



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS OPINION ON EUROJUST ACTIVITY RECORDING TOOL (Case 2021-0808)

1. INTRODUCTION

1. This Opinion relates to the deployment of an activity-recording tool to fulfil reporting obligations related to the utilisation of human resources per activity in the annual work programme (AWP) and refine the planning of human resources by Eurojust.
2. The EDPS issues this Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725¹ (the Regulation).

2. BACKGROUND INFORMATION

2.1. The request for EDPS consultation and subsequent steps

3. The request for consultation was submitted to the EDPS on 30 August 2021, including the note of the administrative director and five annexes (Annex I: Necessity & Proportionality Assessment, Annex II: Data Protection Impact Assessment, Annex III: Record of processing activities, Annex IV: Data Protection Notice and Annex V: Tools comparison).
4. On 27 September 2021, Eurojust informed the EDPS that they had already contracted a supplier for the implementation of the said activity-recording tool and held several meetings with them.
5. On 8 October 2021, a meeting was held between EDPS staff and Eurojust DPO to discuss the developments at Eurojust. Following this meeting, additional information was transmitted to EDPS on 19 October 2021 (Excel table outlining unit activities and unit objectives). On 3 November EDPS was informed about the decision of Eurojust HR to carry out the monitoring on the unit activity level (as recommended by the DPO).

¹ Regulation (EU) 2018/1725 of the European Parliament and the Council 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, OJ, L 295, 21.11.2018, pp. 39-98.

6. On 26 November 2021, the consultation was discussed again at the bi-monthly meeting at staff level between EDPS and Eurojust. The question of the appropriate legal basis for the pilot project was raised. Additional information was requested from Eurojust regarding the pilot project, which was supplemented on 7 December 2021. Following EDPS request of 14 December 2021, the specific contract for the tool was supplemented by Eurojust on the same day.
7. The European Commission and Eurojust have entered a framework contract with Insight Technology Solutions Belgium Inc (processor) for the provision of licences of software products, as well as the respective maintenance and support. In addition, Eurojust entered a specific contract implementing that Framework Contract with Insight Technology Solutions Belgium Inc, which includes the services of Systems@work s.r.o. (sub-processor). Both the processor and sub-processor are located in the European Union (respectively Belgium and Czech Republic).
8. The EDPS regrets that Eurojust took decisions in relation to the activity-recording tool without awaiting the EDPS opinion.

2.2. The processing operation via the activity-recording tool

9. Eurojust intends to introduce an activity-recording tool in order to fulfil its reporting obligations related to the **utilisation of human resources per activity in its AWP**, in line with Articles 28 and 48 of the Eurojust Financial Regulation². The use of this tool will, furthermore, allow Eurojust to validate and refine the planning of human resources in its AWP and make more efficient plans, in accordance with the principle of sound financial management.
10. With the planned tool, Eurojust aims to know how much time in total their human resources dedicate to the various activities planned in the AWP. The aggregated results from the tool would then be reported in the Consolidated Annual Activity Report. Therefore, the **categories of data** processed include the full time equivalent (FTE) allocation of each staff member (determined by the staff members themselves) against preassigned activities corresponding to those included in the Eurojust AWP of the respective year.
11. All human resources that are included in the AWP would need to report the total of their working time against planned activities. Individual staff will not be identifiable by this tool and the reports produced will include only aggregated FTE data per activity in the level of unit/department and organisation.
12. The **persons whose data need to be processed** are Temporary and Contract staff, as well as Seconded National Experts working for organisational units that have their own annual unit plan as part of the Eurojust AWP.
13. To ensure a central coordination regarding the use of the tool, data processing will be in the **Human Resources unit**.

² College Decision 2019-09 of 17 September 2019 on the Financial Regulation applicable to Eurojust.

14. Eurojust will run a **pilot study** introducing the tool in a limited number of units. The pilot results will be analysed to indicate whether a reconfiguration of the tool is needed before it is rolled out throughout the organisation.
15. Eurojust will launch a communication campaign, focusing on the purpose, benefit and use of the tool. Moreover, training sessions aim to clarify any queries staff may have and to guarantee a consistent use. To ensure **transparency**, All relevant documentation will be available on the intranet including user guides and FAQs. The latter will be consistently updated based on feedback from the users of the tool. The overall aim was to have the tool in full use as of 1 January 2022 to ensure a data set covering a full year.

3. LEGAL ANALYSIS AND RECOMMENDATIONS

16. This EDPS opinion relates to the data processing operations that will be performed by Eurojust regarding the deployment of the tool. In this context, the EDPS analysed the framework contract entered with the processor and the specific contract regarding the tool's provision, the necessity and proportionality assessment performed by Eurojust and additional documentation regarding this processing operation. Within this scope, the EDPS highlights below his analysis and recommendations.

3.1. Lawfulness

17. The Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council³ lays down the essential financial rules for bodies which are set up by the Union under the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community and which have legal personality and receive contributions charged to the Union budget, such as Eurojust. On the basis of the Commission Delegated Regulation (EU) 2019/715, Eurojust was to adopt its own financial rules.
18. To that end, Eurojust adopted the Eurojust Financial Regulation of 17 September 2019⁴. This College decision results from a delegation of powers granted by a Union law, the above-mentioned Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 ('the Delegated Regulation 2019/715').

³ Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council (OJ L 122, 10.5.2019, p. 1–38).

⁴ College Decision 2019-09 of 17 September 2019 On the Financial Regulation applicable to Eurojust, available on the website of Eurojust: <https://www.eurojust.europa.eu/sites/default/files/EJLegalFramework/College-Decision-2019-9-Financial-Regulation.pdf>.

19. As stated in Article 4 of the Delegated Regulation 2019/715, its provisions are without prejudice to the requirements of the Regulation.
20. The Eurojust Financial Regulation and the Delegated Regulation 2019/715 are not sufficiently detailed to be considered as a valid legal basis for the tool under Article 5(1)(a) and 5(2) of the Regulation. The legal basis should indeed determine the purpose of the processing, establish specifications to determine the controller, the type of personal data subject to processing, the data subjects concerned, the entities to which the data can be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing.
21. Nevertheless, Article 5(1)(a) of the Regulation can still be a ground for lawful processing if certain conditions are fulfilled. To achieve that, Eurojust should adopt an **executive decision** stating the exact terms of this personal data processing (purpose of the processing, establish specifications to determine the controller, the type of personal data subject to processing, the data subjects concerned, the entities to which the data can be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing), as mentioned above.
22. The purpose of processing personal data via the tool is to fulfil Eurojust's reporting obligations related to the deployment of human resources per activity (unit objective) and per objective to the annual activity in AWP. These reporting obligations are outlined in Articles 28 (Performance and principles of economy, efficiency and effectiveness) and 48 (Consolidated Annual Activity Report) of the Eurojust Financial Regulation of 17 September 2019⁵.
23. Additionally, the use of this tool will allow Eurojust to validate and refine the planning of human resources in its AWP and make more efficient plans, thus adhering to the principles of sound financial management.
24. Article 5(1)(a) provides that a processing is lawful if it is necessary (see Section 3.2.) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the Union institution or body. Recital 22 of the Regulation specifies that processing of personal data for the performance of tasks carried out in the public interest by EUIs 'includes the processing of personal data that is necessary for the management and functioning' of these EUIs. Moreover, Article 5(2) requires that the basis for the processing be laid down in Union law, which in the case under analysis is the Delegated Regulation 2019/715.
25. **Recommendation 1:** Eurojust should adopt an executive decision stating the exact terms of this processing operation (purpose of the processing, establish specifications to determine the controller, the type of personal data subject to processing, the data subjects concerned, the entities to which the data can be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing) to complement the Eurojust Financial Regulation.

⁵ *Idem.*

3.2. Necessity and Proportionality

26. The EDPS analysed the Necessity and Proportionality Assessment (Annex I to the request consultation) provided by Eurojust.
27. According to this document, Eurojust staff will have pre-assigned objectives and they will encode themselves in the tool the time they have allocated for specific activities, as defined in the Unit plans, as well as to horizontal activities (participation in training activities, in recruitment procedures, etc.). The recording of the total working hours aims to ensure an accurate reporting of the human resources' use.
28. In line with the purpose limitation principle, the collected data will be used for the stated purpose of reporting obligations related to the deployment of human resources per activity in the annual work programme (AWP) and to refine the planning of human resources by Eurojust. Therefore, no assessment of individual staff performance will be done using the activity-recording tool and no data will be used in any disciplinary procedure, as stated in the data protection record regarding this processing activity. Therefore, as stated in Eurojust Necessity and Proportionality Assessment, '... any other use e.g. in performance appraisal will be prohibited'.
29. According to Eurojust, '[k]nowing how human resources are used for the planned activities will assist in improving future planning of human resources and will allow Eurojust to assign negative priorities to activities for which human resources cannot be made available. Doing so via a simple tool is an efficient and effective way to achieve the objective'.
30. Considering the limited scope of this processing operation (only staff working for organisational units that have their own annual unit plan as part of the Eurojust AWP), its extension (only recording the total number of hours and the activity performed, kept for a maximum of two years after the collection) and **intensity** (Eurojust stated that there would be no conclusions drawn and no impact on specific individuals following their individual time encoding), the EDPS believes that the data processing operation regarding the use of the activity-recording tool seems effective and the least intrusive, in line with the data protection principles better detailed below. It seems that the processing generated by the activity-recording tool is necessary for the performance of Eurojust tasks and, therefore, is lawful under Article 5(1)(a) of the Regulation.

3.3. Data Protection Principles

31. The data processed in this operation are the name of the data subject, login credentials, working hours and the activities allocated to a certain period. This data seems proportionate to the purpose of the processing operation. However, as above mentioned, the reports sent to the management will not contain any individual information, but only aggregated FTE data. This is in accordance with the data minimisation principle (Article 4(1)(c) of the Regulation).

32. According to Eurojust, all yearly data included in the tool will be manually deleted by the data processor once Eurojust has received parliamentary discharge for the year when the data was created. In any case, the system will automatically delete the yearly data after two years following its creation. This data retention period seems adequate and proportionate, considering the purpose of the processing operation under analysis of better planning the AWP, in line with the storage limitation principle (Article 4(1)(e) of the Regulation).
33. Data subjects themselves encode their respective hours of work per activity. The system will additionally alert them if they have recorded less time against activities than the standard working time, further ensuring data accuracy.
34. Data subjects will only be able to, retroactively allocate time against activities, for a two-month period. Following that period, they will be able to make changes to their time allocation by contacting the data processor.
35. In addition, staff will receive training, in order to inform them about how to use the activity-recording tool.
36. Eurojust stated that the right to access and the right to rectification are always granted to data subjects.
37. Considering all the above, the EDPS believes that the data is accurately encoded and that data subjects are given the opportunity to rectify their data, if needed, following the accuracy principle established in Article 4(1)(d) of the Regulation.

3.4. Data Subject rights

38. Eurojust informed the EDPS that the staff members themselves would be the only persons having access to their respective individual records in the activity-recording tool.
39. A personal report will be available to each staff member at any moment with information on which activity(ies) they allocated their working time for a certain period. This way, staff will be able to verify easily whether they have accurately and fully filled in the activity-recording tool.
40. User authorization is based on user profiles, following the minimum need to know basis to fulfil the purpose. User authentication with single sign-on enables each user to only access their own individual data. Audit trails (logs) are available to monitor illegitimate use. Aggregated data available to specific users is anonymous.
41. Heads of entities (units, offices, secretariats) will have access to a unit report containing only aggregated FTE data recorded against each activity of their entity. Eurojust said that it will not be possible to identify individual staff in these reports. This type of reporting will support the Head of entity in making more accurate distribution of FTE against activities in future plans and will also lead to a more efficient and proactive allocation of human resources for the whole organisation.

42. There is a risk of indirect identification or singling out individuals due to the specific activities they perform and the limited number of staff in certain units. For example, if three staff members are on leave in a particular month and the same tasks are only performed by two other individuals.
43. Considering that Eurojust does not need to identify the individuals, but only aims to deploy human resources per activity (unit objective) and per objective to the annual activity in AWP, Eurojust should try to perform this processing operation without being in a position to identify data subjects. Therefore, Eurojust should carefully assess if the specificity of the activities described in the tool and the size of the Units allow for the singling out of individuals. If Eurojust is able to demonstrate that it is not in a position to identify data subjects, Article 12 of the Regulation is applicable. In such case, Eurojust shall inform staff (in the data protection notice) that there is no possibility to re-identify the data subjects and data subject rights under Articles 17 to 22 do not apply (except where the data subject provides additional information enabling his/her identification for the purposes of exercising these rights). If there is a risk of re-identification, Eurojust needs to comply with all the obligations incumbent upon the controller as to data subject rights.

Recommendation 2: Eurojust should double-check if the specificity of the activities and the size of the Units allow for the singling out of individuals and adapt the information provided to the staff (data subjects) accordingly, either under Article 12(2) or under Articles 14 and 15 of the Regulation.

3.5. Security

44. Heads of Department will have access to the unit reports for the units they supervise and to a departmental report, containing only aggregated FTE data recorded against each activity of their department. It will not be possible to identify individual staff in these reports.
45. In order to ensure full control of the system and the data processed through it, time@Work⁶ is hosted at Eurojust's premises. Therefore, its implementation follows Eurojust's ICT standards for systems within the internal network.
46. User authentication is based on Eurojust's Active Directory and single sign-on is enabled, which ensures each user can only log in with his/her own identity/account.
47. Audit trails (logs) are available so that illegitimate use can be monitored, in case there is a need to review such activity. Access to the activity logs is not available through the system interface and it is restricted to the system administrator, to be used only in case there is an audit requirement or in case there is a personal data breach.

⁶ The software provided by Systems@work (sub-processor in the processing operation under assessment) for timesheets and attendance forms.

3.6. Data processor and sub-processor

48. According to Article 29(1) of the Regulation, when the processing has to be carried out on behalf of the controller, the controller has the obligation of concluding agreements with processors that provide sufficient guarantees to implement appropriate technical and organisational measures.
49. Subcontracting should only take place with the prior written authorisation of the controller and inform controller of any changes, giving the controller the opportunity to object. The same contractual obligations entered between the controller and processor should be passed on to any subcontractors.
50. According to Eurojust⁷, the data sub-processor follows the industry's best practices and is subject to periodic security audits, including penetration testing, performed by trusted and certified parties. Results are evaluated and recommended actions to robust security are implemented.
51. In any event and as already mentioned above, within its role as a controller, Eurojust has the obligation to comply with the Regulation and to demonstrate that compliance, even when it is processing personal data which does not require identification of data subjects (Article 4(2) and 26(1) of the Regulation).
52. Following the analysis of the contract, the EDPS noted that the agreement entered between Eurojust and the processor does include specific data protection clauses, which are still referring to the previous legal framework (Regulation (EC) No. 45/2001). The EDPS considers that Eurojust should update the contract's legal framework, namely regarding transmissions/transfers of personal data.
53. The EDPS reminds Eurojust that such obligations are applicable to the sub-processor.
54. The EDPS notes that the sub-processor is part of a group (LLP), which has its establishment in the United States of America. As indicated in the EDPS letter of 2 October 2020, the EDPS advises against new processing operations involving transfers of personal data to third countries, which do not have an essentially equivalent level of protection.

Recommendation 3: Eurojust should update the legal framework in the contract entered between Eurojust and the processor, as well as with the sub-processor.

Recommendation 4: Eurojust or the processor should remind the data protection obligations agreed with the processor in the framework contract to the sub-processor regarding the use of an activity-recording tool.

Recommendation 5: Eurojust should avoid new processing operations involving transfers to third countries, which do not have an essentially equivalent level of protection.

⁷ See the Data Protection Notice regarding the use of the activity-recording tool at Eurojust.

4. CONCLUSION

55. The EDPS makes recommendations regarding the adoption of an executive decision, the confirmation that the processing operation does not single out individuals and a reminder to the sub-processor of the data protection obligations agreed with the processor to ensure compliance of the processing with the Regulation.
56. The EDPS expects that Eurojust implement the above-mentioned recommendations and provides documentary evidence of this implementation within three months of this Opinion.

Done at Brussels on 4 April 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI