

Data Protection

Working with the EPPO at decentralised level –
Training materials for prosecutors and investigating judges



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Question 1 - Legal Framework

What is the legal framework for data protection applicable to EPPO?

- a. The national law of data protection of the Member State where the respective EDP in control of the data is based.
- b. Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data
- c. Regulation (EU) 2018/1725 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
- d. 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
- e. The data protection rules of Regulation 2017/1939 (EPPO Regulation), which are exhaustive.
- f. The data protection rules of the EPPO Regulation, which are complemented by Regulation (EU) 2018/1725 of 23 October 2018 (see c. above).

Question 1 - and Answer

For administrative data: answer b.

Article 48 EPPO Regulation: Administrative personal data

(1): “Regulation (EC) No 45/2001 applies to all administrative personal data processed by the EPPO.”

For operational personal data (i.e., from the EPPO criminal proceedings): answer e.

Article 49 EPPO Regulation: Processing of operational personal data

(1): “The EPPO shall process **operational personal data** by automated means or in structured manual files **in accordance with this Regulation**, and only for the following purposes:

Article 2(3) Regulation (EU) 2018/1725 :

“... shall not apply to the processing of **operational personal data** by Europol and the **European Public Prosecutor’s Office**, until [Europol/EPPO] Regulation[s] are adapted”

See also Articles 63 to 65 of the IRP – Internal Rules of Procedure (Decision 003/2020 of the College) on the CMS, and other College Decisions: Decision 005/2020 on rules concerning the Data Protection Officer of the EPPO, Decision 005/2020 on rules concerning the Data Protection Officer of the EPPO, Decision 005/2020 on rules concerning the Data Protection Officer of the EPPO, and Decision 005/2020 on rules concerning the Data Protection Officer of the EPPO.

Definitions

Article 2 EPPO Regulation – definitions, inter alia:

(7) “‘personal data’ means **any information relating to an identified or identifiable natural person (‘data subject’)**; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;”

(8): “‘processing’ means **any operation or set of operations which are performed on personal data or on sets of personal data**, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction;”

(17) “‘**administrative personal data**’ means all personal data processed by the EPPO **apart from operational personal data**;

(18) ‘**operational personal data**’ means **all personal data processed by the EPPO for the purposes laid down in Article 49;**”

Processing of operational personal data

Article 49(3) EPPO Regulation: Processing of operational personal data

- (1): “The EPPO shall process operational personal data by automated means or in structured manual files in accordance with this Regulation, and **only for the following purposes**:
 - (a) **criminal investigations and prosecutions undertaken in accordance with this Regulation**; or
 - (b) **information exchange with the competent authorities of Member States of the European Union and other institutions, bodies, offices and agencies of the Union** in accordance with this Regulation; or
 - (c) **cooperation with third countries and international organisations** in accordance with this Regulation.

Question 2 - Access to the case file

In the EPPO proceedings against him, a suspect requests access to the case file of the EDP in your Member State. Access will be granted or denied

- a. on the basis of the relevant legal provisions of the Code of Criminal procedure of your Member State
- b. upon the test laid down in Art. 60(1) of the EPPO Regulation:

“The EPPO may restrict, wholly or partly, the data subject’s right of access to the extent that, and for as long as, such a partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned, in order to:

- (a) avoid obstructing official or legal inquiries, investigations or procedures;
- (b) avoid prejudicing the prevention, detection, investigation or prosecution of criminal offences or the execution of criminal penalties;
- (c) protect public security of the Member States of the European Union;
- (d) protect national security of the Member States of the European Union;
- (e) protect the rights and freedoms of others.”

Question 2 - and Answer

In the EPPO proceedings against him, a suspect requests access to the case. Access will be granted or denied

- if request by **suspect: national law applies**, as indicated in answer a.

See **Article 45 EPPO Regulation: Case files of the EPPO**

- (2): “The case file shall be managed by the **handling European Delegated Prosecutor** in accordance with the **law of his/her Member State**. ... Access to the case file by **suspects** and **accused persons** as well as **other persons involved in the proceedings** shall be granted by the handling European Delegated Prosecutor in accordance with the **national law of that Prosecutor’s Member State**.”
- if request by, e.g., **third person** not involved in the proceedings: **Arts. 58 to 60 EPPO Regulation apply?**

Question 3 - Use of operational personal data for other purpose than collected

An EDP from Germany has granted an EDP colleague in the Netherlands access to case material. This includes telephone intercepts which had to be excluded as evidence under German criminal procedure in the German EDP's case. Can the Dutch EDP use this material in his/her proceedings?

- a. Yes, if the offence subject to the investigation by the Dutch EDP is punishable by a maximum penalty of at least 4 years of imprisonment under Dutch law, see Art. 30(1) EPPO Regulation.
- b. Yes, if the Dutch EDP could have assigned and have obtained judicial authorization of a cross-border measure for telephone surveillance under Art. 31 EPPO Regulation in his/her case.
- c. No, because it is inadmissible as evidence under German law.
- d. Depends on whether the competent Dutch court will rule it admissible in the main trial proceedings.

Question 3 - and Answer?

An EDP from Germany has granted a Dutch EDP colleague access to case material. This includes telephone intercepts which had to be excluded as evidence under German criminal procedure in the German EDP's case. Can the Dutch EDP use this material in his/her proceedings?

Answer c. is correct, although answers a. and b. seem to be supported by

Art. 49(3) EPPO Regulation: Processing of operational personal data

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 - (a) **criminal investigations and prosecutions undertaken in accordance with this Regulation**; or
 - (b) **information exchange with the competent authorities of Member States of the European Union and other institutions, bodies, offices and agencies of the Union** in accordance with this Regulation; or
 - (c) **cooperation with third countries and international organisations** in accordance with this Regulation.

Question 3 - and Answer

An EDP from Germany has granted a Dutch EDP colleague access to case material. This includes telephone intercepts which had to be excluded as evidence under German criminal procedure in the German EDP's case. Can the Dutch EDP use this material in his/her proceedings?

Answer c. is correct, see specific provision in Art. 47(3)(c):

Article 47(3) EPPO Regulation: Principles relating to processing of personal data

- (1): “Processing by the EPPO for **any of the purposes set out in Article 49 other than that for which the operational personal data are collected** shall be permitted in so far as:
 - (a) the EPPO is authorised to process such operational personal data for such a **purpose in accordance with this Regulation**; and
 - (b) processing is necessary and proportionate to that other purpose in accordance with Union law; and;
 - (c) where relevant, the use of operational personal data is **not prohibited by the applicable national procedural law on the investigative measures** taken in accordance with Article 30. The **applicable national procedural law** is the **law of the Member State where the data was obtained**.

Question 4 -Transfers of operational personal data outside European Union



Can an EDP forward data from his/her case file to

- a. INTERPOL for distributing a Red Notice to all member countries for the purpose of having a suspect in the EPPO case arrested?

Yes / No

- b. the London/UK office of the lawyer representing the suspect (assume that the lawyer is qualified to practice in the EDP's Member State but works from London)

Yes / No

- c. the US Federal Bureau of Investigation when telephone surveillance from the EPPO case reveals that a murder is about to be committed against a person in the US?

Yes / No

Question 4 - and Answer

Can an EDP forward information from his/her case file to

- a. INTERPOL for distributing a Red Notice to all member countries for the purpose of having a suspect in the EPPO case arrested?
- Answer: yes – to the extent that fundamental rights and freedoms of the data subject concerned do not override the public interest in the transfer; or with adequacy decision by COM / with binding instrument with INTERPOL, both of which are not yet in place
- Question: May this require to restrict the distribution of the request to certain INTERPOL member countries?

Article 80: General principles for transfers of operational personal data

- (1): EPPO may transfer operational personal data to a third country or international organization, if: (a) the transfer is **necessary for the performance of the tasks of the EPPO**;
(b) the operational personal data are transferred to a controller in a third country or international organisation that is an **authority competent for the purpose of Article 104**;
[(c): prior authorization from Member State if this is source of information],
- and (d): **Commission** has **decided** pursuant to **Article 81** that the third country or international organisation in question ensures an **adequate level of protection**, or in the absence of such an adequacy decision, where **appropriate safeguards** are adduced or exist pursuant to **Article 82**, or both in absence of an adequacy decision and of such appropriate safeguards, **derogation for specific situations apply pursuant to Article 83**

Question 4 - and Answer

Can an EDP forward information from his/her case file to

b. the London/UK office of the lawyer representing the suspect

- Answer would be yes under Art. 84, although this shows that data transfers to third countries are quite restricted in the absence of an adequacy decision or specific agreements.

Art. 84 EPPO Regulation: Transfers of operational personal data to recipients in third countries

- (1): “By way of derogation from point (b) of Article 80(1) and without prejudice to any international agreement referred to in paragraph 2 of this Article, the EPPO, in individual and specific cases, may transfer operational personal data directly to recipients established in third countries only if the other provisions of this Chapter are complied with and all of the following conditions are fulfilled:
 - (a) strictly necessary for the performance of EPPO tasks; and
 - (b) no fundamental rights and freedoms of the data subject concerned override the public interest necessitating the transfer; and;
 - (c) transfer to an authority that is competent for the purposes referred to in Article 49(1) in the third country is ineffective or inappropriate; and
 - (d) the authority that is competent for the purposes referred to in Article 49(1) in the third country is informed without undue delay, unless this is ineffective or inappropriate;
 - (e) EPPO informs the recipient of the specified purpose or purposes for which the operational personal data are only to be processed by the latter provided that such processing is necessary.

Question 4 - and Answer

Can an EDP forward information from his/her case file to

c. the US Federal Bureau of Investigation when telephone surveillance from the EPPO case reveal that a murder is about to be committed against a person in the US?

- Yes, as an exception to the rule that data transfers to third countries require an adequacy decision or specific agreements.

Article 83: Derogations for specific situations

- (1): “In the absence of an adequacy decision, or of appropriate safeguards pursuant to Article 82, the EPPO may transfer operational personal data to a third country or an international organisation only on the condition that the transfer is necessary:(a) strictly necessary for the performance of EPPO tasks; and
 - (a) in order to protect the vital interests of the data subject or another person;
 - (b) to safeguard legitimate interests of the data subject;
 - (c) for the prevention of an immediate and serious threat to public security of a Member State of the European Union or a third country; or
 - (d) in individual cases for the performance of the tasks of the EPPO, unless the EPPO determines that fundamental rights and freedoms of the data subject concerned override the public interest in the transfer

Thank you for your attention

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