

From: European Data Protection Supervisor
[REDACTED]
To: 'Hans.Leijtens@frontex.europa.eu'
<Hans.Leijtens@frontex.europa.eu>
CC: [REDACTED]
Sent at: 29/08/23 16:59:30
Subject: Our ref.: 2023-0834 - D(2023) 2521 - Draft Management Board Decisions adopting the rules for the processing of personal data and operational personal data by the Agency

Dear Sir,

Please find attached a letter signed electronically by Mr Wojciech Rafał WIEWIÓROWSKI for the above mentioned subject.

Kind regards,

EDPS Secretariat



| Tel. (+32) 228 31900 | Fax +32(0)22831950 | >
Email edps@edps.europa.eu
European Data Protection Supervisor
Postal address: Rue Wiertz 60, B-1047 Brussels
Office address: Rue Montoyer 30, B-1000 Brussels
[@EU_EDPS](https://twitter.com/EU_EDPS) www.edps.europa.eu

This email (and any attachment) may contain information that is internal or confidential. Unauthorised access, use or other processing is not permitted. If you are not the intended recipient please inform the sender by reply and then delete all copies. Emails are not secure as they can be intercepted, amended, and infected with viruses. The EDPS therefore cannot guarantee the security of correspondence by email.



EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI
SUPERVISOR

Mr Hans LEIJTENS
Executive Director of Frontex
Pl. Europejski 6
PL - 00-844 Warsaw

Brussels, 29 August 2023

WRW/PdL/vm/ D(2023) 2521 C 2023-0834
Please use edps@edps.europa.eu for all
correspondence

Subject: Draft Management Board Decisions adopting the rules for the processing of personal data and operational personal data by the Agency

Dear Mr Leijtens,

I am writing to you concerning the draft MB decision adopting the general rules on the application of the Data Protection Regulation by the Agency ('draft MB decision on data general rules') and the draft MB decision adopting the rules on processing of operational personal data by the Agency ('draft MB Decision on operational personal data'), which you enclosed in your letter of 28 July 2023.

I appreciate to be informed about the draft MB Decisions before their adoption by the Management Board, in line with Article 41(1) of Regulation (EU) 2018/1725 (the 'EUDPR'). I take the opportunity of this letter to share EDPS' comments on the drafts.

First, let me acknowledge the significant improvement of the draft MB decisions, in particular the draft MB decision on general rules. We appreciate the considerable efforts and work done in mapping the different Frontex's data processing activities and describing the related key data protection elements as recommended in our opinions of 7 June 2022.¹ In

¹ Supervisory opinion on the rules on processing of personal data by the European Border and Coast Guard Agency (Frontex) (case 2022-0148) and the Supervisory opinion on the rules on processing of operational personal data by the European Border and Coast Guard Agency (Frontex) (Case 2022-0147).



these Opinions, I recalled the important role of internal rules in giving effect to their enabling legislation and to explain, implement and complete, where necessary, its provisions. As these rules are an act of general application, intended to produce legal effects vis-à-vis data subjects, they must be clear, precise and their application must be foreseeable to persons subject to them in accordance with the requirements set out in the Charter of Fundamental Rights of the European Union.

I understand from the discussions that took place between my staff and Frontex data protection office that Frontex is currently in the process of expanding its activities in order to implement Regulation (EU) 2019/1896² ('EBCG Regulation') to its full extent. As a result, several of the data protection operations regulated by the draft MB Decisions are not yet in place or even defined. In those cases, the draft Mb Decisions only provide a general framework that will have to be further specified and implemented as Frontex define these new activities.

In view of the above, I would like to draw your attention to some concerns as regard the current wording of the MB Decisions. These relate to the allocation of Frontex's data protection responsibilities, the processing of special categories of data, the processing of personal data under EUROSUR, the regulation of the processing of operational personal data and the introduction of a new provision allowing Frontex to process audio and video recording data for the purpose of the investigation of the violation of fundamental rights.

Allocation of Frontex' responsibilities

I welcome the efforts made in delineating the activities for which Frontex acts as controller, as result of the mapping exercise that took place throughout the year. In particular, I would like to welcome the designation of Frontex as controller for the processing of personal data in the context of debriefing interviews, in line with the EDPS findings during its audit carried out in October 2022. We particularly appreciate the provisions related to the information Frontex must provide to the person concerned when conducting debriefing interviews, addressing EDPS recommendations in that regard.

I however note with concern that the scope of the MB Decision on general rules has been broadened and covers not only personal data processing activities conducted by Frontex as controller, as required under Article 86 of Regulation (EU) 2019/1896, but also as processor. The manner all data processing activities carried out by Frontex are encompassed in the MB decision on general rules, impacts negatively on a clear allocation of data protection responsibilities.

² Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Boardr and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624

In particular, several provisions are drafted in a way that creates a lack of clarity as to the exact scope of such activities, particularly in terms of which data can be collected and further processed, for what purpose and under which applicable data protection framework. For instance, chapter II of the MB decision allows Frontex to process a vast range of categories of personal data in the context of joint operations without specifying for which purpose and in which role (controller or processor) Frontex may process each category of data.

Some provisions also allow Frontex to further use personal data collected in its quality of processor for its own purposes, as controller, without clearly specifying the legal basis and specific conditions for such personal data sharing. For example, as regard the collection of personal data collected in the context of border checks, Frontex is considered as a processor when it collects such information for joint operations purposes (Article 24 (2)) but is then considered as controller when the same data is used for purposes of risk analysis (Articles 51 (4) and 53).

Processing of special categories of data

The draft MB decision on general rules expands considerably the processing of personal data, including special categories of data for risk analysis purposes, without providing the relative assessment of the necessity and proportionality of such processing. In that regard, it should be borne in mind that the data minimisation principle limits the collection and use of personal data to what is directly relevant and necessary to accomplish a specified purpose. In other words, controllers must establish whether they can achieve their purposes without the processing of personal data. Should this not be the case, controllers should use mitigation measures to reduce data protection risks such as the use of pseudonymous data (i.e. process the personal data in such a manner that this data can no longer be attributed to a specific individual, without the use of additional information).

As regards the processing of special categories of data (i.e. the ethnicity, religion or philosophical beliefs, political beliefs, health and sex life or sexual orientation), the MB decision relies on two different legal basis i.e. the consent of the person concerned and the fact that the processing of such data is necessary for reasons of substantial public interest on the basis of Union law. As expressed in the EDPS audit report, in light of the vulnerable position of the interviewee, in particular vis-à-vis the Frontex Debriefing officer, the EDPS has severe doubts that current arrangements for debriefing interviews guarantee their voluntary nature, thus of the possibility to use consent as a valid legal basis for such data collection. We recall that according to Articles 10 (2) and 3 (15) of Regulation (EU) 2018/1725, consent must be freely given, specific and informed. As regards the possibility to collect and process such data under the legal basis of “substantial public interest”, we recall that this implies a high threshold. To be considered as a valid legal basis, Frontex must demonstrate that the processing of personal data relate to public interests that the EU considers the most important, as also explained in our opinion of 20 December 2021 on international transfers

in the context of return operations³, a justification which is missing from the current wording of the draft MB Decision on general rules.

Processing of personal data under EUROSUR

The EDPS is in the process of drafting an Opinion on the processing of personal data in the context of EUROSUR, in reply to Frontex consultation on three specific points: controllership, the applicable data protection framework and the concept of personal data.⁴ I however observe that the draft MB Decision on general rules already takes position with regard to some of these issues. This Opinion will be issued in the forthcoming weeks.

I however note with concern Frontex's position on the nature of the additional information collected on vessels and aircrafts, considering these information as not being personal data, in particular as such information is necessarily linked to the identification numbers of the vessels and aircrafts, which are explicitly considered by the legislator as personal data.

In addition, I note that the draft MB decision mentions the establishment and maintaining of the European and specific situational pictures as data processing activities carried out by Frontex. However, the draft MB decision does neither define the categories of data subjects and of data processed nor the role of Frontex in this context. As stressed in our opinion of 7 June 2022, these are necessary elements to meet the requirements of clarity, precision and foreseeability as set out in the Charter of Fundamental rights of the European Union.

Processing of operational personal data

The draft MB Decision on operational data includes provisions that appear to substantially broaden Frontex's processing of operational personal data. I would like to recall once again that Regulation (EU) 2019/1896 limits the processing of operational personal data by Frontex to a function of support to Europol, Eurojust and Member State's competent authorities in their respective mandate and tasks in criminal matters. It does not allow Frontex to do criminal analysis for its own purposes, similarly to other EU law enforcement agencies.

In light of the above, several provisions of the draft MB Decision on operational data are problematic. This is for instance the case of Article 10(5) on the transmission of operational personal data by Member States, Europol and Eurojust to Frontex including their justification on why they consider a person as a suspect and whether this is based on facts or on a personal assessment.

Another example is to be found in the fact that the draft MB decision on operational data provides Frontex's own self-standing definitions on concepts in criminal law such as suspect

³ Case 2021-0856

⁴ Case 2023-0181

or witness, in contradiction with the position expressed in the EDPS Opinion of 11 May 2023 on the processing of personal data related to “associates” and “contacts” as categories of data subjects processed by the European Border and Coast Guard Agency (Frontex) for the purposes of identifying suspects of cross-border crime pursuant to Article 90 of Regulation (EU) 2019/1896.⁵ In that regard, I would like to recall that Regulation (EU) 2019/1896 allows Frontex to process operational personal data uniquely as a form of support to Europol, Eurojust and Member States’ competent authorities, such processing must be compliant with the latter’s legal framework.

Processing of personal data for the purpose of investigation of fundamental rights violations

Article 23 (6) of the draft MB decision on general rules introduces a new personal data processing activity, namely the collection, processing and storage of image and voice recording devices for purpose of the investigation of fundamental rights violations. Such processing activity appears to be particularly sensitive, with a high impact on the rights of the persons being recorded or otherwise affected by such processing. However, the article is very short and does not specify to what extent personal data contained in surveillance devices such as image and voice recording devices used by Frontex can be processed for monitoring its actions to ensure compliance with fundamental rights, the duration storage and the access rules to these data. It is not clearly specified either whether such processing activity would be under the sole control of the Fundamental Rights Officer, in charge of such investigation according to Article 109 of the EBCG Regulation.

Conclusion

I welcome the good cooperation with your Agency and trust in its commitment to ensure the full alignment of the implementing rules with the applicable regulatory framework. Please note that my office remains available to support your Agency in this process and will continue to be in contact with your services.

Yours sincerely,

[e-signed]

Wojciech Rafał WIEWIÓROWSKI

cc: 

⁵ Case 2023-0118