

Key notes - Operational Personal Data Workshop (24/6/2021)

Participants: Experts from the Member States, Representatives of the Commission, Staff members of Frontex

Venue: Held by videoconference (WebEX)

Introduction:

- **The Operational Personal Data Workshop (“OPD workshop”)** was opened by the Executive Director who addressed the participants through a recorded speech. The Executive Director introduced the aim of the meeting. The aim was to discuss a particular type of personal data: operational personal data. This is because the Agency is preparing a draft Management Board decision adopting implementing measures for the purpose of processing operational personal data (the “Agency’s OPD implementing rules”), in accordance with Article 90 of the European Border and Coast Guard Regulation (“EBCG Regulation”)¹.

The Executive Director emphasised that operational personal data is all personal data processed by the Agency while carrying out its activities which fall within the scope of Police cooperation and Judicial cooperation in criminal matters, to meet the objectives and tasks laid down in the EBCG Regulation². This data is crucial for the Agency’s mandate and may include licence plate numbers and vehicle identification numbers, but also telephone numbers and ship or aircraft identification numbers linked to suspects of cross border crimes. The rules set out in Article 90 of the EBCG Regulation and in Chapter IX of the Data Protection Regulation of the European Union institutions and agencies³ (the “EDPR”) apply to the processing of operational personal data.

- **The Director of Governance Support Centre *ad interim* (DoGSC)** gave a welcome address and introduced the participants to the workshop’s agenda.
- **The Head of the Legal Services Sector *ad interim* (HoS.LEG)** then introduced a few pointers on how the participants should use certain functionalities of the videoconference platform in order to have a successful meeting.
- **The meeting was divided into 3 blocks.** The first block contained 3 presentations, followed by a discussion. The second block contained 2 presentations, followed by a discussion. The third and last block contained 1 presentation, followed by a discussion and closing remarks.

Presentations and discussions:

The first block:

- **Presentation entitled “Introduction to Operational Personal Data (OPD)”:** It was delivered by HoS.LEG together with another staff member of Frontex’s Legal Services Sector. It was an introductory presentation dissecting Article 90 of the EBCG Regulation. **This Article, which concerns the processing of operational personal data by the Agency, was the main focus of the OPD workshop.**
- **Presentation entitled “Principles of Frontex Risk Analysis for the operational activities of the Agency”:** It was delivered by the Head of Frontex Risk Analysis Unit (RAU) who elaborated on the principles of Frontex risk analysis for the operational activities of the Agency. He also elaborated on the ways operational personal data can be used to enhance the European Union Integrated Border Management Strategy. He mentioned that the aim of risk analysis in light of operational personal data processing is to collect useful information from multiple

¹ Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard (OJ L 295, 14.11.2019, p.1).

² Frontex may collect operational personal data while monitoring migratory flows, carrying out risk analyses or operations for the purpose of identifying suspects of cross-border crime.

³ 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 (OJ L 295, 21.11.2018, p. 39).

sources to develop a comprehensive picture related to cross-border crime threats to the internal security of the European Union. This information may also be used for the planning and implementation of inter-agency coordinated measures at the strategical, operational and tactical levels. The key element though should be a **coordinated approach** among European Union institutions and agencies and Member State law enforcement authorities. Finally, he referred to the question contained in the discussion paper sent to the Member States before the workshop as a guide for the OPD workshop: “*What are the main MS needs with respect to the processing of operational personal data and risk analysis?*”.

- **Presentation entitled “Practical implementation of processing OPD - PEDRA2 and beyond”**: It was delivered by a staff member from RAU (PeDRA team) who drew on the practical implementation of processing OPD in relation to the PeDRA 2 platform, highlighting both what has already been accomplished and what are the future prospects. In particular, he briefly explained PeDRA’s workflow and mentioned that thus far the Agency collected operational personal data only from debriefing interviews performed in the framework of Frontex’s joint operations. However, with Article 90 of the EBCG Regulation in place, the potential expands beyond debriefing activities and beyond only suspects of cross-border crime to all operational areas, to the extent of mapping cross-border criminality for the benefit of Member States and supporting the roles of Europol and Eurojust.
- **Discussions held during the first block**:
 - A participant emphasised that it is important to frame the discussion. Article 90 is a small part of the Agency’s renewed mandate.
 - ✓ DoGSC agreed and noted that the workshop functions as a **brainstorming session** among different stakeholders involved during the processing of OPD. Topics beyond Article 90 of the EBCG Regulation may also be touched upon.
 - **There were exchanges on how “reasonable grounds to suspect” involvement in cross-border crime are established at national level as well as on data retention considerations for operational personal data**:
 - ✓ One participant mentioned that in their country different levels of suspicion exist to establish “reasonable grounds to suspect”. Once this is established, the right to start collecting information is also justified.
 - ✓ Another participant suggested that the **Passenger Name Record (PNR) Directive (EU) 681/2016⁴** is important for approaching the problem of defining “reasonable grounds to suspect” involvement in cross-border crime. Article 12 of the PNR Directive could also be useful on data retention. The PNR Directive may give some starting point to approach the question. **The SIENA system was also highlighted as useful to exchange information, ensuring interoperability.**
 - ✓ Another participant mentioned that the criteria to establish “reasonable grounds to suspect” is **intrinsically difficult to define** as suspicion is also a matter left to the experience of the law enforcement professional in question.
 - ✓ Frontex’s DPO mentioned that, with reference to the retention rules of operational personal data, Article 91 provides that deletion should follow once the purpose is achieved. **Concerning “reasonable grounds to suspect”, Chapter IX of the EDPR is similar in broad terms to the law enforcement directive⁵.** At practical level the DPO underlined that the feeling of the law enforcement officer is used in conjunction with the facts in an investigation. The question that needs to be answered is: how does one substantiate these grounds?
 - ✓ Another participant noted that **the border is not necessarily where the suspicion that a cross-border crime was committed starts**. Cross-border crime is a “label” which many crimes can have, e.g. forced marriages or trafficking. This could be detected much later than the moment when a border was crossed.

⁴ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ L 119, 4.5.2016, p. 132).

⁵ 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).

- ✓ Finally, another participant expressed the view that “reasonable grounds to suspect” is a particular question for the law to define and that, in this regard, **the framework of Article 5 ECHR convention could be a good starting point.**

The second block

- **Presentation entitled “Overview of OPD rules”**: It was delivered by Frontex’s Head of Field Operations Unit, who is also Head of Coast Guard and Law Enforcement Unit *ad interim*. **He presented a comprehensive picture on Frontex’s opportunities to make good use of Article 90 of the EBCG Regulation.** The objective is to initiate a discussion that will reflect the thoughts of the Member States on the ways Frontex could be contributing to this type of data processing, as well as being part of the European Union law enforcement spectrum. **The presenter mentioned that Frontex’s activities in this field are interlinked with the activities of Europol and Eurojust, as well as with the national law enforcement frameworks.** The main reason is that cross-border crime has an impact on the security of the European Union. Frontex’s main concern, as is the case with other European Union Agencies, is to support the Member States, fill in the missing gaps and maybe develop its own product portfolio to tackle cross-border crime.
- **Presentation entitled “Potentials of new OPD rules in the law enforcement context”**: It was delivered by a Senior Coordinating Officer of Frontex’s Law Enforcement Sector. It was mentioned that the processing of operational personal data could pertain to all operations at Frontex and not be limited to particular types (within the limits of the EBCG Regulation). **In this sense, the collection of operational personal data could be accessible to all Frontex staff participating in operational activities, including the Standing Corps.** The scope of operational personal data collection would necessarily encompass cross-border crime and terrorism, with a view to enhancing cooperation with key partners.
- **Discussions held during the second block**:
 - **During the discussion session Frontex asked the participants how cross-border crime is perceived in their national jurisdictions.**
 - ✓ Certain participants noted that there is **no clear definition on cross-border crime beyond Frontex’s interpretation.** This is why reciprocity in sharing information between Frontex and the Member States was stressed.
 - **A participant enquired about the way forward with regards to the Agency’s OPD implementing rules.** The latter was supported by other participants who stressed past issues involving the concept of joint controllership or who **highlighted the need to have a clear division of tasks in the field of law enforcement.**
 - ✓ HoS.LEG reiterated the role of the workshop and Member States’ crucial role on drawing up the Agency’s OPD implementing rules. For this purpose, he stressed that another round of consultations might be needed.
 - ✓ The Head of Coast Guard and Law Enforcement Unit a.i. mentioned that **Frontex is an operations-based Agency involved in real time incidents of cross-border crime. Therefore, synergies with Europol, which is an intelligence-based Agency, can create further useful synergies in light of the provisions concerning the processing of operational personal data.**
 - ✓ Addressing the point about joint controllership, Frontex’s DPO referred to the applicable legal framework that has changed since past talks. **The DPO also stressed the need to talk about controllership in view of determining the data protection responsibilities of the process.** The DPO also underlined that the implementing rules are binding for Frontex only, *albeit* requiring the Member States’ approval.

The third block

- **Presentation entitled “Monitoring activities over the maritime and air domains - Potentials of new OPD rules”**: It was delivered by a Command and Control Senior Officer at Frontex’s Situation Centre. **The presentation dealt with the potential implementation of the new OPD processing rules in the context of monitoring**

activities in the maritime and air domains. As the daily operational activities are executed in the context of EUROSUR, it was noted that the overall goal is to create actionable intelligence for stakeholders, with focus on the Member States. Nevertheless, beyond the scope of Eurosur, **a comprehensive and accurate assessment of suspected assets (e.g. vessels) could be achieved** by the provisions of Article 90 of the EBCG Regulation. Central to this approach is the processing of operational personal data as it will create the grounds to access information beyond the assets as such. A case study was also presented. In addition, the presenter referred to a related project that is currently under development for the air domain.

- **Discussions held during the third block:**

- A participant underlined that the exchange of information is very important. **However, the MS highlighted that it needs to be bilateral and that the 90 days retention period usually applied to data related to operations is too short.**
 - ✓ The presenter concurred. **He also stated that mutual sharing of information is an important principle for efficiency.** The overall aim of this process is to provide the MS with a holistic picture by fusing information from Frontex's sources.

Concluding remarks:

- **HoS.LEG reiterated that:**

- **Frontex is moving forward to prepare the OPD implementing rules.** The workshop has been a catalyst for the way forward in this regard.
- **Frontex will take into account the exchanges concerning the definition for “reasonable grounds to suspect” that a person has committed a cross-border crime. The exchanges concerning the definition of “cross-border crime” are also very useful.**
- In general, the interventions of the participants have proved to be of utmost importance to the delineation of the future steps.

- **Concluding the workshop,** DoGSC conveyed his appreciation to the fruitful discussions highlighting the very useful contributions of the Commission and the DPO. He also took note of the participants' willingness to share their input for the common benefit of the Agency and the Member States. **In this framework, he also invited the Member States to continue to liaise with Frontex's entities as well as Frontex's DPO.**