EUROPEAN DATA PROTECTION SUPERVISOR

AUDIT REPORT ON THE EUROPEAN UNION AGENCY FOR LAW ENFORCEMENT COOPERATION (EUROPOL)

The Hague, 16 December 2022 - EDPS Case number 2022-0382

Executive summary

Introduction

The European Data Protection Supervisor (EDPS) is the independent supervisory authority established by Article 52 of Regulation (EU) 2018/1725 and responsible under Article 43 of Regulation (EU) 2016/794 (hereinafter referred to as 'the Europol Regulation' or 'ER' abbreviated) for:

- monitoring and ensuring the application of the provisions of the Europol Regulation and of Regulation (EU) 2018/1725 relating to the protection of fundamental rights and freedoms of natural persons with regard to the processing of personal data by Europol, and for advising Europol and data subjects on all matters concerning the processing of personal data.

To these ends, the EDPS fulfils the duties provided for in Article 43(2) and exercises the powers granted in Article 43(4) of the Europol Regulation. Among his powers to investigate, the EDPS can carry out investigations in the form of data protection inspections. The power to inspect is one of the tools established to monitor and ensure compliance with Europol's legal framework.

The inspection at Europol was part of the EDPS annual audit plan for 2022. The formal Decision was communicated to Europol by means of an Announcement Letter dated 17 November 2022. The fieldwork was carried out on 16 December 2022 at Europol's premises, Eisenhowerlaan 73 2517 KK in The Hague, The Netherlands.

Scope of the inspection

The EDPS carried out an inspection of Europol's processing of personal data of minors under 15 years old, provided to the Agency by third countries and international organisations, and marked as suspects.

According to Article 30(1) of the Europol Regulation, the processing of individuals under the age of 18 is allowed if it is strictly necessary and proportionate for the purposes of preventing or combating crime within the scope of Europol's objectives. This requirement reflects the additional vulnerability of minors and the sensitivity associated with processing their data, as well as the potential harms they may face if involved in the criminal justice system at an early stage of their development.

More specifically, the EDPS limited the scope of this inspection to the processing of minors under 15 years old. This decision was based on the findings of the Joint 2018 Annual Inspection with regard to the compliance with Article 30(1) ER, where the average Minimum Age of Criminal Responsibility (MACR) used at Member State level was found to be 15 years old. This in turn means that personal data on minors processed by Europol before the minor reaches 15 years of age should be carefully checked to ensure lawfulness of the processing. The 2018 Annual Inspection also showed the need for coordinated supervision of the processing of personal data of minors, in particular of minors under 15 marked as suspects in Europol systems.

Under Article 38 ER, the responsibility for the legality of a transfer and of the quality of the personal data processed by Europol, and thus of the lawful marking of a minor as suspect (during the 'Data Subject Categorisation', or 'DSC' process)[1] and of the accuracy of the personal data processed about that minor, lies with Europol when the data is provided by third countries or international organisations (Article 38(2)(b) Europol Regulation).

Such responsibility lies with Member States when they provide personal data to Europol. A finding of the 2018 Annual Inspection was that, given the complexity of the different national legal frameworks as regards the definition of the minimum age of criminal responsibility, it is difficult for Europol to give assurance that data provided by national authorities complies with this requirement.

A coordinated supervisory action was thus launched in 2020 in the context of the Europol Cooperation Board[2], now taken over by the Coordinated Supervision Committee (CSC) [3] of the European Data Protection Board (EDPB). Within the CSC, the supervisory authorities of Member States, along with the EDPS, have undertaken to verify the lawfulness and accuracy of the processing of personal data of minors under 15 sent to Europol as suspects, on a yearly basis. This subcategory of minors was chosen based on the same combination of the stigmatising effect of being labelled specifically as a suspect, as well as the common MACR of 15 years old across EU Member States. It must be borne in mind that Article 30(1) of the Europol Regulation requires that all personal data about minors is processed only where 'strictly necessary', and not only this subcategory of minors under 15. However, even among this already specially protected category of data, processing data on minors under 15 as suspects can be seen as the 'most sensitive of sensitive' processing.

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1 In the context of Europol, DSC stands for Data Subject Categorisation. It is the act of identifying in datasets suspects, potential future criminals, contacts and associates, victims, witnesses and informants linked to criminal activities.

2 The Europol Cooperation Board (ECB) was an advisory body composed of representatives of the national supervisory authorities of the European Union Member States and of the EDPS, cooperating on specific issues requiring national involvement and to ensure the consistent application of the Europol Regulation.

3 On 28 June 2022, the ECB ceased to exist with the entry into force of Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022, which transferred its tasks to the Coordinated Supervision Committee of the EDPB.

For these reasons, national data protection authorities have undertaken, on a yearly basis, to verify the lawfulness of the transmission of data about these minors by EU Member State competent enforcement authorities to Europol.

As an integral part of this joint exercise, the EDPS, as the supervisory authority of Europol, should also conduct checks of the processing of personal data of minors under 15, transferred to Europol by third countries and international organisations, thus ensuring that all contributions are covered.

This inspection was carried out in that context.

Key findings of the inspection

The audit identified seven formal findings. The main findings are summarised below:

- The EDPS found that the general process for the assessment of information provided by partners on minors (including minors under 15 years old) is clear and well developed. Furthermore, this general process has been well documented in the appropriate process descriptions and guidelines. However, when examining whether Europol applies any specific (or additional) safeguards for personal data transferred by third countries and international organisations, the EDPS found that Europol does not apply different measures to those data.

  The EDPS considers that the assessment Europol needs to perform where it receives personal data of minors under 15 years old marked as 'suspects' by third countries and international organisations differs from the assessment it needs to perform where it receives this data from Member States. Whereby for the latter Europol can rely (if available) on the sender's own assessment that the transfer is lawful under their legal system, for third country partners Europol must instead perform its own assessment whether the data is lawful under the EU's legal system (which may have a higher threshold).

- Upon conducting specific checks of third country datasets, the EDPS found multiple cases where minors (under 15 years old) apparently have only been involved in relatively minor infractions, such as pickpocketing (at least two cases) or shoplifting, within the broader framework of an organised crime group.

  The EDPS considers it crucial to distinguish between the varying levels of involvement within an organised crime group. While the organised crime group itself may be engaged in more serious or organised criminal activities, minors affiliated with the group may have limited roles or may have been coerced or influenced by family ties or older family members. Thus, attributing the same level of suspicion (in terms of classification) to minors as to the main organisers of the criminal activities could fail to acknowledge the nuances of their participation and may not meet the threshold of 'strict proportionality' established in Article 30(1) of the Europol Regulation.

- On the technical side, the EDPS found that Europol has recently upgraded its architecture for the processing of personal data for operational analysis purposes (Article 18(2)(c) of the Europol Regulation). The EDPS found that as part of this, several improvements have been made to the technical enforcement of data protection safeguards, including data

retention and tracking of the reasons for the processing of minors. However, the justification fields (providing the reasoning for the processing) inspected by the EDPS did not yet meet the standard set out by Europol itself, which in turn implement Article 30(1) of the Europol Regulation.

Recommendations and follow-up of the audit

As a result of the audit activities and his findings, the EDPS has issued a set of 10 recommendations addressed to Europol. The main findings and recommendations are included at the end of each section of the report (with a full compiled list of recommendations inserted in Section 5). The recommendations contained in the report are issued in order to ensure compliance with the Europol Regulation, as well as Chapter IX of Regulation 2018/1725.

In the case of 6 out of 10 recommendations, implementation is designated as imperative to ensure compliance with the legal framework, with the requirement that Europol provides documentary evidence to the EDPS of implementation within the specified timeframe.

This inspection was part of the EDPS Annual Audit Plan for 2022

6 September 2023