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**Sent at:** 07/06/22 14:13:02  
**Subject:** Our ref.: 2022-0147 + 2022-0148 - D(2022) 1402

Dear Madam,

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

Kind regards,

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EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI  
SUPERVISOR

Ms Aija KALNAJA  
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Brussels, 7 June 2022  
WRW/PdL/vm/ D(2022) 1402 C 2022-0147/0148  
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**Subject: Management Board Decisions 68/2021 and 69/2021 adopting the rules on processing personal data and operational personal data by Frontex**

Dear Ms Kalnaja

I am writing in reply to Frontex's letter of 31 January 2022 on the Management Board Decision 68/2021 of 21 December 2021 adopting rules on processing personal data by the Agency and the Management Board Decision 69/2021 of 21 December 2021 adopting rules on processing operational personal data by the Agency.

Please find enclosed the EDPS Opinions on the two Decisions.

We remain at your disposal should you need any further information.

Yours sincerely,

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI

Annex: EDPS Opinions

cc.: Mr Marko Gašperlin, Chair of the Frontex Management Board  
Mr Thibault de la Haye Jousselin, Director of the Governance Support Centre  
[REDACTED]

**EUROPEAN  
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EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

# EDPS SUPERVISORY OPINION ON THE RULES ON PROCESSING OF PERSONAL DATA BY THE EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX) (Case 2022-0148)

## 1. INTRODUCTION

1. This Opinion relates to the Management Board Decision 68/2021 of 21 December 2021 adopting the rules on the processing of personal data by Frontex (the ‘Decision’).
2. The Decision was adopted in accordance with Article 86 (2) of Regulation (EU) 2019/1896<sup>1</sup> (the ‘EBCG Regulation’), which provides that the Management Board shall adopt internal rules on the application of Regulation 2018/1725. The annex of the Decision (the ‘Annex’) lays down Frontex’s rules on the general implementation of Regulation 2018/1725, applicable to all processing activities conducted by Frontex outside the scope of Chapter IX of this Regulation.
3. Chapters I to III of the Annex contains the internal rules applicable to the processing of personal data for all purposes referred to in Article 87 EBCG Regulation, except the processing of personal data for facilitating the exchange of information with the Member States’ law enforcement authorities, Europol or Eurojust (Article 87 (1) (d) EBCG Regulation). The internal rules applicable to such processing are specified in another decision of the Management Board<sup>2</sup>. Chapter IV of the Annex contains additional specific rules for the processing of personal data for the purposes referred to in Article 87 (1) (a), (c) and (e) EBCG Regulation.

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

<sup>2</sup> Management Board Decision 69/2021 of 21 December 2021 adopting the rules on processing operational personal data by the Agency.

4. On 31 January 2022, pursuant to Article 41 of Regulation (EU) 2018/1725<sup>3</sup>, Frontex communicated the Decision to the EDPS. On 8 February 2022, following the EDPS request, the Data Protection Officer ('DPO') of Frontex sent to the EDPS the DPO opinion on the draft Decision.<sup>4</sup>
5. The EDPS notes that he was informed about the Decision after its adoption by the Management Board. He recalls that he stands ready to provide advice prior to the adoption of internal rules on the processing of personal data.
6. Considering that the Decision raises important concerns in particular as regards the critical matters of legal certainty as to conditions of the processing operations covered, and the legal basis used by Frontex to process special categories of personal data, the EDPS is hereby issuing an own initiative opinion pursuant to Article 58 (3) (c) of Regulation 2018/1725.

## 2. FINDINGS AND RECOMMENDATIONS

### 2.1. Minimum content of internal rules

7. The Decision is based on Article 86(2) of the EBCG Regulation, which mandates the Management Board (MB) to adopt internal rules on the application of Regulation 2018/1725. The legislator thus required the MB to take specific action. In doing so it specifically framed the administrative autonomy that all EU Institutions and bodies enjoy, indicating how to further regulate the processing of personal data by Frontex. These decisions, in general terms, should provide more details as to how Frontex will perform the processing of personal data.
8. Internal rules aim at explaining, implementing and completing, where necessary, the provisions of the law. Their role is to give effect to their enabling legislation. 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

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<sup>3</sup> 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.

<sup>4</sup> Opinion of the Data Protection Officer on General Data Processing Implementing Rules, 3 December 2021, Reg 13609, Reference PO/NAPE/ 13609/2021.

persons subject to them in accordance with the requirements set out in the Charter of Fundamental Rights of the European Union (the 'Charter')<sup>5</sup>

9. According to these requirements, such rules must be:
  - clear and precise and their application predictable for those subject to them.<sup>6</sup>
  - accessible to the person concerned and foreseeable, i.e. drawn up with sufficient precision to enable the individual to regulate his conduct<sup>7</sup>. It is "essential [...] to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness."<sup>8</sup>
10. Individuals should know with sufficient precision the purpose(s) of the processing of their data, the categories of data, the categories of data subjects, the safeguards to prevent abuse or unlawful access or transfer, the controller or categories of controllers, the retention periods of the data and the applicable safeguards taking into account the nature, scope and purposes of the processing.<sup>9</sup>

## 2.2. Elements not sufficiently specified in the Decision

11. Chapter IV, section 2 EBCG Regulation already contains several data protection key elements as regards the processing of personal data by Frontex. These elements concern:
  - the purposes for which Frontex may process personal data,
  - the categories of data that may be processed for several of these purposes,

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<sup>5</sup> See Recital 24 of Regulation 2018/1725 and ECJ, JSIA 'SS' v Valsts ieņēmumu dienests, Judgment of 24 February 2022. Case C 175-20 paragraphs 54,-55

<sup>6</sup> see ECJ, Case C-110/03 Belgium v Commission [2005] ECR I-2801, paragraph 30; Case C-76/06 Britannia Alloys & Chemicals v Commission [2007] ECR I-4405, paragraph 79; and Case C-226/08 Stadt Papenburg [2010] ECR I-0000, paragraph 45.

<sup>7</sup> See paragraph 77 of the judgment of the Court of Justice on Österreichischer Rundfunk, judgment of 20 May 2003, Joined cases C-465/00, C-138/01 and C-139/01. See also Opinion of Advocate general of 14 April 2011 in Scarlet Extended SA C-70/10 pars. 94-95

<sup>8</sup> See paragraph 77 of the aforementioned judgment of the Court of Justice on Österreichischer Rundfunk.

<sup>9</sup> See also Recital 24 and Article 25 (2) of Regulation 2018/1725. Recital 24 refers to the requirement of foreseeability as regards internal rules intended to produce legal effects vis-à-vis data subjects. Article 25 (2) lists the elements that such internal rules should contain, i.e. the purpose(s) or categories of processing, the categories of personal data, the safeguards to prevent abuse or unlawful access or transfer, the scope of the restrictions introduced, the specification of the controller or categories of controllers, the storage periods and the applicable safeguards as well as the risks to the rights and freedoms to data subjects.

- the requirement for the host Member State and Frontex to determine their data protection responsibilities,
- the maximum duration of the data storage and security rules on the protection of classified information and sensitive non-classified information.

In addition, Article 86 EBCG Regulation requires the adoption by Frontex's Management Board of internal rules on the application of Regulation 2018/1725.

12. The Annex lays down Frontex's rules on the general implementation of Regulation 2018/1725 and is applicable to data processing activities conducted by Frontex in relation to seven of the eight purposes mentioned in Article 87 EBCG Regulation.<sup>10</sup>
13. Chapter I to III of the Annex (Article 1 to 8) contain general provisions, which are applicable to all purposes covered by the Decision. These provisions are about internal arrangements concerning the engagement of processors, international data transfers, security measures, personal data breach notifications, storage, anonymization and deletion as well as logging, Chapter IV of the Annex (Articles 9 to 14) adds specific rules for the processing of personal data for the purpose of joint operations, pilot projects, rapid border interventions and migration management support team deployments.
14. Considering the legal obligation for the Agency to adopt internal rules as regards its processing of personal data, such rules must contain at least for each main area of activity (i.e. for each purpose) specific provisions developing the following key data protection elements as far as these elements are not fully defined in the EBCG Regulation:
  - the purposes,
  - the categories of data subjects,
  - the categories of data processed,
  - the controller(s) or categories of controllers,
  - the safeguards to prevent abuse for unlawful access of transfer,
  - the data retention period.The subsequent sections will analyse whether these elements are sufficiently provided for and regulated by the Decision.

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<sup>10</sup> Rules as regards the processing of personal data for the purpose of facilitating the exchange of information with the law enforcement authorities of the Member States, Europol or Eurojust are developed in the Management Board Decision 69/2021.

### 2.2.1. Processing of personal data for purpose of returns

15. The EDPS points out the increasing role of Frontex in the area of return operations. In addition to assisting Member States in a number of pre-return and return-related activities (including identifying irregularly staying third-country nationals, assisting in obtaining travel documents and preparing return decisions<sup>11</sup>), Frontex has also started coordinating and organising return operations on its own initiative under Article 50 (1) EBCG Regulation.<sup>12</sup> These activities entail several personal data processing activities, which contrary to the requirements established above in para 14, are not further developed in the Annex.
16. The EDPS recommends Frontex therefore to include a dedicated chapter on the processing of personal data for the purpose of return. This chapter should contain provisions on the categories of data processed for each return activities (i.e. information collected for issuing return decisions, for identifying third country nationals subject to return activities, for the acquisition of travel documents, etc.), the controller or categories of controllers, the safeguards to prevent abuse for unlawful access of transfer and the specific related data retention period.

### 2.2.2. Processing of personal data for purposes of EUROSUR

17. Article 89 EBCG Regulation contains only a few elements as regards the processing of personal data in the framework of EUROSUR. It refers to the applicable EU and national data protection legislation, limits the categories of personal data processed to ship and aircraft identification numbers unless exceptionally required and imposes some limitations for the exchanges of personal data with third countries. The EDPS notes that the Decision does not contain any specific rules on the processing of personal data in the framework of EUROSUR and as such does not contain the key data protection elements referred to under above para. 14, which are necessary to meet the criteria of foreseeability (see above para. 8-10).
18. Therefore, the EDPS recommends Frontex to specify the type of cases requiring the processing of personal data in the framework of EUROSUR, the categories of data processed in such cases, the controller or categories of controller, the safeguards to prevent abuse for unlawful access of transfer (in particular as regards international transfers considering the strict conditions required by Article 89 (4) and (5) EBCG Regulation) and the specific related data retention period.

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<sup>11</sup> Article 48 of EBCG Regulation.

<sup>12</sup> See <https://frontex.europa.eu/media-centre/news/news-release/first-frontex-led-return-operation-hVqUXN>



### 2.2.3. Processing of personal data for purposes of joint operations, pilot projects, rapid border interventions, migration management support teams and risk analysis.

19. The EDPS welcomes that the Annex contains specific provisions on the processing of personal data for the purposes of joint operations, pilot projects, rapid border interventions, migration management support teams and risk analysis.
20. The EDPS notes that the Annex refers to the operational plan for key elements such as the allocation of data protection roles and responsibilities.<sup>13</sup> The EDPS stresses that the determination of the role of each actor involved in the processing of personal data is essential to promote transparency of processing and the effective exercise of data subject rights. Article 88 EBCG Regulation requires the Agency and the host Member State to determine in a transparent manner the responsibilities for compliance with data protection obligations.<sup>14</sup>
21. The EDPS notes that operational plans are not publicly available and that Article 10 (3) of the Annex only provides for the publication of the essence of their provisions on the Agency's website. The EDPS considers that the sole publication of the essence of the provisions of the operational plan does not comply with the legal requirements of transparency and foreseeability as it may not provide sufficient information to enable the individuals to regulate their conduct (see above para 8-10).
22. The EDPS notes that Article 14 of the Annex lists the categories of data processed but non-exhaustively. He stresses that to meet the requirement of foreseeability, the Decision should determine all the categories of data processed, in an exhaustive manner.
23. The EDPS recommends Frontex to specify the key data protection elements of the processing (i.e. the purposes, the controller or categories of controllers, all the categories of data processed, the categories of data subjects and the specific related data retention period ) in the Decision or, at least, to provide that the related provisions of the operational plan shall be publicly available.

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<sup>13</sup> See Article 10 (1) of the Annex.

<sup>14</sup> Recital 15 of EBCG Regulation also stresses the importance of transparency by mentioning that: 'the Agency should be as transparent as possible about its activities, without jeopardising the attainment of the objective of its operations. It should make public the information about all of its activities. It should likewise ensure that the public and any interested party are rapidly given information with regard to its work.'



#### 2.2.4. Processing of personal data for the purpose of operating the FADO system

24. Article 87 (1) (h) EBCG Regulation allows Frontex to process personal data for operating the FADO system which is established in accordance with Joint Action 98/700/JHA.<sup>15</sup> Article 2 (b) of the joint Action 98/700/HA<sup>16</sup> provides that the database shall contain - among other things - images of genuine documents, which would imply the processing of personal data. The EDPS notes that the Decision does not contain any specific rules for the processing of personal data for the purpose of operating the FADO system”. The EDPS recalls the specific legal obligation imposed to Frontex by the legislator under Article 86 (2) EBCG Regulation to adopt internal rules on the application of Regulation 2018/1725 as a whole and not only when such regulation requires it.<sup>17</sup>
25. As a consequence, the EDPS recommends Frontex to include in the Decision the key data protection elements related to Frontex’s data processing activities for all purposes mentioned in Article 87 EBCG Regulation, including the purpose of operating the FADO system. These elements are the categories of data subjects, the categories of data processed, the controller or categories of controller, the safeguards to prevent abuse for unlawful access of transfer and the data retention period.

#### 2.2.5. Processing of personal data for the purpose of carrying out administrative tasks

26. The EDPS notes that the Decision does not contain any specific rules for the processing of personal data for the purpose of carrying out administrative tasks”. The EDPS recalls the specific legal obligation imposed to Frontex by the legislator under Article 86 (2) EBCG Regulation to adopt internal rules on the application of Regulation 2018/1725 as a whole and not only in the specific instances when this latter regulation requires it.
27. The EDPS therefore recommends that the Decision or other additional internal rules adopted by Frontex’s Management Board contain the key data protection elements related to Frontex’s data processing activities for all purposes mentioned in Article 87 of Frontex Regulation, including the purposes of administrative tasks. These elements are the categories of data subjects, the categories of data processed, the controller or

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<sup>15</sup> Article 79 EBCG Regulation.

<sup>16</sup> Joint Action 98/700/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO), OJ, L 333, 09/12/1998 P. 0004 - 0007.

<sup>17</sup> i.e. concerning the tasks, duties, and powers of the data protection officer (Article 45 (3) of Regulation 2018/1725) and the restrictions to data subjects rights (Article 25 of Regulation 2018/1725).

categories of controller, the safeguards to prevent abuse for unlawful access of transfer and the data retention period.

#### 2.2.6. Special categories of data

28. Article 14 (2) of the Annex provides that Frontex may process special categories of data if strictly necessary to achieve the purposes referred to in points (a), (c) and (e) of Article 87 (1) EBCG Regulation, i.e.:
- organising and coordinating joint operations, pilot projects, rapid border interventions and in the framework of the migration management support teams,
  - facilitating the exchange of information with Member States, the Commission, the EEAS and the following Union bodies, offices and agencies and international organisations: EASO, the European Union Satellite Centre, EFCA, EMSA, EASA and the Network Manager of the EATMN and,
  - risk analysis.
29. The special categories mentioned in Article 14 (2) of the Annex are
- racial or ethnic origin,
  - political opinions, religious or philosophical beliefs,
  - genetic data and or biometric data, fingerprints or photographs for the purpose of uniquely identifying a natural person and,
  - health status.
30. The EDPS recalls that Article 10 Regulation 2018/1725 establishes as principle the prohibition of the processing of special categories of data, with the exception of the cases explicitly mentioned in Article 10(2). Personal data which are, by their nature, particularly sensitive in relation to fundamental rights and freedoms merit specific protection, as the context of their processing could create significant risks to the fundamental rights and freedoms.
31. In order to be able to process special categories of data, Frontex needs therefore not only a legal basis under Article 5 of Regulation 2018/1725 but also to meet the additional conditions of Article 10 (2) of the same regulation.
32. The EDPS notes that the Decision neither mentions the legal ground Frontex is relying on under Article 10 (2) of Regulation 2018/1725 to process special categories of personal data nor does the Decision contains sufficient elements to determine it.
33. Therefore, the EDPS recommends Frontex to clarify the legal basis for the processing of special categories of data for the purposes of:

- organise and coordinate joint operations, pilot projects, rapid border interventions and in the framework of the migration management support teams,
  - facilitate the exchange of information with Member States, the Commission, the EEAS and the following Union bodies, offices and agencies and international organisations: EASO, the European Union Satellite Centre, EFCA, EMSA, EASA and the Network Manager of the EATMN and/or,
  - perform risk analysis.
34. The EDPS also recommends Frontex to include in the Annex clear and precise provisions governing the scope and application of the processing of special categories of data as well as accompanying safeguards.
35. Without all the above elements clarified, the EDPS considers that Frontex does not have a legal basis to process special categories of data.
36. Finally, as the Decision produces legal effects vis-à-vis data subjects, the EDPS recommends publishing it in the Official Journal of the European Union and giving it appropriate visibility in Frontex's website.

### 3. CONCLUSION

37. The EDPS welcomes the efforts of Frontex to establish internal rules specifying the obligations stemming from the EBCG Regulation and Regulation 2018/1725 by way of the Decision. However, the EDPS considers that the Decision has identified several shortcomings in the Decision, in particular where it concerns the critical matters of raises of legal certainty as to conditions of the processing operations covered, and the legal basis used by Frontex to process special categories of personal data.
38. The EDPS notes that the accompanying letter mentions that Frontex would accommodate any EDPS' guidance in the implementation phase. The EDPS recalls that in accordance with the accountability principle laid down in Article 4 (2) of Regulation 2018/1725, Frontex must take appropriate measures to ensure compliance with Regulation 2018/1725 as well as be able to demonstrate such compliance. Henceforth and considering the concerns raised by the Decision, the EDPS strongly recommends Frontex to amend the Decision to avoid lack of compliance with Regulation 2018/1725 and the EBCG Regulation.

39. In particular the EDPS recommends Frontex to modify the Decision as follows:

- Include a dedicated chapter on the processing of personal data for the purpose of return. This chapter should contain provisions on the categories of data processed for each return activities (i.e. information collected for issuing return decisions, for identifying third country nationals subject to return activities, for the acquisition of travel documents, etc.), the controller or categories of controllers, the safeguards to prevent abuse for unlawful access of transfer and the specific related data retention period.
- Specify the type of cases requiring the processing of personal data in the framework of EUROSUR, the categories of data processed in such cases, the controller or categories of controller, the safeguards to prevent abuse for unlawful access of transfer (in particular as regards international transfers considering the strict conditions required by Article 89 (4) and (5) EBCG Regulation) and the specific related data retention period
- Specify the key data protection elements of the processing of personal data for the purposes of joint operations, pilot projects, rapid border interventions, migration management support teams and risk analysis (i.e. the purposes, the controller or categories of controllers, all the categories of data processed, the categories of data subjects and the specific related data retention period ) in the Decision or, at least, to provide that the related provisions of the operational plan shall be publicly available
- Specify the categories of data subjects, the categories of data processed, the controller or categories of controller, the safeguards to prevent abuse for unlawful access of transfer and the data retention period related to data processing activities for the purposes of operating the FADO system and of carrying out administrative tasks.
- Clarify the legal basis for the processing of special categories of data for the purposes of:
  - o organising and coordinating joint operations, pilot projects, rapid border interventions and in the framework of the migration management support teams,
  - o facilitating the exchange of information with Member States, the Commission, the EEAS and the following Union bodies, offices and agencies and international organisations: EASO, the European Union Satellite Centre, EFCA, EMSA, EASA and the Network Manager of the EATMN and/or,
  - o perform risk analysis.

- Include clear and precise provisions governing the scope and application of the processing of special categories of data as well as accompanying safeguards.
40. The EDPS also recommends publishing the Decision in the Official Journal of the European Union and giving it appropriate visibility in Frontex's website.
41. Finally the EDPS recommends that Frontex implements the above-mentioned recommendations and provides documentary evidence of this implementation to the EDPS within three months of this Opinion, i.e. by 7 September 2022.

Done at Brussels on 7 June 2022

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI



EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

# EDPS SUPERVISORY OPINION ON THE RULES ON PROCESSING OF OPERATIONAL PERSONAL DATA BY THE EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX) (Case 2022-0147)

## 1. INTRODUCTION

1. This Opinion relates to the Frontex Management Board (MB) Decision 69/2021 of 21 December 2021 adopting the rules on processing operational personal data by Frontex (the ‘Decision’).
2. The Decision was adopted in accordance with Article 86 (2) of the Regulation (EU) 2019/896<sup>1</sup> (the ‘EBCG Regulation’), which provides that the Management Board shall adopt internal rules on the application of Regulation 2018/1725. Its Annex lays down the Agency rules on the application of Chapter IX of Regulation 2018/1725 in accordance with Article 90 of the EBCG Regulation including specific internal rules on data retention of personal data pursuant to Article 91 (3) of the EBCG Regulation.
3. On 31 January 2022, pursuant to Article 41 of Regulation (EU) 2018/1725<sup>2</sup>, the European Border And Coast Guard Agency (Frontex) communicated to the EDPS the Decision. On 8 February 2022, following the EDPS request, the Data Protection Officer (‘DPO’) of Frontex sent to the EDPS the DPO opinion on the draft Decision.<sup>3</sup>

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<sup>1</sup> Regulation (EU) 2019/1896 of the European parliament and of the Council of 13 November 2019 on the European Border Cast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ, L 295, 14.11.2019, pp 1-131

<sup>2</sup> 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.

<sup>3</sup> Opinion of the Data Protection Officer - Part II on the draft implementing rules on operational personal data, 16 November 2021, Reference DPO/NAPE/11364a/2021.

4. The EDPS notes that he was informed about the Decision after its adoption by the Management Board. He recalls that he stands ready to provide advice prior to the adoption of internal rules on the processing of personal data.
5. Considering that the Decision raises important concerns, in particular about the critical matters of purpose limitation, the categories of data processed including special categories of data, the allocation of data protection responsibilities and data retention, the EDPS is hereby issuing an own initiative opinion pursuant to Article 58 (3) (c) of Regulation 2018/1725.

## 2. FINDINGS AND RECOMMENDATIONS

### 2.1. Minimum content of internal rules

6. The Decision is based on Article 86(2) EBCG Regulation, which mandates the Management Board (MB) to adopt internal rules on the application of Regulation 2018/1725. The legislator thus required the MB to take specific action. In doing so it specifically framed the administrative autonomy that all EU Institutions and bodies enjoy, indicating how to further regulate the processing of personal data by Frontex. These decisions, in general terms, should provide more details as to how Frontex will perform the processing of personal data.
7. Internal rules aim at explaining, implementing and completing, where necessary, the provisions of the law. Their role is therefore to give effect to their enabling legislation. 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 (the Charter').<sup>4</sup>
8. According to these requirements, such rules must be:
  - clear and precise and their application predictable for those subject to them<sup>5</sup>

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<sup>4</sup> See Recital 24 of Regulation 2018/1725 and ECJ, JSIA 'SS' v Valsts ieņēmumu dienests, Judgment of 24 February 2022. Case C 175-20 paragraphs 54,-55

<sup>5</sup> see ECJ, Case C-110/03 Belgium v Commission [2005] ECR I-2801, paragraph 30; Case C-76/06 Britannia Alloys & Chemicals v Commission [2007] ECR I-4405, paragraph 79; and Case C-226/08 Stadt Papenburg [2010] ECR I-0000, paragraph 45.



- accessible to the person concerned and foreseeable, i.e. drawn up with sufficient precision to enable the individual to regulate his conduct<sup>6</sup>. It is "essential [...] to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness."<sup>7</sup>

9. Considering the legal obligation for the Agency to adopt internal rules as regards its processing of personal data, such internal rules must contain specific provisions developing the following key data protection elements, as far as these elements are not fully defined in the ECBG Regulation:

- the purposes for processing of operational personal data,
- the categories of data subjects,
- the categories of data processed,
- the controller(s) or categories of controllers,
- the safeguards to prevent abuse for unlawful access of transfer,
- the data retention period.<sup>8</sup>

The subsequent sections will analyse whether these elements are sufficiently provided for and regulated by the Decision.

## 2.2. Purpose of the processing

10. Pursuant to Article 86 (2) of the ECBG Regulation, the Annex lays down Frontex's rules on the application of Chapter IX of Regulation 2018/1725 in accordance with Article 90 of the EBCG Regulation, including specific internal rules on data retention of personal data pursuant to Article 91 (3) of the EBCG Regulation.

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<sup>6</sup> See paragraph 77 of the judgment of the Court of Justice on *Österreichischer Rundfunk*, judgment of 20 May 2003, Joined cases C-465/00, C-138/01 and C-139/01. See also Opinion of Advocate general of 14 April 2011 in *Scarlet Extended SA C-70/10*, pars. 94-95

<sup>7</sup> See paragraph 77 of the aforementioned judgment of the Court of Justice on *Österreichischer Rundfunk*.

<sup>8</sup> See also Article 72(2) of Regulation 2018/1725 which provides that: 'Specific Union legal acts regulating processing within the scope of this Chapter shall specify at least the objectives of processing, the operational personal data to be processed, the purposes of the processing, and the time limits for the storage of the operational personal data or for periodic review of the need of further storage of the operational personal data.'

11. Article 90 read together with Article 10(1)(q) of the EBCG Regulation clearly defines the purpose of the processing for which Frontex can process operational personal data.
12. Article 90 of the EBCG Regulation allows Frontex to process personal data, which it has collected while monitoring migratory flows, carrying out risk analyses or in the course of operations, in accordance with Chapter IX of Regulation 2018/1725. Frontex can only do so in the context of the performance of its tasks under Article 10 (1) (q) of the EBCG Regulation and for the sole purpose of identifying suspects of cross-border crime. These tasks are cooperation with Europol and Eurojust within their respective mandates and support to Member States in circumstances requiring increased technical and operational assistance at the external borders in the fight against cross-border crime and terrorism.
13. In line with Article 90 of the EBCG Regulation, Article 5 of the Annex provides that Frontex may process personal data only for the purpose of identifying suspects of cross-border crimes while performing its tasks under Article 10 (1) (q) of the EBCG Regulation.
14. The EDPS recalls that Frontex is established to ensure European Integrated Border management at EU external borders.<sup>9</sup> Its founding act is based on Article 77 (2) (b) (d) and 79 (2) (c) of the Treaty on the functioning of the European Union ('TFEU'), which refer to the checks of persons crossing external borders, the establishment of integrated management systems for external borders and illegal immigration. Under Article 88 of the TFEU, the EU agency responsible for preventing and combating serious crimes is Europol. This is also reflected in Recital 41 of EBCG Regulation which mentions that given its activities at the external borders, the Agency should contribute to preventing and detecting cross border crime and coordinate with Europol, which is the EU Agency responsible for supporting and strengthening Member State's actions and their cooperation in preventing and combating serious crimes affecting two or more Member States.
15. Any activity by Frontex in relation to the prevention, detection and investigation of criminal offences is secondary and should be carried out primarily as a form of support to Europol, Eurojust and Member States' competent authorities.

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<sup>9</sup> Article 1 of EBCG regulation.

16. All provisions of the Annex must therefore be read in line with the above and against the unique purpose of identifying suspects of cross-border crime to provide support to Europol, Eurojust and Member States' competent authorities.
17. In this context, the EDPS notes, firstly, that Recital 6, Articles 11 (9), 16 and 23 of the Annex uses wording which is ambiguous and which does not clearly reflect the strict limitation in terms of purposes of the processing imposed by Article 90 (1) EBCG Regulation. These provisions will be analysed in turn.

### **Ambiguity in Recital 6**

18. While the wording of Article 1(2) of the Annex clearly reflects Article 90 of the EBCG Regulation, Recital 6 of the Decision seems to broaden the scope of Article 1(2) of the Annex. This Recital mentions that the personal data collected while monitoring migratory flows, in the course of operations or carrying out risks analysis may be repurposed to serve the task of the Agency referred to in Article 10 (1) (q) of the EBCG Regulation *including* the identification of suspects of cross-border crimes. The use of the word 'including' suggests that personal data could be used for purposes *other* than the identification of suspects of cross-border crime, which would go beyond Frontex's legal mandate.
19. The EDPS recommends Frontex to delete the wording 'including' in Recital 6 and to reformulate the sentence to indicate clearly that in accordance with Article 90 (1) of the EBCG Regulation Frontex may process personal data only to identify suspects of cross-border crime.

### **Article 11(9) and 23 - Use of handling codes**

20. Article 11 (9) of the Annex provides that when exchanging operational personal data with the Agency, the Member States' competent law enforcement authorities, Europol and Eurojust or the Agency's own staff shall indicate the purposes for which the Agency may use this information via the handling codes described in Article 23 of the Annex.
21. The EDPS notes that the handling code H0<sup>10</sup> and H1 refer to the authorisation (or interdiction) to use the information transmitted as evidence in judicial proceedings. The EDPS submits that these are not purposes for which Frontex may process

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<sup>10</sup> See the explanation under Handling Code H0, which mentions that: 'The handling Code H0 allows the recipient of the information, to share and use that information as evidence in judicial proceedings, without any prior approval from the owner of the information'.

operational personal data, since such purposes are not listed in Article 10 or any other provision of the EBCG Regulation.

22. The EDPS understands however that the provider of the data may want to attach restrictions to the use of these data in case, for instance, Frontex further exchanges them with Europol, Eurojust or Member States law enforcement authorities. The EDPS therefore recommends Frontex to review Articles 11 (9) and 23 to clarify that the handling codes do not determine the purposes for which Frontex may process operational personal data but only serve to restrict further processing for the recipients of these data in case of further transmission by Frontex.

## **2.3. Categories of data subjects**

### **2.3.1. Processing of data related to ‘associates’**

23. Article 6 (1) of the Annex reflects Article 90(1) EBCG Regulation, which allows Frontex to process operational personal data collected while:
- monitoring migratory flows,
  - carrying out risk analysis or,
  - in the course of operations.
24. Article 6 (2) further lists the categories of data subjects whose personal data may be processed, i.e. persons involved in cross-border crimes, namely suspects and associates, victims and witnesses. The EDPS notes that Article 90(1) of the EBCG Regulation does not mention ‘associates’ as a category of data subject about whom Frontex may process operational personal data. He therefore recommends Frontex to delete any reference to ‘associates’ throughout the Decision.

## **2.4. Categories of data processed**

### **2.4.1. Data categories that can be processed under Article 90 EBCG Regulation**

*a) Processing of data collected in the context of border management activities for the purpose of identifying suspects of cross-border crime*

25. As already mentioned above<sup>11</sup> and described in Recitals 3, 12 and 41 of the EBCG Regulation, the key roles of the Agency relate to border control, in particular by:
- carrying out risk analysis and vulnerability assessments,
  - supporting Member States through joint operations and rapid interventions,
  - supporting search and rescue operations for persons in distress at sea and organising return operations.
- Frontex's contribution in preventing and combating cross-border crimes is limited to the information it obtained while performing its tasks related to border management.
26. In other words, personal data are initially collected by Frontex for border management purposes. Pursuant to Article 90(1) EBCG Regulation, where necessary and relevant to cooperate with Europol and Eurojust and to provide support to Member States in the fight against cross-border crimes, Frontex may process these data to identify suspects of cross-border crimes. It cannot however collect *directly* data during the conduct of these border management activities for the purpose of identifying suspects of cross-border crime. The EDPS submits that some wording in Articles 6, 7, 8 and 9 of the Annex lends itself to conclude that collection of operational personal data is a primary task of Frontex, which is not the case as already explained in section 2.2 of this Opinion.
27. For example, Article 7 (2) of the Annex provides that where the Agency activates the Eurosur fusion services on behalf of a Member State, any processing of personal data other than ship and aircraft identification numbers shall fall under the scope of Article 90 of EBCG Regulation. This means that Frontex will collect directly personal data through the EUROSUR framework to identify suspects of cross-border crimes. This is however not in line with the authorization provided under Article 90 EBCG Regulation. Data collected by Frontex in the context of EUROSUR should first and foremost comply with the limits set up by Article 89(2) and (3) of the EBCG Regulation and should be limited to what is strictly necessary for the purposes of EUROSUR. Only data collected in full compliance with this article can then be processed under Article 90 EBCG Regulation to identify suspects of cross-border crimes.
28. The EDPS recommends Frontex to review Articles 6, 7, 8, 9 of the Annex to make clear that only data collected for the purposes of monitoring migratory flows, carrying out risk analysis or in the course of operations can be further used for the specified purpose of Article 90 EBCG Regulation (i.e. the identification of suspects of cross-border crime).

*b) Data categories collected in the context of border management activities*

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<sup>11</sup> See Section 2.2.

29. The sources of the operational personal data are further developed in Articles 7 (migratory flows), 8 (operations) and 9 (risks analysis) of the Annex. The EDPS stresses that pursuant to Article 90 EBCG Regulation, Frontex may only process the data collected in the context of the above-mentioned activities in order to identify suspects of cross borders crimes. It is therefore essential that the collection and use of data during these activities are clearly described either in this Annex or in the internal rules about the processing of personal data for such activities.
30. However, the EDPS considers that neither the internal rules about the processing of personal data by Frontex<sup>12</sup> nor Articles 7, 8 and 9 of this Annex provide a clear overview and understanding of each of the sources - including their interactions - that Frontex is allowed to use to collect operational personal data. It is not clear from the two Decisions<sup>13</sup> sent to the EDPS how and which personal data will be further used for the purpose of identifying suspects of cross-border crimes.

*c) Cross-checking of operational data against Frontex' database and open sources*

31. Article 16 (b) of the Annex provides that Frontex may crosscheck operational personal data against the Agency's database and open sources. Such cross-checking however goes beyond the authorization given to Frontex under Article 90 EBCG Regulation as it could involve the processing of personal data that Frontex has not initially collected while monitoring migratory flows, carrying risk analyses or in the course of operations for the purpose of identifying suspects of cross-border crimes.
32. The EDPS recommends Frontex to delete Article 16(b) of the Annex.

#### 2.4.2. Processing of special categories of data

33. The EDPS notes that the processing of special categories of personal data by Frontex is not explicitly provided in Article 90 ECBG Regulation. He stresses that such processing for the purpose of identifying suspects of cross-border crime must comply with Article 76 of Regulation 2018/1725.
34. Article 76 of Regulation 2018/1725 only allows the processing of special categories of data where strictly necessary for operational purposes, within the mandate of the Agency and

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<sup>12</sup> See EDPS opinion of 7 June 2022 on the Management Board Decision 68/2021 of 21 December 2021 adopting the rules on processing personal data by the Agency.

<sup>13</sup> This decision and the Management Board Decision 68/2021 of 21 December 2021 adopting the rules on the processing of personal data by the Agency.

subject to appropriate safeguards for the rights and freedoms of the data subject. These data cannot be used to discriminate against natural persons. In addition, the DPO shall be informed without undue delay wherever this article is used by Frontex.

35. Article 15(2) of the Annex only provides for the possibility to use any of the special data category if strictly necessary. It does not indicate when this assessment will be made (at the level of the operational plan or on a case-by-case basis by the analyst), which criteria should guide this assessment (e.g. the criteria might be stricter depending on the categories of data subjects and the type of suspected crimes) or whether the assessment will be recorded in the system or elsewhere.
36. In addition, even though required by Article 76 of Regulation 2018/1725, the Annex does not contain appropriate safeguards (e.g. specific and shortened retention period) including safeguards to avoid discriminatory practices (e.g. prevent any search based on special categories of data only).
37. Finally, the Decision does not refer to the obligation of informing the DPO without undue delay (specifying the timeline considered) of the use of this Article.
38. The EDPS recommends Frontex to specify in the Decision:
  - how the requirement of strict necessity will be complied with by indicating when the assessment will be made, on the basis of which criteria and where it will be recorded to allow for further checks,
  - the additional appropriate safeguards in order to limit the processing to what is strictly necessary and to avoid discrimination against natural persons on the basis of the processing of special categories of data and, the obligation to inform the DPO without undue delay when special categories of persona data are being processed.

## **2.5. Data protection responsibilities of the controllers and processors involved in the processing**

39. The EDPS recalls the importance of a clear and precise allocation of data protection responsibilities. The determination of who is controller or who is processor plays a crucial role in allocating responsibilities for compliance with the applicable data protection rules.



40. Ever since the extension of Frontex's mandate to process personal data, the EDPS has been insisting on the need to clearly delineate responsibilities between the Agency, EU Member States and the EU institutions and bodies so that there is no blurring of accountability in the data protection obligations of each controller.<sup>14</sup>
41. The EDPS considers that the Annex does not clarify the allocation of responsibilities. He notes that Article 4 of the Annex only mentions that where the Agency and the competent law enforcement authorities of the Member States, Europol or Eurojust are joint controllers, the data collection plan shall cover the necessary elements of the arrangement required under Article 86 of Regulation 2018/1725. However, the Decision does not explain when this would be the case, nor does it provide criteria to make the assessment, except in relation to data security and to the data verification process.<sup>15</sup>
42. While the roles, tasks and responsibilities of controller, joint controller and, if relevant, processor could be further detailed in the data collection plan, the Annex should contain sufficient elements to identify when and where the Agency would be controller, joint controller or processor in practice. The EDPS recommends Frontex to define these elements in the Annex.
43. In addition, the EDPS considers that the processing of personal data during the verification and acceptance process is performed for the purpose of ensuring that the data transmitted by Member States, Europol or Eurojust fall under the mandate of Frontex and the scope of Article 90 EBCG Regulation. This processing cannot be under the joint responsibility of Frontex and the sender of the data as the processing is performed for the sole compliance with Frontex' tasks. Frontex should thus be considered as sole controller for this processing operation.
44. The EDPS recommends Frontex to adjust Article 4 and 12 of the Annex accordingly.

## 2.6. Data retention

45. Article 21 of the Annex provides that the data shall be deleted when the purpose (i.e. the identification of a suspect of a cross-border crime) has been achieved or if the identification has not been successful, upon expiry of the data, i.e. in case no new information has been received on the individual after three years (Article 21(6) of the

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<sup>14</sup> See [EDPS opinion 02/2016](#) of 18 March 2016 on recommendations on the proposed European Border Coast Guard Regulation and EDPS formal comments of 30 November 2018 on the Proposal for a Regulation on the European Border Coast Guard

<sup>15</sup> Footnote 6 merely refers as example to situations within the scope of Article 88 of the EBCG Regulation

Annex). If the identification has not been successful, the Agency's business units shall review the necessity of their storage three months after the start of the initial processing and every six months thereafter. Article 21 (4) of the Annex provides for a shorter period of retention for data about a potential suspect by providing that such data shall be deleted if no additional relevant information has been collected within 24 months after the verification process. These two articles thus set contradictory data retention periods for potential suspects. The EDPS recommends Frontex to clarify this.

46. This could however mean that data about victims and/or witnesses could be stored for a longer period than potential suspects. The EDPS notes that the Annex does not provide for any shorter period of retention for these categories of data subjects. Article 20 (3) of the Annex even refers to this maximum period of three years for data about victims below 15 years old.
47. The EDPS submits that Frontex does not have a legal basis to store data about victims and witness longer than the data about suspects. Under Article 90 EBCG Regulation, Frontex may process personal data about victims and/or witness only if they supplement personal data about suspects.
48. The EDPS recommends clarifying in Article 21 of the Annex that in any event, as soon as data about a suspect are deleted, those related data to victims and witness shall be automatically deleted.
49. More generally, Frontex does not provide any justification for the definition of these data retention periods, i.e. to what extent it is necessary for Frontex to store personal data for 24 months or 3 years for the purpose of identifying suspects of cross-border crimes in support to Europol, Eurojust and Member States competent authorities in the fight against cross-border crimes.
50. The EDPS recommends Frontex to justify for each category of data subject the need for a data retention period in line with the principles of storage limitation and accountability (Article 71 (1) (e) and (4) of Regulation 2018/1725).

## 2.7. Role of the Data Protection Officer

51. The EDPS welcomes the level of involvement of the Data Protection Officer (the ‘DPO’) in drafting and providing advice on the early drafts of the Decision.<sup>16</sup> He notes that the DPO had pointed out several of the main shortcomings described above.<sup>17</sup>
52. The EDPS would like to stress the key role of data protection officers in ensuring effective compliance with data protection principles within European institutions and bodies. The importance of the function has been recognised in the Regulation 2018/1725<sup>18</sup>, which include the obligation for the Union institutions and bodies to:
  - involve them properly and in a timely manner in all issues related to the protection of personal data<sup>19</sup>,
  - provide them with sufficient resource to carry their tasks<sup>20</sup> and,
  - ensure that they do not receive any instructions regarding the exercise of their tasks<sup>21</sup>.
53. The EDPS notes that Article 3(2)(b) of the Annex reproduces the obligation to involve the DPO in a “properly and timely manner” in all issues related to data protection wherever these rules are of application. He recommends Frontex to clarify specifically when and how the DPO will be involved in the specific context of Frontex’s processing of operational personal data to ensure that the DPO’s involvement meets the requirements of being proper and timely.
54. Finally, as the Decision produces legal effects vis-à-vis data subjects, the EDPS recommends publishing it in the Official Journal of the European Union and giving it appropriate visibility in Frontex’s website.

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<sup>16</sup> See Opinion of the Data Protection Officer on the draft implementing rules on operational personal data, Procedural aspects, 7 October 2021, Reference DPO/NAPE/11364/2021.

<sup>17</sup> See Opinion of the Data Protection Officer on the draft implementing rules on operational personal data, Procedural aspects, 7 October 2021, reference DPO/NAPE/11364/2021 and Opinion of the Data Protection Officer - Part II on the draft implementing rules on operational personal data, 16 November 2021, Reference DPO/NAPE/11364a/2021.

<sup>18</sup> Regulation 21018/1725 includes a dedicated section on the DPO (section 6 of Chapter IV)

<sup>19</sup> Article 44 (1)

<sup>20</sup> Article 44 (2)

<sup>21</sup> Article 44 (3)

### 3. CONCLUSIONS

55. The EDPS welcomes the efforts of Frontex to specify the obligations stemming from the EBCG Regulation and Regulation 2018/1725 in its internal rules by way of the Decision. However, the EDPS has identified several shortcomings in the Decision, in particular where it concerns the critical matters of purpose limitation, the categories of data processed including special categories of data, the allocation of data protection responsibilities and periods of data retention.
56. The EDPS notes that the accompanying letter mentions that Frontex would accommodate any EDPS' guidance in the implementation phase. The EDPS recalls that in accordance with the accountability principle laid down in Article 4 (2) of Regulation 2018/1725, Frontex must take appropriate measures to ensure compliance with Regulation 2018/1725 as well as be able to demonstrate such compliance. Henceforth and considering the concerns raised by the Decision, the EDPS strongly recommends Frontex to amend the Decision to avoid lack of compliance with Regulation 2018/1725 and the EBCG Regulation.
57. In particular the EDPS recommends Frontex to modify the Decision as follows
- Delete the wording 'including' in Recital 6 and reformulate the sentence to indicate clearly that in accordance with Article 90 (1) of the EBCG Regulation Frontex may process personal data only to identify suspects of cross-border crime.
  - Review Articles 11 (9) and 23 to clarify that handling codes do not determine the purposes for which Frontex may process operational personal data but only serve to restrict further processing for the recipients of these data in case of further transmission by Frontex.
  - Delete any reference to 'associates' throughout the Decision.
  - Review Articles 6, 7, 8, 9 to make clear that only data collected for the purposes of monitoring migratory flows, carrying out risk analysis or in the course of operations can be further used for the specified purpose of Article 90 EBCG Regulation (i.e. the identification of suspects of cross-border crime).
  - Delete Article 16(b).
  - Specify in the Decision:

- how the requirement of strict necessity will be complied with by indicating when the assessment will be made, on the basis of which criteria and where it will be recorded to allow for further checks,
  - the additional appropriate safeguards in order to limit the processing to what is strictly necessary and to avoid discrimination against natural persons on the basis of the processing of special categories of data and, the obligation to inform the DPO without undue delay when special categories of persona data are being processed.
- Specify in Article 4 of the Annex when and where Frontex will be controller, joint controller or processor in practice.
  - Review Articles 4 and 12 of the Annex to clarify that Frontex is the sole controller for the processing carried out during the verification and acceptance process
  - Clarify in Article 21 the data retention periods for potential suspects and specify that in any event, as soon as data about a suspect are deleted, the related data to victims and witness shall be automatically deleted.
  - Justify the data retention period for each category of data subject in line with the principles of storage limitation and accountability (Article 71 (1) (e) and (4) of Regulation 2018/1725).
  - Clarify specifically when and how the DPO will be involved in the specific context of Frontex's processing of operational personal data to ensure that the DPO's involvement meets the requirements of being proper and timely.
58. The EDPS also recommends publishing the Decision in the Official Journal of the European Union and giving it appropriate visibility in Frontex's website
59. Finally, the EDPS recommends that Frontex implements the above-mentioned recommendations and provides documentary evidence of this implementation to the EDPS within three months of this Opinion, i.e. by 7 September 2022.

Done at Brussels on 7 June 2022

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI