While Europol itself is not in a position to perform an assessment of the risks generated at a Member State level, the EDPS has not been provided with evidence that the consortium has an overall assessment of the data protection risks generated by the system it is piloting.

Europol's data protection impact assessment should not be seen as an isolated assessment but should be considered as one component of the wider data protection impact assessment to be conducted for the pilot project. Without having further information on where the risks are generated, and which participant is appointed to implement the corresponding mitigating measures, the EDPS is concerned that significant risks in the EPRIS system are not sufficiently identified and addressed.

²⁴ See Proposal for a Regulation of the European Parliament and the Council 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 on research and innovation, COM/2020/796 final. As part of this proposal, Articles 86 and 87 EUDPR would become applicable to Europol.

For example, one risk in the overall EPRIS system stems from the potential low quality of the data sources being queried. This risk is located at the Member State level (who decide on which sources to index), however some safeguards for this risk could still be put in place at Europol. Having a centrally published list of the data sources that are indexed by the EPRIS system could help participants to assess the quality of the other sources being queried. If this list is to be published by Europol (as suggested in the prior consultation), this may be a relevant safeguard in the overall data protection evaluation of EPRIS, in the sense that it would allow participants to have an overview of what systems are being queried and take this into account for their assessment. The EDPS considers that, in the absence of a clear legal framework and during the start-up phase of EPRIS, it is even more crucial that the participants have a clear understanding of the data that they are querying. Therefore, such a document should exist as well for the pilot project. Europol should clarify whether it (as the central administrator of EPRIS) would be the entity publishing this list or whether this would fall on one of the participating Member States.

Another central safeguard could be the central management services, which are technically operated by Europol. However, it is insufficiently clear what the process is that will apply to e.g. the stop word list, how they mitigate (or do not mitigate) the data protection risks generated in EPRIS and how (and to what extent) Europol receives instructions from the Member States when it operates the services. Again, even where risks are generated at a Member State level, Europol should also provide information on which risks it is partially responsible for mitigating, and evaluate the resulting risks.

3.4. Technical recommendations

From the technical perspective, the EDPS recommends Europol to further clarify one aspect in its documentation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



4. CONCLUSION AND RECOMMENDATIONS

Based on all of the above, the EDPS is of the view that Europol has insufficiently identified all of the specific risks related to the EPRIS pilot project. This finding stems from the lack of clear division of responsibilities between the participants of the EPRIS consortium as regards data protection, resulting in an incomplete assessment of the risks to the rights and freedoms of data subjects. As such, the EDPS will bring this Opinion to the attention of the supervisory authorities of the Member States concerned and inform the Europol Coordination Board.

As part of its written advice under Article 39(3) of the Regulation, the EDPS makes the following proposals to ensure compliance of the envisaged processing with the Europol Regulation.

1. In the lack of a specific legal basis regulating the system and considering that the EU co-legislators are currently discussing the opportunity and conditions for the deployment of such a system at EU level, Europol must justify the necessity and proportionality of setting up the technical basis of EPRIS at this stage, before the adoption of the Prüm II framework. Not doing so creates a risk of non-compliance with the principle of lawfulness as defined under Article 28(1)(a) ER.
2. The lack of definition of the roles and responsibilities in terms of data protection of Europol and Member States in the context of this pilot project creates a risk of non-compliance with the Europol Regulation, as the qualification of Europol as processor or controller will trigger the application of different provisions. Europol must further clarify its roles and responsibilities in terms of data protection in the context of the EPRIS pilot project.
3. Following the first two recommendations, Europol should reassess the data protection risks linked to its participation to the EPRIS pilot project and the mitigating measures it can take. Such assessment should be part of a comprehensive data protection risk assessment of the system as a whole, as some of the data protection risks identified for other parties might have to be mitigated by the implementation of technical and organizational measures on Europol's side. In particular, Europol should further detail how it intends to implement the central management services, and whether (and if so how) it will publish the central list of data sources. Not doing so create a risk of non-compliance with Article 33 ER.
4. On a technical level, Europol should clarify 
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Done at Brussels on 25 April 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI