

**EDPS Informal comments on
Europol Draft Management Board Decision on the conditions
related to the processing of personal data on the basis of 18(2)
of the amended Europol Regulation**

12 May 2022

1. Timing and procedure

This document is meant to provide initial feedback on the four Management Board decisions. It constitutes a purely informal advice.

This informal consultation by Europol cannot replace the **formal consultation** of the EDPS that can only take place **once the new Europol regulation has entered into force**. The EDPS will strive nevertheless to provide a swift formal reply to that future consultation building on the present and future informal exchanges.

In order to be as constructive as possible and in the interest of timing the EDPS has prepared the comments below, as well as revised versions of the decisions (in track-changes, attached). Please note that this way of working should not be meant as constituting a precedent, and is without any prejudice to any further comments or measures by the EDPS.

3/6/22: Europol has amended the text of the draft decisions and in the recital, they state "Whereas the EDPS was consulted on the draft decision". This however does not seem sufficient to meet the legal requirement of consultation of the EDPS, which should be consulted on the final text.

2. General remarks

The decisions, in general terms, should provide **more details** as to how Europol will perform the processing of personal data.

The decisions are based on three specific legal bases in the Europol Regulation:

- **Article 11(1)(q)**: "The Management Board shall: (...) (q) adopt guidelines further specifying the procedures for the processing of information by Europol in accordance with Article 18, after consulting the EDPS;"
- **Article 18(6b)**: "The Management Board, acting on a proposal from the Executive Director and after consulting the EDPS, shall further specify the conditions relating to the processing of such data pursuant to paragraphs 6 and 6a, in particular with respect to the provision, access to and use of the data, as well as time limits for the storage and deletion of the data, which may not exceed the respective time-limits set out in paragraphs 6 and 6a, having due

regard to the principles referred to in Article 71 of Regulation (EU)2018/1725."

- **Article 18a(3a)** second sentence: "The Management Board, acting on a proposal from the Executive Director and after consulting the EDPS, shall further specify the conditions relating to the provision and processing of personal data in accordance with paragraphs 3 and 4."

Indeed, in all these provisions the legislator requires the Management Board (MB) to take specific actions. In doing so it specifically framed the administrative autonomy that all EU Institutions and bodies enjoy, indicating how to further regulate certain aspects, related to processing of personal data. It required in particular **to specify the procedures and/or the conditions of processing of personal data**.

The pre-existing and 'general' empowerment contained in Article 11(1)(q) concerns the 'entirety' of Article 18. Then, the legislator of 2022 added a further framing of the powers of auto-organisation of Europol by **adding a duty to further specify conditions** for processing of personal data for determining whether datasets submitted are relevant for Europol tasks (paragraph (6)) and also for the temporary processing of data lacking DSC (new paragraph (6a)).

Concerning new Article 18a, the legislator requires the MB to take specific action in relation to the storage of investigative data (paragraph 3 of Article 18a) and in relation to data received by third countries (paragraph 4 of that same article).

In essence, under these three empowerments, Europol (its Management Board) is under a duty to give concrete effect to the requirements made explicit in the Europol Regulation to specify procedures and conditions for processing.

Two consequences stem from the above:

First, the MB is under a duty to give full effect to the provisions introduced by the legislator framing and orienting its autonomy.

The EDPS after a first analysis deems that the draft decisions in some instances only repeat provisions of the Europol Regulation but **do not provide further specifications on the procedures and conditions with the level of detail that the legislator required**. Please see to that purpose the specific comments made directly in the texts and in section 4 below.

Second, the existence of specific mandates given to the MB does not mean that this latter cannot take the decisions, which are necessary to implement more generally the new provisions of the amended Europol

Regulation. In particular, in connection with Article 18a, **the EDPS deems necessary for the MB also to specify in a specific decision:**

- How an ongoing criminal investigation will be considered 'specific' and 'ongoing'?
Art. 2 MB Decision on Art. 18a specifies “ongoing”: every 6 months MS will have to provide confirmation that the investigation is still ongoing and that they are still authorised to process the data (Art. 6(1) MB Decision) - i.e. that investigative activities are currently being carried out by the national competent authorities in one or more of MS or EPPO.
- What the term ‘investigative data’ means? In particular, is this limited to formal criminal investigations (supposedly where the investigation has reached the stage of the judicial investigation) and not in the context of administrative police tasks?
Not specified. MS or EPPO should only confirm that investigative activities are currently being carried out by the national competent authorities in one or more of MS or EPPO.
- What criteria will guide the assessment, referred in Article 18a(1)(b) as to whether the support of the ongoing criminal investigation cannot be carried out without proceeding to DSC in accordance with Article 18(5)? (Refer also to section 4 below)
Article 2bis MB Decision Art. 18a: “such assessment shall consider whether the support will be provided in a specific Europol case for which the purpose as well as the specific conditions for processing are clearly defined.” Europol explains in a comment: “although the law refers the term to investigations at MS level, Europol proposes to suggest a delineation of specificity at Europol level. Due to its mandate, the support Europol can offer must be always to several investigations in several (“one or more”) MS, not one in one MS. Hence it is difficult to verify the specificity in this context of several investigations; how can several investigations in several MS be specific? Europol therefore proposes to introduce the specificity requirement at Europol level to delineate -ie limit the scope of processing under Art. 18a. The support for which (several) MS provide non DSC data in the context of a national investigation should be in the delineation of a specific Europol investigation which is supporting also several (involved) other MS. This does not address the necessity and proportionality requirement (see Recital 21 of recast ER, which says that Europol should be allowed to process personal data where it is strictly necessary and proportionate for the purpose of determining the categories of data subjects). In EDPS legislative opinion, we considered that such pre-filtering should be based on an objective necessity.¹
- According to which criteria will Europol verify whether the exceptional situations mentioned in Article 18a(1)(a)(ii) and which

¹ §24 - https://edps.europa.eu/system/files/2021-03/21-03-08_opinion_europol_reform_en.pdf

allow the cross-checking in line with Article 18(2)(a) are truly exceptional and reject submissions which (at least) are manifestly not exceptional? (Refer also to section 4 below)

- Article 2bis(1) MB Decision Art. 18a = “exceptional operational or urgent circumstances” justifying this request.
- How will this be recorded and stored to be later put at the disposal of the EDPS? (Refer also to section 4 below)
 - Article 2bis(3) and (4) MB Decision Art. 18a:
 - Europol shall report every 6 months to the EDPS the total number of contributions per data provider, the number of verifications in accordance with article 2(3), the progress in identifying the categories of data subjects as listed in Annex II and the number of contributions deleted.
 - All verifications and assessments referred to in Article 2 and this Article shall be logged following the standard logging, auditing and control mechanisms in accordance with Article 40(1) ER.
 - No specification of the fact that the assessment will be recorded.

These specifications are essential in order to ensure that the special provision allowing processing of data lacking DSC introduced by the legislator with Article 18a takes place only where the conditions laid down by this latter are fulfilled. Such conditions are important to ensure effective protection of personal data, given the extent of the interference that will be allowed (data of persons not necessarily having a link with the crime will be processed by Europol for ongoing criminal investigations) and also given the fact that control by the EDPS may only take place once Europol ceases to support the related specific criminal investigation; in order for any supervision to be effective it should be based on the verification of clear and precise rules foreseen in advance.

3. Structure and status of the decisions

Europol has chosen to prepare in the immediate four decisions:

- A decision based on the empowerment in Article 11(1)(q) implementing article 18 repealing and replacing a pre-existing one;
- Two separate decisions, one 'implementing' Article 18(6) and another one implementing Article 18(6a), which should be both based on Article 18(6b);
- A decision implementing Article 18a but limited to paragraphs 3 and 4 thereof as mandated by Article 18a(3a).

The EDPS suggests:

- For Article 18: To consider whether it would be possible to merge in one decision all the provisions implementing Article 18 (i.e. the first

three mentioned above). If that should not be considered possible or appropriate (see also comments on the role of initiative of the Executive director in the attached revised versions), at least the two decisions based on the same provision in Article 18(6b) could perhaps be grouped together.

- For Article 18a: Introduce the elements missing mentioned in the previous section and prepare a decision with a broader scope than the strict mandate contained in Article 18a(3a).

4. Comments on specific data protection aspects

4.1. **MB Decision relating to Article 18(6a): Processing for purposes of determining whether personal data are in compliance with Art. 18(5)**

- Requirement necessary to trigger the application of the article ("where strictly necessary") not defined.
- The requirement in Article 18(6a) of functional separation of these datasets from datasets processed under the general regime (Art. 18(2)) is a safeguard intended to ensure compliance with the purpose limitation principle. It is meant to prevent further incompatible uses (i.e. processing for other purposes than the one of determining whether personal data are in compliance with Art. 18(5)). In that regard the measures proposed by Europol (labelling of data and limitation of access rights to senior analysts on a "need-to-know basis for the performance of their duties") appear insufficient to ensure that such key data protection principle is complied with. Access to the data should be strictly limited to the purpose of determining whether personal data are in compliance with Art. 18(5). This should be complemented by other measures such as:
 - o Clear separation of duties, i.e. dedicated analysts for the processing under Art. 18(6a) and/or technical limitations in terms of import of these datasets into the EAS (= blocking of import for non-DSC data);
 - o Logging that would allow internal checks of who has accessed the data and identification of abnormalities - **Logging obligations introduced in Art. 2bis(4) MB Decision Art. 18a and Art. 2(3bis) MB Decision Art. 18(6a)**
- As this article sets up a broad derogation, assurance should be provided that the safeguards put in place are complied with in practice by regular internal checks (eg that the verification process works as expected).
 - o **Art. 5(2) MB Decision on Art. 18(6a) states that "Europol shall implement appropriate technical and organisational measures in order to ensure and verify, at regular intervals, that the processing of personal data under this Decision is limited to the use as defined in Art. 6"**
- The requirement to inform the EDPS of any extension of the maximum processing period is a key safeguard to ensure that the

processing period is only extended in justified cases. Europol should thus clarify in the internal rules the criteria which will be used in order to decide whether prolonging this period and when the EDPS will be informed.

- Art. 7(1bis) MB Decision on Art. 18(6a): Europol shall describe the evolving criminal intelligence picture and define reasonable grounds or factual indications for believing that a prolongation not exceeding a total processing period of 3 years will facilitate the determination of compliance with Art. 18(5) ER.
 - This criteria does not seem relevant nor specific to the case. Initially, Europol was arguing that this was a technical necessity as it was not technically possible to assign a DSC within 6 months (unstructured datasets). Now the argument is merely operational. Recital 21 seems to support Europol's interpretation. However, it requires that such processing is assessed as being strictly necessary and proportionate.
- EDPS informed after the assessment has been made. Does not specify if before the end of 18 months period.

4.2. MB decision relating to Article 18a: Processing for the purpose of supporting a specific ongoing criminal investigation

- Scope of application of Art. 18a. From the modifications of the text (see Art. 2(5) and (6) of MB Decision on Art. 18a), it has become clear that Europol interprets this Art. 18a as a derogation to the derogation contained in Art. 18(6a). It is thus a pre-filtering chamber where datasets can be stored for years, Europol extracting the data as the investigation is ongoing. We need to take a clear position on this.
- The application of this article is subject to a series of preliminary checks, which condition the application of such broad derogation:
 - MS/EPPO/EJ requests Europol to support an ongoing specific criminal investigation within the mandate of Europol AND Europol assesses that it is not possible to carry out the operational analysis or cross-checking in support of the specific criminal investigation without processing personal data that does not comply with requirements of Art. 18(5). This assessment shall be recorded.
 - Art. 2(1) MB Decision Art. 18a states that when MS/EPPO/EJ and 3rd Countries have not indicated the purpose(s) for which Europol can process the data , Europol shall determine the appropriate purpose in consultation with the data provider concerned.

- This is not compliant with the wording of Art.18a. Such assessment must happen before the dataset is sent and it can only be sent for operational analysis or cross-checking purposes.
 - Article 2bis MB Decision Art. 18a= “such assessment shall consider whether the support will be provided in a specific Europol case for which the purpose as well as the specific conditions for processing are clearly defined. Europol explains in a comment that : “although the law refers the term to investigations at MS level, Europol proposes to suggest a delineation of specificity at Ep level. Due to its mandate, the support Europol can offer must be always to several investigations in several (“one or more”) MS, not one in one MS. Hence it is difficult to verify the specificity in this context of several investigations; how can several investigations in several MS be specific? Europol therefore proposes to introduce the specificity requirement at Europol level to delineate -ie limit the scope of processing under Art. 18a. The support for which (several) MS provide non DSC data in the context of a national investigation should be in the delineation of a specific Europol investigation which is supporting also several (involved) other MS.
 - As explained above, this does not address the necessity and proportionality requirements.
- A third country (TC) requests support to Europol provided that:
 - This TC is object of an adequacy decision, international agreement, or there are adequate safeguards or these are provided in a legally binding instrument; Art. 3 MB Decision Art. 18a contains a reference to the agreements referred to in Art. 25(1) ER. Explanation: “This specific requirement is exactly contained in the cooperationa agreements and working arrangements. These arrangements are binding in the TC (ratification), integrating this specific requirements into national law of TC.
 - The data was acquired in the context of a criminal investigation in accordance with procedural requirements and safeguards under its national criminal law; Europol refers to Art. 10(4) excerpt (supposedly of model WA): “Parties shall only supply information to each other which was collected, stored and transmitted in accordance with their respective legal framework and has not been manifestly obtained in violation of human rights”.
 - Europol has verified that the amount of data is not manifestly disproportionate;

- Europol has verified that there is no indication that the data was collected in obvious violation of fundamental rights
 - The MB decision should specify the criteria that Europol will use to make these assessments and that such assessments will be documented, in line with the principle of accountability.
 - **Europol will only rely on the provisions of the WA. No further assessment.**
- Similarly, the DPO may, where relevant, notify the EDPS that a third country has provided investigative data to Europol. The MB Decision should specify when the DPO should inform the EDPS.
 - **Cases when the DPO may inform the EDPS are not defined (Europol only added “where appropriate” instead of “where relevant”).**
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- Article 5 of the MB decision states that Europol may process the data in accordance with Art. 18(2). However, Art. 18a(1)(a) only provides for the possibility to process the data for purposes of operational analysis and, in exceptionally and duly justified cases, for purposes of cross-checking pursuant to Art. 18(2)(a).
 - The scope should be narrowed down -> **not provided**
 - The MB Decision should specify the criteria that will be used by Europol in order to verify whether the exceptional situations mentioned in Article 18a(1)(a)(ii) and which allow the cross-checking in line with Article 18(2)(a) are truly exceptional and reject submissions which (at least) are manifestly not exceptional. The MB decision should also provide for relevant documentation. -> **not provided**
- Same comments with regard to the requirement of functional separation of the data

4.3. MB Decision relating to Art. 18a: Processing for purposes of ensuring the veracity, reliability and traceability of the criminal intelligence process (Article 7 of the internal rules)

- Data minimisation: the rules do not specify that only the data which are adequate, relevant and not excessive in relation to this purpose will be stored for a longer period. Europol should plan for a specific process to proceed to the selection of data that should be further stored.
 - **Art. 7(1) MB Decision has been modified to state that MS may request Europol to store the specific investigative data. This modification does not address our comment.**
- Limitation on access to the data should be further specified (who will get access to the data, when and for what purpose)

- Art. 7(3) MB Decision now indicates that “only duly authorised staff shall have access, specifically designated for the purpose outlined in paragraph 1.
- Europol should specify where the data will be stored (in the archive?) and how the restrictions on processing will be implemented.
 - New Art. 7(5) now states “personal data stored for the purposes of this Article shall be further functionally separated and will only be strictly accessible by specifically designated staff”.

MB Decision on Art. 18(2)

- Art. 5(3) states that “unless explicitly stated otherwise, all contributions to a specific operational analysis project as well as data submitted for cross-checking under Art. 18(2)(a) shall be deemed also to be submitted for the purpose of strategic and thematic analysis. -> EDPS Recommendation to modify SIENA in order to allow MS to indicate for which purpose they submit the data, so it is not automatic (to be checked)
- Art. 9(2) about processing for the purpose of informing the public about wanted suspects or convicted individuals. Specific conditions of the processing further referred to a Decision by the MB.

4.4. Data subjects access requests

Although not in the scope of the MB decisions, it is of utmost importance that Europol addresses the issue of the data subjects’ access requests, in light as well of the EDPS Opinion of 13 December 2021.