



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

19 July 2022

Opinion 16/2022

on the Proposal for a Directive of the
European Parliament and of the
Council on asset recovery and
confiscation

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3) ‘...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’.*

This Opinion relates to the Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the draft Proposal that are relevant from a data protection perspective.

Executive Summary

On 25 May 2022, the European Commission issued the Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation ('the Proposal').

The objective of the Proposal is to strengthen the capabilities of the competent authorities of the Member States to identify, freeze and manage assets; to reinforce and extend confiscation capabilities so as to cover all relevant criminal activities carried out by organised crime groups, thereby enabling confiscation for all relevant assets; and to improve the cooperation between the authorities involved in asset recovery.

The EDPS notes that processing of personal data in the context of asset recovery and confiscation, envisaged under the Proposal, is liable to have a significant impact on the individuals concerned and constitute an interference with individuals' rights guaranteed by the EU Charter of Fundamental Rights, including the right to data protection. He therefore welcomes the fact that the Proposal explicitly underlines the particular importance that the protection of personal data, in accordance with Union law, is ensured in connection to processing of data under the Proposal.

The EDPS, however, has doubts whether special categories of personal data listed under Annex II.B.(2)(c) (v) of Regulation (EU) 2016/794 (e.g. forensic identification information such as fingerprints, DNA profile established from the non-coding part of DNA, voice profile, blood group, dental information or behavioural data), to which the Proposal refers to, may actually be relevant in the specific context of assets recovery and whether they should be available for the cross-border exchange between asset recovery offices.

Moreover, the EDPS considers that the national legislation transposing the proposed Directive should designate the competent authority (or authorities) which will be responsible for the management of the registry of frozen and confiscated property and thus will take the role of data controller in accordance with Article 3(8) of the LED. The Proposal should also lay down clearly the purposes for which centralised registries may be accessed and searched, directly and immediately.

As regards the cooperation with EU bodies and agencies, the EDPS recalls that any exchange and further processing of personal data in the context of the envisaged cooperation must take place in strict compliance with the provisions of Chapter IX of the EUDPR and the specific data protection rules in the legal acts establishing the Union agencies.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 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 ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 25 May 2022, the European Commission issued the Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation² ('the Proposal').
2. The objectives of the Proposal, according to the Explanatory Memorandum³, are the following:
 - to strengthen the capabilities of competent authorities to identify, freeze and manage assets;
 - to reinforce and extend confiscation capabilities so as to cover all relevant criminal activities carried out by organised crime groups, thereby enabling confiscation for all relevant assets;
 - to improve the cooperation between all actors involved in asset recovery and promote a more strategic approach to asset recovery.
3. The present Opinion of the EDPS is issued in response to a consultation by the European Commission of 25 May 2022, pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 51 of the Proposal. In this regard, the EDPS also positively notes that he was already previously informally consulted pursuant to recital 60 EUDPR.

¹ OJ L 295, 21.11.2018, p. 39.

² COM (2022) 245 final.

³ COM (2022) 245 final, p. 2.

2. General remarks

4. The Proposal, announced in the EU Strategy to tackle Organised Crime adopted by the Commission in April 2021⁴, would replace the existing Directive 2014/42/EU on the freezing and confiscation of the proceeds and instrumentalities of crime⁵, and Council Decision 2007/845/JHA on Asset Recovery Offices⁶.
5. The Proposal aims at establishing minimum rules on the tracing, freezing, confiscation and management of property in criminal matters. The Proposal would apply:
 - to the criminal offences listed in Article 2(1);
 - to the list of offences committed within the framework of a criminal organization listed in Article 2(2); and
 - to any other criminal offence set out in other EU legal instrument providing for the applicability of the Proposal (Article 2(4)).

The rules laid down in the Proposal also aim at facilitating the implementation of ‘EU restrictive measures’, as defined in Article 3(11) of the Proposal⁷.

6. Processing of personal data in the context of asset recovery and confiscation, envisaged under the Proposal, is liable to have a significant impact on the individuals concerned and constitute an interference with individuals’ rights guaranteed by the EU Charter of Fundamental Rights, including the right to data protection. Therefore, the requirements of necessity and proportionality of the envisaged processing need to be assessed in accordance with Article 52(1) of the Charter⁸. Consequently, the proposed Directive must ensure that the limitations to right data protection in relation to the fight against organised crime apply only in so far as is strictly necessary⁹.
7. The EDPS welcomes the fact that the Proposal explicitly underlines the particular importance that the protection of personal data, in accordance with Union law, is ensured in connection to processing of data under this Directive¹⁰. In this context, recital 37 of the Proposal clarifies that Directive (EU) 2016/680 (‘the LED’)¹¹ applies to the processing of

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy to tackle Organised Crime 2021-2025, COM(2021)170 final.

⁵ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ L 127, 29.4.2014, p. 39).

⁶ Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime (OJ L 332, 18.12.2007, p. 103).

⁷ See Article 2(3) of the Proposal.

⁸ For further details see the EDPS Guidelines on assessing the proportionality of measures that limit the fundamental rights to privacy and to the protection of personal data, issued on 19 December 2019, https://edps.europa.eu/sites/edp/files/publication/19-12-19_edps_proportionality_guidelines_en.pdf

⁹ See Judgments of the Court of Justice of 8 April 2014 in Joined Cases C-293/12 and C-594/12, DRI, paragraph 52; of 16 December 2008 in Case C-73/07 Satakunnan Markkinapörssi and Satamedia, paragraph 56; of 9 November 2010 in Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, paragraphs 77 and 86.

¹⁰ See Recital 37 of the Proposal.

¹¹ 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).

personal data by national competent authorities, notably asset recovery offices, for the purposes of this Proposal.

8. In addition, recital 38 of the Proposal specifies that, where relevant, notably having regard to the processing of personal data by asset management offices for the purpose of the management of property, Regulation (EU) 2016/679 ('the GDPR')¹² may also be applicable.

3. Access to information by asset recovery offices

9. The EDPS notes that Article 6 of the Proposal provides a list of information to be accessed by asset recovery offices to the extent that information is necessary for the identification and tracing of proceeds, instrumentalities and property. Although Article 6(1)(g) ("*relevant information which is held by authorities competent for preventing, detecting, investigating or prosecuting criminal offences*") and Article 6(1)(a) "*fiscal data, including data held by tax and revenue authorities*", do not exhaustively list all of the categories of data to be processed pursuant to these provisions, the information to be accessed should in any event be limited in accordance with Article 6(1) ("*to the extent that information is necessary for the tracing and identification of proceeds, instrumentalities, and property*").
10. The EDPS welcomes the fact that the access to information would be subject to specific safeguards in order to prevent possible misuse of the access rights¹³. In this regard, he positively notes that the access to information by asset recovery offices established under Article 7 of the Proposal would be permitted only where necessary and on a case-by-case basis (Article 7(1)) and would be accompanied by technical and organisational measures ensuring the security of the data (Article 7(3)). The EDPS also takes note of the safeguard for the persons concerned laid down in Article 6(3), according to which the access to the information listed in Article 6(1) must be without prejudice to the procedural safeguards established under national law.
11. In addition, the EDPS welcomes the provisions on monitoring the access and searches by asset recovery offices in Article 8 of the Proposal. He also notes that these provisions are without prejudice to the general rules on logging in Article 25 of the LED and compliment them in the specific context of asset recovery and confiscation.

4. Exchange of information between asset recovery offices

12. The EDPS notes that Article 9(1) of the Proposal would provide for the cross-border exchange between asset recovery offices of the information listed in Annex II, Section B, point 2, of Regulation (EU) 2016/794¹⁴. The referred catalogue of data categories would apply

¹² Regulation (EU) 2016/679 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 and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) (OJ L 119, 4.5.2016, p. 1–88).

¹³ See Recital 17 of the Proposal.

¹⁴ 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).

to persons who, pursuant to the national law of the Member State concerned, are (a) suspected of having committed or having taken part in a criminal offence in respect of which Europol is competent, or who have been convicted of such an offence, or (b) persons regarding whom there are factual indications or reasonable grounds under the national law of the Member State concerned to believe they will commit criminal offences in respect of which Europol is competent.

13. The EDPS has consistently expressed his support for measures aimed at harmonisation and alignment of the legal rules applicable to the processing of operational personal data. Therefore, he welcomes the approach chosen by the Commission to define in an exhaustive manner the categories of data that may be exchanged asset recovery offices.
14. The use of a closed list of data categories would provide additional legal certainty and corresponds to the principle of data minimisation, laid down in Article 4(1)(c) of the LED. Moreover, it is complemented by the obligation laid down in Article 9(2) of the Proposal to specify as precisely as possible the content of the request for information, including the type of criminal offence for which the request is made.
15. At the same time, the EDPS has doubts whether the special categories of personal data listed in Annex II.B.(2)(c) (v) would actually be relevant in the specific context of assets recovery (e.g. forensic identification information such as fingerprints, DNA profile established from the non-coding part of DNA, voice profile, blood group, dental information or behavioural data). Therefore, the EDPS recommends excluding the above-mentioned categories of sensitive personal data from the scope of the Proposal, unless convincing objective arguments in support of their necessity and proportionality in the specific context of the Proposal can be presented to the co-legislator.
16. The EDPS also notes that Article 9(5) of the Proposal establishes the use of the Secure Information Exchange Network Application (SIENA), managed by Europol, by asset recovery offices as secure communication channel for this exchange of information¹⁵. In this regard, the EDPS considers that this element of the Proposal may indeed contribute to enhancing data security and also strengthening and facilitating supervision.

5. Establishment of centralised registries of frozen and confiscated property

17. Article 26 of the Proposal would impose on Member States an obligation to put in place centralised registries containing information related to the freezing, confiscation and management of instrumentalities and proceeds, or property which may become or is the object of a confiscation order¹⁶. Pursuant to Article 26(5) of the Proposal, Member States must put in place appropriate technical and organizational measures to ensure the security of the data contained in the centralised registries of frozen and confiscated property.
18. In this regard, the EDPS considers that the national legislation transposing the Directive should designate the competent authority(ies) which will be responsible for the

¹⁵ See Recital 18 of the Proposal.

¹⁶ See Recital 43 of the Proposal.

management of the registry and thus will take the role of data controller in accordance with Article 3(8) of the LED.

19. Furthermore, the EDPS recommends the Proposal to lay down clearly the purposes, for which centralised registries may be accessed and searched, directly and immediately (i.e. information stored in the registry can only be accessed and used for the purposes laid down by the Proposal, i.e. freezing, confiscation and management of instrumentalities and proceeds, or property which may become or is the object of a confiscation order).

6. Cooperation between asset recovery offices and EU agencies

20. The EDPS notes that Article 28 of the Proposal would provide for close cooperation between asset recovery offices and the European Public Prosecutor's Office (EPPO), Europol and Eurojust, in accordance with their respective mandates, insofar as it is necessary to trace and identify property within the cross-border investigations¹⁷.
21. In this regard, the EDPS recalls that any exchange and further processing of personal data in the context of the envisaged cooperation must take place in strict compliance with the provisions of Chapter IX of the EUDPR and the specific data protection rules in the legal acts establishing the Union agencies.

7. Conclusions

22. In light of the above, the EDPS makes the following recommendations:

- (1) *with regard to Article 9(1), to exclude from the Proposal the EDPS the possibility to exchange the special categories of personal data listed under Annex II.B.(2)(c) (v) (forensic identification information such as fingerprints, DNA profile established from the non-coding part of DNA, voice profile, blood group, dental information or behavioural data), unless there are convincing objective arguments in support of their necessity and proportionality;*
- (2) *with regard to Article 26, to require Member States to designate which competent authority (or authorities) are responsible for the management of the registry; and to clearly lay down the purposes, for which centralised registries may be accessed and searched, directly and immediately.*

Brussels, 19 July 2022

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

¹⁷ See Recitals 44 and 45 of the Proposal.