



EDPS
EUROPEAN DATA PROTECTION SUPERVISOR



EDPS SUPERVISORY OPINION ON THE DRAFT ANNEX ON PERSONAL DATA PROTECTION PROVISIONS TO THE MODEL FOR A WORKING ARRANGEMENT ON OPERATIONAL COOPERATION BETWEEN THE EUROPEAN BORDER COAST GUARD AND THIRD COUNTRIES

(Case 2024-0139)

1. INTRODUCTION

1. This Supervisory Opinion relates to the request of the Directorate-General for Migration and Home Affairs of the European Commission (DG HOME), sent on 31 January 2024, concerning the draft annex on personal data protection provisions to supplement the existing model working arrangements on operational cooperation between the European Border and Coast Guard Agency ('Frontex') and third countries.
2. The European Data Protection Supervisor ('EDPS') issues this Supervisory Opinion in accordance with Article 58 (3)(c) of Regulation (EU) 2018/1725¹ ('EUDPR') and Article 76 (2) of Regulation (EU) 2019/1896² ('the EBCG Regulation').

2. BACKGROUND

3. Under Article 73 of the EBCG Regulation, Frontex may cooperate with the relevant authorities of third countries through working arrangements to the extent required for the fulfilment of its tasks. Article 73 (3) provides that these working arrangements may include provisions concerning the exchange of information and cooperation in the

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.

² Regulation (EU) 2019/1896 of the European Parliament and the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ, L 295, 14.11.2019, pp.1-131.

framework of EUROSUR. Pursuant to Article 73(4), where these working arrangements provide for the transfer of personal data and where provided by the EUDPR, Frontex must request a prior authorisation from the EDPS.

4. Article 76(2) of the EBCG Regulation calls the Commission to draw up the model working arrangement referred to in Article 73 (4) of the same regulation after consulting the EDPS and requires that such model include provisions related to fundamental rights and data protection safeguards.
5. The Model Working Arrangement ('Model WA') was adopted by the Commission on 21 December 2021.³ The EDPS had provided comments on the draft model working arrangement on 3 July 2020.⁴ The EDPS noted however that a number of these comments were not addressed in the adopted Model WA. The Commission also adopted on 21 January 2022 model provisions (which include a specific provision on data protection) for the exchange of information in the framework of EUROSUR ('EUROSUR Model Provisions') in accordance with Article 76 (2) of the EBCG Regulation but did not share them with the EDPS. To the extent that the EUROSUR Model Provisions are included in a working arrangement⁵ involving also the transfer of personal data, the EDPS considers that such arrangement is subject to consultation of the EDPS in line with Article 76(2) of the EBCG Regulation as well as to prior authorisation under Article 73(4) of the same regulation.
6. The EDPS issued a decision on 1 August 2022 refusing the prior authorisation of a working arrangement between Frontex and Niger that was based on the Model WA and the EUROSUR Model Provisions.⁶ Following the EDPS' decision, the Commission drafted an annex with data protection provisions to supplement the existing Model WA and informally consulted the EDPS on 23 March 2023.⁷ The draft annex did not include provisions on the exchange of personal data for the purposes of EUROSUR. The EDPS provided informal comments on 7 July 2023.
7. On 31 January 2024, the Commission informally consulted the EDPS on a revised draft annex that aims at addressing the recommendations contained in the EDPS Decision of 1

³ *Commission Communication on Model working arrangement as referred to in Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, COM(2021) 830, 21.12.2021*

⁴ *EDPS case 2020-0612*

⁵ *As defined in Article 73(4) of the EBCG Regulation*

⁶ *EDPS case number 2022-0647*

⁷ *EDPS case number 2023-0375.*

August 2022 and in the EDPS informal comments of 7 July 2023. In addition to addressing previous EDPS recommendations, the revised draft annex extends the scope to transfers of personal data in the context of EUROSUR. The EDPS provided informal comments on 19 April 2024.⁸

8. On 26 April 2024, the Commission sent to the EDPS:
 - a new revised draft annex on Personal Data Protection ('the Draft Annex on DP'),
 - the draft model for a working arrangement ('the Draft Model WA') on operational cooperation between the European Border Coast and Guard and third countries and,
 - an annex on the provisions for the exchange of information within the framework of EUROSUR ('the Draft Annex on EUROSUR').
9. The Commission underlined at the time of the submission that the documents provided were preliminary drafts requiring extensive consultation, including formal inter-service consultation before adoption.

3. LEGAL AND TECHNICAL ASSESSMENT

3.1. Preliminary remarks

10. The EDPS recalls that before concluding a specific working arrangement providing for the exchange of personal data with a third country, Frontex must carry out a transfer impact assessment ('TIA') in order to assess the risks to individuals' rights and freedoms entailed by the transfer, considering the level of protection required by EU law. In light of this TIA, the text of the Draft Annex on DP may need to be adapted to the specific circumstances of the transfer.
11. In addition, each specific working arrangement to be signed with a third country that provides for the transfer of personal data must obtain a formal prior authorization of the EDPS, pursuant to Article 48(3)(b) of the EUDPR and Article 73(4) of the EBCG Regulation. In other words, regardless of the opinion on the Draft Model WA, each specific working arrangement between Frontex and a specific third country providing for the exchange of personal data will have to be authorized by the EDPS prior to its conclusion. For each

⁸ EDPS Case number 2024-0139.

specific working arrangement, the EDPS will assess whether appropriate data protection safeguards have been included in light of the TIA, the circumstances of the transfer and the specific situation of the third country concerned.

12. The scope of this opinion concerns the Draft Annex on DP taking into consideration the Draft Model WA on operational cooperation and the Draft Annex on EUROSUR as sent by the Commission to the EDPS on 26 April 2024. Any modifications made to the Draft Model WA or the Draft Annex on EUROSUR may also require adaptation of the Draft Annex on DP to ensure compliance with the applicable legal framework. The EDPS remains available for formal and informal consultations throughout the consultation and adoption process in line with the EUDPR and the EBCG Regulation.

3.2. Processing of personal data under the Draft Model WA

13. The Model WA, as adopted on 21 December 2021, listed all data protection provisions in Point 8, without including the annex⁹ with the specific terms governing information exchanges within the framework of EUROSUR. Point 3.2 of the Draft Model WA allows exchanges of information within the framework of EUROSUR in accordance with the terms of a specific annex. Point 7 of the Draft Model WA provides that Frontex and the third country may process personal data under the draft Model WA, including its annexes, only in accordance with the terms set out in the Draft Annex on DP. The EDPS notes that the provisions from Point 8 concerning the processing of personal data have been moved to the Draft Annex on DP.

14. This is also confirmed by Section 8 of the Draft Annex on EUROSUR,¹⁰ which sets out that personal data may be processed only in accordance with the terms set out in a separate annex, i.e. in the Draft Annex on DP.

15. The Draft Annex on DP allows in Point 1 the transfer of personal data under the Draft Model WA only (i) for administrative purposes and (ii) for performing tasks in the framework of EUROSUR as indicated in Section 2 (1) on scope and purpose of the Draft Annex on EUROSUR.

16. The EDPS understands that the two annexes will supplement the Draft Model WA; one related to the exchange of information within the framework of EUROSUR (the Draft

⁹ See Point 5 of the Model WA.

¹⁰ As provided to the EDPS by DG HOME on 26 April 2024.

Annex on EUROSUR) and the other one related to data protection rules (the Draft Annex on DP). The Draft Annex on DP will apply to the processing of personal data for administrative purposes and for the purposes of EUROSUR, as defined under the Draft Model WA for administrative purposes and under the Draft Annex on EUROSUR. The EDPS understands that only the processing of personal data specifically listed in the Draft Annex on DP¹¹ may take place under the Draft Model WA and the Draft Annex on EUROSUR. The processing of personal data in the context of returns is not thus covered¹² by the present request for consultation.

3.3. Analysis

17. As a general remark, the EDPS welcomes the efforts made in addressing his informal comments issued on 7 July 2023 and 19 April 2024 to bring the Draft Annex on DP into compliance with the EUDPR, the EBCG Regulation and the [2/2020 EDPB Guidelines](#). Nevertheless, the EDPS has still some comments on the processing of personal data for the purposes of EUROSUR. These comments are developed below.

3.3.1. Transfer Impact Assessment and suspension clause

18. As a preliminary remark, the EDPS would like to recall the significant adverse consequences the exchange of personal data with third countries may have on individuals, in particular for people on the move, in cases where the legislation in place raises risks of violations of human rights¹³ or where violations of human rights have been reported.¹⁴

¹¹ See Points 2(b) and 3(a) of the Draft Annex on DP.

¹² The EDPS reiterates that should returns be covered in specific working arrangements, specific provisions shall be added in that regard. Since working arrangements are subject to prior authorisation of the EDPS under Article 73(4) of the EBCG Regulation, the respective model or specific provisions on returns would thus benefit from the consultation of the EDPS to avoid delays during the authorisation procedure.

¹³ This can be the case where (i) the legislation in the third country formally meeting EU standards is manifestly not applied/complied with in practice; (ii) the legislation in the third country is lacking in comparison to EU standards or (iii) the transferred data and/or importer of the data falls within the scope of problematic legislation, EDPS Decision on the request for prior authorisation of the Working Arrangement establishing Operational Cooperation between the European Border and Coast Guard Agency and the Directorate for Territorial Surveillance of the Republic of Niger (Case 2022-0647).

¹⁴ See for instance, the UN experts' call in July 2023 to Tunisia to uphold migrants rights (<https://www.ohchr.org/en/press-releases/2023/07/un-experts-urge-tunisia-act-swiftly-uphold-migrants-rights>) and UN experts' serious concerns about about the situation of migrants and refugees in Libya who were allegedly held captive and tortured, subsequently released by Libyan authorities and transferred to unknown places of detention, where they are reportedly at risk of further serious human rights violations, including

There are great risks that information provided by Frontex is used by these countries for repression of these individuals, being their own nationals or persons fleeing from another country and transiting by them.

19. The importance to address the specific risks created for the individuals by the exchange of personal data with third countries in the framework of EUROSUR is reflected in Article 89 (4) and (5) of the EBCG Regulation.
20. Article 89 (4) of the EBCG Regulation strictly limits the exchanges to ‘what is absolutely necessary’ for the purposes of EUROSUR. As highlighted by the Court of Justice of the European Union,¹⁵ the requirement of absolute necessity must be interpreted as establishing strengthened conditions for the lawful processing of the data. It aims at giving enhanced protection with regard to the processing, which, because of the particular sensitivity of the data at issue and the context in which they are processed, is liable to create significant risks to fundamental rights and freedoms, such as the right to respect for private life and the right to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.¹⁶
21. Article 89 (5) of the EBCG Regulation further prohibits the exchange of personal data with a third country when the data could be used to identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment, or any other violation of fundamental rights.
22. In this context, the EDPS would like to stress that ship and aircraft identification numbers (‘ship and aircraft ID numbers’) can enable the identification of the owner of an aircraft, its pilot and potentially the passengers associated with a particular flight or ship journey and are as such considered personal data in Article 89(2) of the EBCG Regulation.
23. In light of the high risks for individuals, in particular for people on the move, the EDPS considers to be of the utmost importance to perform an in-depth prior TIA taking into account the situation in the third country which personal data exchanges are envisaged with, as well as a regular update of this assessment. The TIA must assess in detail whether

acts tantamount to enforced disappearance (<https://www.ohchr.org/en/press-releases/2023/07/libya-un-experts-alarmed-reports-trafficking-persons-arbitrary-detention>)

¹⁵ Case C-205/21, *Ministerstvo na vatreshnite raboti, Glavna direktsia za borba s organiziranata prestapnost*, Judgment of 26 January 2023, ECLI:EU:C:2023:49, paragraphs 116 and 117.

¹⁶ *Charter of Fundamental Rights of the European Union.* Official Journal of the European Union C83, vol. 53, European Union, 2010, p. 380

the level of protection required by Union law in terms of data protection and other fundamental rights is respected in the third country, in order to determine whether:

- an exchange of personal data with the third country may be envisaged,
- the list of safeguards included in the working arrangement are adequate to address the risks for the data subjects.

24. In this regard, the EDPS **welcomes** that Point 6(4) of the Draft Annex on DP provides that the exchange of personal data may be suspended in case where substantial changes to the situation in the third country may adversely affect the initial personal data transfer impact assessment performed by Frontex, at least until a new impact assessment is completed.

3.3.2. Purpose(s) of transfers of personal data

25. The EDPS notes that Point 3 of the Draft Annex on DP limits the personal data to be transferred to third countries within the framework of EUROSUR to ships and aircraft ID numbers.

26. Pursuant to Point 1(b)(ii) of the Draft Annex on DP the transfer of ship and aircraft ID numbers is allowed for the purpose of *‘performing tasks in the framework of EUROSUR as included in Section 2 (1) on scope and purpose of the Draft Annex on EUROSUR, namely for establishing Specific Situational Pictures’*.

27. The EDPS notes that Section 2 (1) of the Draft Annex on EUROSUR refers to the general objectives of EUROSUR (i.e. detecting, preventing and combating irregular immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants) and not only to the establishment of Specific Situational Pictures, which is further elaborated in Section 6 of the Draft Annex on EUROSUR. Moreover, the Draft Annex on DP also includes the EUROSUR fusion services in the instances where ship and aircraft ID numbers can be processed. Therefore, it is unclear whether the wording ‘namely’ in Point 1 (b) (ii) of the Draft Annex on DP limits the processing of personal data under the framework of EUROSUR to the establishment of specific situational picture(s) or not.

28. If transfers are not limited to the establishment of specific situational picture(s) but they can occur for the general objectives of EUROSUR, the EDPS recalls that under Article 4(1)(b) EUDPR, the purposes of the processing of personal data must be specified, explicit and legitimate. This means that the purpose must be sufficiently defined to enable the

implementation of any necessary data protection safeguards, and to delimit the scope of the processing operation. In particular, the specification of the purpose(s) for the exchange of personal data with a third country within the framework of EUROSUR is required to determine whether such exchange is absolutely necessary for the defined purpose(s)¹⁷ and to ensure that the data exchanged will only be processed for the purpose(s) for which they were provided.¹⁸

In view of the above, the EDPS **recommends** that the European Commission adapt the wording and list exhaustively in Point 1 (b) (ii) the purposes for which ship and aircraft ID numbers may be transferred to a third country within the framework of EUROSUR.

29. The EDPS understands that the Draft Model WA will be adapted to the terms of cooperation Frontex and a third country will establish. It is thus paramount that each working arrangement specify which of the purposes listed in the Draft Annex on DP for the transfers of ship and/or aircraft ID numbers to a third country beyond the general objective of EUROSUR are applicable to the working arrangement.
30. Concerning the legal requirement of the absolute necessity to transfer ship and aircrafts ID numbers to a third country for the purposes of EUROSUR, the EDPS understands, based on the information provided by the Commission on 26 April 2024,¹⁹ that the justification for such necessity will be reflected in individual transfer impact assessments, considering the specific recipients and circumstances of the transfer.
31. The EDPS stresses that this justification together with the specific purposes identified from the exhausting list of purposes of the Draft Annex on DP for the transfer of ships and aircraft ID numbers to a third country are essential elements to assess the lawfulness of the transfer.

¹⁷ Article 89 (4) of the EBCG Regulation.

¹⁸ Article 86 (3) of the EBCG Regulation.

¹⁹ Attachment of the email of 19 April 2024 from Deputy head of Unit Home B.1 to Head of EDPS Supervision and enforcement unit

4. CONCLUSION

32. The EDPS welcomes the efforts made in addressing the comments on previous drafts and bringing the Draft Annex on DP into compliance with the EUDPR, the EBCG Regulation and the [2/2020 EDPB Guidelines](#).
33. The EDPS points out that before concluding a specific working arrangement providing for the exchange of personal data with a third country, Frontex must carry out a transfer impact assessment in order to assess the risks to individuals' rights and freedoms entailed by the transfer taking into account the situation in the third country which personal data exchanges are envisaged with, as well as a regular update of this assessment.
34. The EDPS reiterates that each specific working arrangement to be signed with a third country that provides for the transfer of personal data must obtain a formal prior authorization of the EDPS pursuant to Article 48(3)(b) of the EUDPR and Article 73(4) of the EBCG Regulation.
35. The EDPS **recommends** that the European Commission adapt the wording and list exhaustively in Point 1 (b) (ii) of the Draft Annex on DP the purposes for which ship and aircraft ID numbers may be transferred to a third country within the framework of EUROSUR.
36. In light of the accountability principle, the EDPS expects the Commission to implement the above recommendations accordingly and has decided to close the case.

Done at Brussels on 19 June 2024

[e-signed]

WOJCIECH RAFAŁ WIEWIÓROWSKI