



EUROPEAN DATA PROTECTION SUPERVISOR

# EDPS SUPERVISORY OPINION ON PROCESSING ACTIVITIES BY THE EUROPEAN BORDER AND COAST GUARD (FRONTEX) IN THE FRAMEWORK OF EUROSUR

(Case 2023-0181)

## 1. INTRODUCTION

1. This Supervisory Opinion relates to the processing of personal data by the European Border and Coast Guard ('the Agency' or 'Frontex') in the framework of EUROSUR.
2. The EDPS issues this Supervisory Opinion in accordance with Article 58 (3) (c) of Regulation (EU) 2018/1725<sup>1</sup>, (the 'Regulation').

## 2. FACTS

3. On 7 June 2022, the EDPS issued an opinion on the Management Board Decision 68/2021 of 21 December 2021 adopting the rules on processing of personal data by the Agency ('MB Decision 68/2021'). This decision was adopted on the basis on Article 86 of Regulation (EU) 2019/1896<sup>2</sup> (the 'EBCG Regulation'), which requires that the Management Board of Frontex adopt internal rules on the application of the Regulation. In his opinion, the EDPS considered that the MB Decision 68/2021 did not develop with sufficient precision key data protection elements necessary to

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<sup>1</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>2</sup> Regulation (EU) 2019/896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulation (EU) No 1052/2013 and (EU)2016/1624, OJ, L 295, 14.11.2019, pp.1-131.



ensure that the data processing is foreseeable to persons subject to it, in accordance with the requirements of the EU Charter of Fundamental Rights and considering the specific legal obligation of Frontex to adopt such rules. In the framework of EUROSUR, these elements were the type of cases requiring the processing of personal data, the categories of data processed in such cases, the controller or categories of controller, the safeguards to prevent abuse for unlawful access or 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.

4. On 21 November 2021, Frontex received in its headquarters an EDPS staff level visit dedicated to getting a better understanding of EUROSUR and related data processing activities. During this visit, issues related to the controllership, the applicable data protection framework and the concept of personal data were identified.
5. On 10 February 2023, the DPO of Frontex formally consulted the EDPS on the concept of personal data, controllership and the applicable data protection framework as regards the Agency's activities carried out in the framework of EUROSUR.

### 3. LEGAL AND TECHNICAL ASSESSMENT

#### 3.1. Legal framework

6. Established in 2013<sup>3</sup>, the European Border Surveillance system (EUROSUR) is an integrated framework for information exchange and operational cooperation between Member States and Frontex to improve situational awareness and increase reaction capability at the external borders. It is a multi-purpose system that aims at preventing, detecting and combating (i) illegal immigration, (ii) cross-border crime and contributing to (iii) protecting and saving migrants' lives.<sup>4</sup> It provides a common mechanism for near-real time information exchange and interagency cooperation in the field of border surveillance. All national authorities with a responsibility for border surveillance (e.g. border guard, police, coast guard,

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<sup>3</sup> Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosir), OJ, L295, 6.11.2013, pp. 11-26. Regulation (EU) No 1052/2013 was subsequently repealed by the EBCG Regulation which embeds the new EUROSUR legal framework.

<sup>4</sup> See Articles 2 (9), 18 and 19 of the EBCG Regulation.

navy) are required to coordinate their activities via national coordination centres with each other, with other Member States and with Frontex.<sup>5</sup>

7. EUROSUR is governed by Articles 18 to 28 of the EBCG Regulation. Article 87 (1) (f) and Article 89 of the same regulation contain rules related to the processing of personal data in the framework of EUROSUR. Information, resources and systems available in the framework of EUROSUR may be used for the cooperation with Union institutions, bodies, offices and agencies (Article 68 (1) of the EBCG Regulation) and with third countries (Articles 72 to 75 of the EBCG Regulation).
8. EUROSUR consists of (i) national coordination centres, (ii) national situational pictures, (iii) a European situational picture, (iv) specific national situational pictures, (v) EUROSUR Fusion services and (vi) an integrated planning.<sup>6</sup> Additional rules regarding the situational pictures are specified in the Commission implementing rules (EU) 2021/581<sup>7</sup> (the ‘Commission Implementing Rules’).
9. Pursuant to Article 22 of the EBCG Regulation, which replicates Article 21 of the repealed Regulation (EU) 1052/2013 establishing EUROSUR, the Commission must adopt a EUROSUR handbook providing technical and operational guidelines, recommendations and best practices, including on cooperation with third countries. Frontex mentions that so far, the EUROSUR handbook adopted by the Commission on 15 December 2015<sup>8</sup> has not been reviewed to reflect the changes brought by the EBCG Regulation when embedding the existing EUROSUR.

### **3.2. Concept of personal data as regards ship and aircraft identification (‘ID’) numbers**

10. In accordance with Article 89 (2) of the EBCG Regulation, ship and aircraft identification numbers are the only personal data Frontex is allowed to process in the framework of EUROSUR. The processing of other personal data must be exceptional and strictly limited to what is necessary for the purposes of EUROSUR (Article 89 (3) of the EBCG Regulation).

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<sup>5</sup> [https://ec.europa.eu/commission/presscorner/detail/de/MEMO\\_13\\_1070](https://ec.europa.eu/commission/presscorner/detail/de/MEMO_13_1070)

<sup>6</sup> Article 20 of the EBCG Regulation.

<sup>7</sup> Commission implementing rules (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), OJ, L 124, 12.04.2021, pp. 3-39.

<sup>8</sup> Commission recommendation of 15.12.2015 adopting Practical handbook for implementing and managing the European Border Surveillance System (EUROSUR Handbook), C(2015) 9206 final,

### 3.2.1. Frontex's position

11. Frontex is arguing that ships and aircraft identification numbers are *not* personal data as long as Frontex does not use or has no intention to use this information to identify a natural person. The DPO is asking whether this interpretation is in line with the Regulation and the EBCG Regulation.
12. In support of its view, Frontex claims that to consider a vessel identification number as personal data, the key element to be assessed is whether this type of information renders a natural person identifiable. In this regard, Frontex is arguing that the purpose of processing ships and aircraft identification numbers within EUROSUR is not the identification of individuals at that stage. This identification would be done *a posteriori*, under other circumstances for different purposes. The definition of personal data would thus apply only when there is an intent to identify or there is identification of an individual. In other words, Frontex is arguing that while using the information collected within EUROSUR, such information would not be considered as personal data but only when using it or willing to use it to identify a natural person for other purposes than EUROSUR.
13. In addition, Frontex claims that the criteria developed by the Court ruling in the Breyer case<sup>9</sup> are not met as Article 40 of the Commission Implementing Regulation (EU) 2021/581 ('COM Implementing Regulation')<sup>10</sup> prohibits Frontex to identify a natural person in the framework of EUROSUR. Such provision states that "although data processed by EUROSUR may exceptionally contain information relating to indirectly identifiable natural persons, such data shall not be processed in the framework of EUROSUR to identify these natural persons." Frontex considers, despite the explicit qualification of ship and vessels ID numbers as personal data by Article 89(2) EBCG Regulation, that information collected within the framework of EUROSUR are *not* personal data since Frontex has no legal means to use this information to identify a natural person for the purposes of EUROSUR (but well for other purposes).
14. The question therefore is if, despite the explicit qualification of ship and vessels ID numbers as personal data by Article 89(2) EBCG Regulation, ship and vessels ID numbers collected within the framework of EUROSUR could be regarded as *not* personal data within the meaning of Article 3(1) of the Regulation.

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<sup>9</sup> ECJ Judgment in Breyer, C-582/14, ECLI:EU:C:2016:779.

<sup>10</sup> Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational picture of the European Border Surveillance System (EUROSUR), JO, 12.04.2021, L124, p.3.

### 3.2.2. Interpretation of Article 89 (2) of the EBCG Regulation

15. The EDPS would like to stress first that in accordance with the maxim '*interpretatio cessat in claris*' (i.e. interpretation ceases with clarity), there is no room for interpretation of a legal provision when its meaning is plain and clear. It is settled case law of the European Court of Justice ('ECJ') that the contextual or teleological interpretation of an EU law provision may not question the literal meaning of that provision, where the wording of such provision is clear and unambiguous.<sup>11</sup> Such questioning would be contrary to the principle of legal certainty, which requires the ECJ to follow an interpretation of an EU law provision that tries to stay as close as possible to its wording. In other words, the ECJ would never ignore the clear and precise wording of an EU law provision.<sup>12</sup>
16. The EDPS considers that the wording "ships and aircraft identification numbers shall be the only personal data" in Article 89 (2) of the EBCG Regulation is clear and unambiguous and as such, leaves no doubts about the intention of the legislator to consider these numbers are personal data.
17. It is also settled case law of the ECJ that a national court of last resort is relieved from the obligation to refer to the ECJ for the interpretation of an EU law provision if it has established that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.<sup>13</sup> Before concluding that this is the case, the national court must be convinced that this would be equally obvious to the other courts of the Member States and to the Court of Justice. This implies that:
  - the national court should take into consideration the divergences between linguistic versions it is aware of but it cannot be required to examine, in that regard, each of the language versions of the provision in question,
  - It must be borne in mind that EU law uses terminology which is peculiar to it and legal concepts that do not necessarily have the same meaning as the corresponding concepts that may exist in the law of the Member States,

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<sup>11</sup> See, e.g., Case C-220/03 *BCE v Germany* [2005] ECR I-10595, para. 31, and Case C-263/06 *Carboni e derivati* [2008] ECR I-1077, para. 48, and Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-10627, para. 44; Case C-582/08 *Commission v United Kingdom* [2010] ECR I-07195, paragraphs 33 and 51.

<sup>12</sup> Koen Lenaerts and José A. Gutiérrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice", EUI working papers, Academic of European Law, European Institute University, AEL 2013/9, p.7.

<sup>13</sup> See judgments of 6 October 1982, *Cilfit and Others*, 283/81, EU:C:1982:335, paragraph 21; of 15 September 2005, *Intermodal Transports*, C-495/03, EU:C:2005:552, paragraph 33; and of 4 October 2018, *Commission v France (Advance payment)*, C-416/17, EU:C:2018:811, paragraph 110, and of 6 October 2021, *Consorzio Italian management v. Rete Ferroviaria Italiana SpA*, C-561/19, ECLI:EU:C:2021:799 paragraphs 33 and 39.

- the EU law provision must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.<sup>14</sup>
18. The EDPS first notes that the qualification of ship and aircraft ID numbers as personal data is borne out by a comparison of at least the French, Dutch, Spanish, Swedish, Greek, German, Lithuanian, Polish, Croatian, Bulgarian, Italian, Slovenian, Portuguese, Hungarian, Finnish and English versions of Article 89 (2) of the EBCG Regulation. A reading of each of these linguistic versions leads to the same conclusion<sup>15</sup> that ship and aircraft identification numbers are considered personal data.
  19. Second, the concept of personal data defined in Article 3 of the Regulation applies to all Union institutions, bodies, offices and agencies. The definition of this concept is identical to the definition of the same concept in Regulation 2016/1729, which is binding and directly applicable in all EU Member States. Hence, it is not peculiar to EU law but has the same meaning as the corresponding concept in the law of the Member States.
  20. Third, the EDPS notes that the EBCG Regulation contains a dedicated section on the processing of personal data, which explicitly states the applicability of the Regulation to Frontex (Article 86 (1)) and includes a specific provision on EUROSUR (Article 89 (2)). Article 87(1)(f) explicitly allows Frontex to process personal data for the purpose of performing its tasks in the framework of EUROSUR in accordance with Article 89, whose second paragraph states that ship and aircraft identification numbers shall be the only personal data that are permitted to be accessed in the European situational and specific situational pictures and the EUROSUR fusion services. The intention of the legislator was thus to provide specific data protection rules that would apply to the processing of ship and aircraft identification numbers in the national pictures maintained by national authorities, in the European or specific situational pictures maintained by Frontex and for the provision of fusion services by Frontex in the context of EUROSUR. It thus appears clearly from this provision that ship and aircraft identification numbers are personal data when processed by Frontex.

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<sup>14</sup> See *judgment* of 6 October 2021, *Consorzio Italian management v. Rete Ferroviaria Italiana SpA*, C-561/19, ECLI:EU:C:2021:799 paragraphs 40 to 46

<sup>15</sup> See *Judgment* of 23 November 2006, *Hauptzollamt Hamburg-Jonas v. ZVK Zuchtvieh-Kontor GmbH*, C-300/05, ECR I-11169, para. 22

### 3.2.3. Restriction to the processing of specific categories of personal data in EUROSUR

21. Pursuant to Article 89 (2) of the EBCG Regulation, ships and aircraft identification numbers are the only personal data that can be processed in the framework of EUROSUR. The processing of other personal data must be exceptional and strictly limited to what is necessary for the purposes of EUROSUR (Article 89 (3) of the EBCG Regulation). Article 89 is thus very specific about the type of personal data that can be processed: it restricts the permissible data to "ship and aircraft identification numbers." In other words, the legislator has determined that ship and aircraft identification numbers are personal data and decided to limit the scope of personal data processing, focusing on identifiers related to transportation vessels rather than individuals' personal information like names or personal identification number.
22. This is also reflected in Article 40 of the Commission implementing rules, which explicitly recognizes that data processed within EUROSUR may contain information relating to indirectly identifiable natural persons. This provision further adds that such information cannot be processed to identify natural persons. Such measure should be thus read as a safeguard put in place by the Commission in order to mitigate the risks for individuals concerned and limit the impact of the processing.
23. When adopting the EBCG Regulation, the legislators thus assessed whether ships and aircraft ID numbers may enable the identification of natural persons. They concluded that this was the case by explicitly defining them as personal data in Article 89 of the EBCG Regulation but restricted the scope of the processing of personal data to such numbers.
24. In light of the above, **the EDPS concludes that ships and aircraft identification numbers must be considered personal data when processed by Frontex in the context of the European or specific situational pictures or for the provision of EUROSUR fusion services as clearly and unambiguously stated by the legislator in Article 89(2) of the EBCG Regulation.**

### 3.3. Controllership

25. The EBCG Regulation establishes the shared responsibility of the national authorities of Member States responsible for border management and Frontex to implement the European integrated border management.<sup>16</sup> However, the EBCG Regulation does not establish the specific responsibilities of the Member States and Frontex in terms of data protection. The consultation of the DPO of Frontex aims at establishing whether

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<sup>16</sup> See Article 7 'Shared responsibility' and Recital 12 of the EBCG regulation.

Frontex is a (joint) controller as defined in Art. 3(8) of the Regulation or processor as defined in Art. 3(12) of the Regulation when the Agency processes personal data in the framework of EUROSUR. This determination is essential to determine who is responsible for compliance with the applicable data protection rules, and against whom data subjects can exercise their rights in practice.

### 3.3.1. The concept of controller

26. Article 3(8) of the Regulation defines a “controller” as “(...) the Union institution or body or the directorate-general or any other organisational entity which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by a specific Union act, the controller or the specific criteria for its nomination can be provided for by Union law”. This definition is essentially functional: the entity that decides on the “why” and the “how” of the processing will be the controller, independently of its organisational status.<sup>17</sup>

27. Article 28 of the Regulation defines that “where two or more controllers or one or more controllers together with one or more controllers other than Union institutions and bodies jointly determine the purposes and means of the processing, they shall be joint controllers.”

28. The definition of the controller contains several elements (“Union institution or body or the directorate-general” or “natural or legal person, public authority or other body”; “determines”, “alone or jointly with others”, “the purposes and means”).

*‘Union institution or body or the directorate-general or natural or legal person, public authority or other body’*

29. The first part of the definition refers to the type of actors that can be controllers in line with the Regulation, i.e. EU institutions, bodies, a directorate-general or any other organisational entity. This element underlines the fact that any of the institutions, agencies, bodies or directorates-general (i.e. organisational entities commonly found within most of the largest EUs) can be considered as a ‘controller’ for the carrying out of specific processing operations.<sup>18</sup>

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<sup>17</sup> EDPS [Guidelines](#) on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725, 2019 (‘EDPS Guidelines’), p. 7. EDPB [Guidelines 07/2020](#) on the concepts of controller and processor in the GDPR, 2021 (‘EDPB Guidelines’), p. 12.

<sup>18</sup> EDPS [Guidelines](#) p. 7.



*‘determines’*

30. The controller must be the one who ‘determines’ the purpose and the means of the processing and in particular the one who exercises influence over the processing, by virtue of a decision-making power.<sup>19</sup> In case the control is stemming from legal provisions, the law would in principle establish a task or impose a duty on someone to collect and process certain data. In those cases, the law often determines the purpose of the processing.
31. The controller will normally be the one designated by law for the realisation of this purpose. In the absence of control arising from legal provisions, the qualification of a party as controller must be established based on an assessment of the factual circumstances surrounding the processing. In order to evaluate the ‘factual influence’ of a controller over the processing operation, the entirety of the factual elements should be evaluated, by answering the questions ‘why is the processing taking place’, ‘who initiated the processing’ and ‘who benefits from the processing’.<sup>20</sup>
32. The need for factual assessment also means that the role of a controller does not stem from the nature of an entity that is processing data but from its concrete activities in a specific context. In other words, the same entity may act at the same time as controller for certain processing operations and as processor for others, and the qualification as controller or processor has to be assessed with regard to each specific data processing activity.

*‘purposes and means’<sup>21</sup>*

33. The determination of ‘the purposes and the means’ of the processing amounts to deciding respectively ‘why’ the processing is taking place (i.e., ‘to what end’; or ‘what for’) and ‘how’ this objective shall be reached. The controller must decide on both purpose and means of the processing. In case a controller engages a processor to carry out the processing on its behalf, it often means that the processor shall be able to make certain decisions of its own on how to carry out the processing. Therefore, a margin of manoeuvre may exist for the processor also to be able to make some decisions in relation to the processing. Decisions on the purpose of the processing are clearly always for the controller to make.
34. As regards the determination of means, a distinction can be made between essential and non-essential means. ‘Essential means’ are closely linked to the purpose and the scope of the processing and are traditionally and inherently reserved to the controller. Examples of essential means are the type of personal data, which is processed, the

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<sup>19</sup> EDPS [Guidelines](#) p. 8. EDPB [Guidelines 07/2020](#), p. 11-13.

<sup>20</sup> EDPS [Guidelines](#) p. 7.

<sup>21</sup> EDPS [Guidelines](#), p. 9-10. EDPB [Guidelines 07/2020](#), p. 14-16.

duration of the processing, the categories of recipients and the categories of data subjects. ‘Non- essential means’ concern more practical aspects of implementation, such as the choice of a particular type of hardware or software or the detailed security measures which may be left to the processor to decide on.

*‘alone or jointly’<sup>22</sup>*

35. The qualification as joint controllers may arise where more than one actor is involved in the processing. The overarching criterion for joint controllership to exist is the joint participation of two or more entities in the determination of the purposes and means of a processing operation. More specifically, joint participation needs to include the determination of purposes on the one hand and the determination of means on the other hand. If each of these elements are determined by all entities concerned, they should be considered as joint controllers of the processing at issue. Joint participation can take the form of a common decision taken by two or more entities or result from converging decisions by two or more entities regarding the purposes and essential means.

### 3.3.2. Role of Frontex in the framework of EUROSUR

36. EUROSUR aims at improving situational awareness and increasing reaction capability at the external borders for the purposes of border management, including the detection, prevention and combating of illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants.<sup>23</sup>
37. Situational awareness means ‘the ability to monitor, detect, identify, track and understand illegal cross-border activities in order to find reasoned grounds for reaction measures on the basis of combining new information with existing knowledge, and to be better able to reduce the loss of lives of migrants at, along or in the proximity of the external borders.’<sup>24</sup> Reaction capability is ‘the ability to perform actions aimed at countering illegal cross-border activities at, along or in the proximity of the external borders, including the means and timelines to react adequately.’<sup>25</sup>

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<sup>22</sup> EDPS [Guidelines](#), p. 11 and 22-25. EDPB [Guidelines 07/2020](#), p. 12-13 and 18-25.

<sup>23</sup> Article 18 of the EBCG Regulation. See also Article 23 (1) of the EBCG Regulation.

<sup>24</sup> Article 2 (7) of the EBCG Regulation.

<sup>25</sup> Article 2 (8) of the EBCG Regulation.

38. Situational awareness and reaction capability build on the national situational picture, the European situational picture, the specific situational picture and the EUROSUR fusion services,<sup>26</sup> which are components of the EUROSUR framework.<sup>27</sup>

#### 3.3.2.1. Situational pictures

39. There are three types of situational pictures: the national situational picture, the European situational picture and the specific situational picture.<sup>28</sup> They consist of three information layers (event, operational and analysis) and must be produced through the collection, evaluation, collation, analysis, interpretation, generation, visualisation, dissemination of information.<sup>29</sup> The EBCG regulation determines the specific purpose of each situational picture, i.e.:

- to provide all authorities having responsibility for external border control at national level with effective, accurate and timely information (national situational picture)<sup>30</sup>,
- to provide the national coordination centres and the Commission with effective, accurate and timely information and analysis, covering the external borders, the pre-frontier area and unauthorised secondary movement (European situational picture)<sup>31</sup>,
- to support specific operational activities at the external borders or to share information with Union institutions, bodies, offices, agencies and international organisations or third countries (Specific situational picture).<sup>32</sup>

40. The EBCG Regulation also determines the sources of the information to be collected and who is responsible for establishing and maintaining the picture.<sup>33</sup>

41. In addition, pursuant to Article 24 (3) of the EBCG Regulation, the type of information to be provided, the entities responsible for collecting, processing archiving and transmitting specific information, the maximum time limits for reporting, the data security, the data protection rules and the related data quality control mechanisms for the situational pictures must be specified in an implementing act adopted by the

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<sup>26</sup> See Chapter II, Section 4 ‘Situational awareness’ of the EBCG Regulation, which encompasses the national situational picture, the European situational picture, the specific situational picture and the EUROSUR fusion services and Article 2 (10) of the EBCG Regulation which defines situational picture as ‘an aggregation of geo-referenced near-real-time data and information received from different authorities, sensors, platforms and other sources which is transmitted across secured communication and information channels and can be processed and selectively displayed and shared with other relevant authorities in order to achieve situational awareness and support the reaction capability at, along or in the proximity of the external borders and the pre-frontier area.’

<sup>27</sup> Article 20 of the EBCG Regulation.

<sup>28</sup> Articles 25, 26 and 27 of the EBCG Regulation.

<sup>29</sup> Article 24 (1) of the EBCG Regulation.

<sup>30</sup> Article 25 of the EBCG Regulation

<sup>31</sup> Article 26 of the EBCG Regulation

<sup>32</sup> Article 27 of the EBCG Regulation

<sup>33</sup> Articles 25, 26 and 27 of the EBCG Regulation

Commission. Based on this provision, the Commission adopted the implementing rules (EU) 2021/581 on the situational pictures of EUROSUR<sup>34</sup> (the ‘Commission Implementing Rules’). These rules also contain provisions on reporting in EUROSUR including the type of information to be provided, details of the information layers, modalities for establishment of the picture, responsibilities, data security and data protection as well as mechanisms for ensuring control.<sup>35</sup>

42. The Commission Implementing Rules defines managing the situational picture as “establishing and maintaining the situational picture and processing all the information it contains”.<sup>36</sup> Such management includes processing the reports received, establishing and maintaining the different layers (i.e. event, operational and analysis) and the links between the different elements of the situational picture, managing the user access, contributing to the data security of EUROSUR, archiving and deleting the relevant information in line with the applicable data policy.<sup>37</sup>
43. The EBCG Regulation, complemented by the Commission implementing rules, determines thus *the purposes* of the situational pictures and the *essential means* to achieve them by defining why a situational picture must be established and how this should be done (the type of the information to be provided, from which sources, the modalities for its establishment, etc.). The EBCG Regulation also designates who is responsible for achieving this purpose, i.e. who must establish and maintain the picture. The EDPS notes in this context that the further specification in the Commission implementing rules of what the establishment and maintenance (i.e. its management) of a situational picture entails shows the key role of the entity designated in terms of data processing (analysis of the information and deleting the relevant one, management of user access, etc.)
44. In light of the above, the EDPS considers that **the entity that is responsible for establishing and maintaining a situational picture under the EBCG Regulation must be considered as the controller for this situational picture as this entity is tasked by the legislator with the realisation of the purpose of such picture through specific means, both the purposes and the means being described in the EBCG Regulation and complemented by the Commission implementing rules.**
45. **The EDPS considers thus that Member States are controllers for the national situational pictures** as under Article 25 of the EBCG Regulation, they are responsible for establishing and maintaining these pictures. This conclusion is further supported

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<sup>34</sup> Commission implementing rules (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), OJ, L 124, 12.04.2021, pp. 3-39.

<sup>35</sup> Article 1 of the Commission implementing rules.

<sup>36</sup> Article 3 (2) of the Commission Implementing Rules.

<sup>37</sup> Article 25 of the Commission Implementing Rules.

by the requirement of Article 89(1) of the EBCG Regulation that Member States must specify which national authority in particular is to be considered as controller when processing personal data in this context.<sup>38</sup> Similarly, **Frontex must be considered as the controller for the European situational picture** following Article 26 of the EBCG Regulation, which designates Frontex responsible for their establishment and maintenance.

46. As regards specific situational pictures, Article 27 of the EBCG Regulation allows Frontex and Member States to establish and maintain such pictures in order to support specific operational activities at the external borders or to share information with Union institutions, bodies, offices, agencies and international organisations listed in Article 68 of the EBCG Regulation or third countries as provided for in Article 75 of the same Regulation.
47. Article 27 (3) of the EBCG Regulation provides that the detailed rules for establishing and sharing the specific situational pictures must be set out in an operational plan for the operational activities concerned and in a bilateral agreement where a specific situational picture is established in the framework of bilateral or multilateral cooperation with third countries. Article 26 of the Commission implementing rules further requires that when establishing a situational picture Member States and Frontex ensure alignment with several principles and requirements referred to in the Commission implementing rules. The same Article also requires that the rules for establishing and sharing a specific situational picture contain the content and scope of the picture (including its purpose and the type of information to be reported), its governance as well as the rules for information exchange with other users of EUROSUR.
48. The EBCG Regulation, complemented by the Commission implementing rules, determines thus the main purpose of the specific situational pictures and the essential means to achieve this purpose by defining why a situational picture could be established and, if so, how this should be done. The EDPS notes that considering that the specific situational picture will vary according to the needs and specificities of operational activities, the legislator requires Frontex and Member State to further specify the rules, content and scope of these pictures in line with the requirements provided in the EBCG regulation and the Commission implementing rules.

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<sup>38</sup> Article 89 (1) of the EBCG Regulation provides that: “Where the national situational picture requires the processing of personal data, those data shall be processed in accordance with Regulation (EU) 2016/679 and, where applicable, Directive (EU) 2016/680. Each Member State shall designate the authority which is to be considered as controller within the meaning of point 7 of Article 4 of Regulation (EU) 2016/679 or point (8) of Article 3 of Directive (EU) 2016/680, as applicable, and which shall have central responsibility for the processing of personal data by that Member State.”

49. In light of the above, the EDPS considers that, **Member States and Frontex are controllers for the specific situational picture they establish and maintain alone, as each will further determine the purpose and the means of this picture in accordance with Article 26 of the Commission implementing rules. If they maintain and establish a specific situational picture together and jointly further determine its purpose and means, they will be considered as joint controllers.**

#### 3.3.2.2. EUROSUR fusion services

50. The EUROSUR fusion services should be based on a common application of surveillance tools and provide Member States and Frontex with value-added information services related to European integrated border management. They should also be used to support border checks, air border surveillance and the monitoring of migration flows.<sup>39</sup> The EUROSUR fusion services is one of the components of the EUROSUR Framework<sup>40</sup>.
51. Pursuant to Article 28 of the EBCG Regulation, it is Frontex that must coordinate EUROSUR fusion services (which must include specific and defined features such as monitoring designated areas or tracking vessels) and provide information derived from these services to the Member States. The law thus determines the *purposes* of the EUROSUR fusion services and tasks Frontex with the realisation of such purposes.
52. The EDPS notes that Article 28 (4) of the EBCG Regulation determines an additional purpose of the EUROSUR fusion services by allowing Frontex to use these services also for collecting information, which is relevant for the European situational picture that Frontex is required to establish and maintain under Article 26 (1) of the EBCG Regulation.
53. As regards the *means*, while Article 28 (2) lists what the services must enable to do (i.e. monitoring of designated ports and coasts, tracking of vessels, etc.), it does not determine how these services should be developed and designed, what information should be collected and how. Recital 37 of the EBCG Regulation only mentions that these services supplied by Frontex should be based on the common application of surveillance tools and inter-agency cooperation at Union level.
54. Frontex has designed 17 services that it has compiled in a catalogue ('Service catalogue').<sup>41</sup> The Service catalogue describes each service together with the information provided, technical prerequisites, and delivery channels for service

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<sup>39</sup> See Recital 37 of the EBCG Regulation.

<sup>40</sup> Article 20 (1) (e) of the EBCG Regulation.

<sup>41</sup> EUROSUR fusion services - Service catalogue, version 3.2.

provision. It is accessible to users who can request services listed in the Service catalogue by sending a service request form to Frontex.<sup>42</sup> Frontex decided on its own the full design of the services, the type of information they can provide, how and when request such services and what for. Besides, following Article 28 (3) of the EBCG Regulation, Frontex may refuse a request from a Member State to provide a service for technical, financial or operational reason. Considering Frontex's level of influence in the decision-making on the development and implementation of the EUROSUR fusion services and its genuine ability to exercise control on them, the EDPS considers that Frontex is defining the essential means of the processing, in accordance with the definition of 'controller' laid down in Article 3(8) of the Regulation.

55. In light of the above, the EDPS considers that **Frontex is acting as a controller** in accordance with the definition laid down in Article 3(8) of the Regulation **(i) when processing personal data derived from the EUROSUR fusion services for the transmission of such data to the Member States at their request pursuant to Article 28 (1) of the EBCG Regulation and (ii) when using the EUROSUR fusion services for collecting information that is relevant for the European situational picture in accordance with Article 28 (4) of the EBCG Regulation**

### 3.4. Applicable data protection framework

56. The Regulation applies to the processing of personal data by all Union institutions, bodies, offices and agencies.<sup>43</sup> A distinct chapter (i.e. Chapter IX) of this Regulation contains the rules applicable to the processing of personal data processed by Union bodies, offices or agencies when carrying out activities that fall within the scope of Chapter 4 or Chapter 5 of Title V of Part Three of the Treaty for the Functioning of the European Union ('TFEU'), i.e. in the fields of judicial cooperation in criminal matters and police cooperation. In other words, this concerns activities of Union bodies/offices/agencies exercised for the purposes of the prevention, detection, investigation, and prosecution of criminal offences. In such circumstances, the provisions of Chapter IX of the Regulation apply as a *lex specialis*.<sup>44</sup>
57. Pursuant to Article 86 of the EBCG Regulation, Frontex must apply the general rules of the Regulation when processing personal data. Article 90 of the EBCG Regulation provides however the application of the specific rules of Chapter IX of the Regulation in certain circumstances. The consultation of the DPO aims at determining which chapter(s) (Chapter IX or the others) of the Regulation apply to Frontex when processing personal data in the framework of EUROSUR. In particular, the DPO considers that in general the activities including the processing of personal data under

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<sup>42</sup> Service Catalogue, p.5.

<sup>43</sup> Article 2 (1) of Regulation 2018/1725.

<sup>44</sup> See Recitals 9 to 12 of Regulation 2018/1725.

the framework of EUROSUR would fall under the general rules of Regulation 2018/1725. Only when those activities lead to the discovery of cross-border crime, those activities would fall under Article 90 of the EBCG Regulation and thus Chapter IX of Regulation 2018/1725 would be applicable. The DPO is asking whether this approach complies with the EBCG Regulation.

58. As already concluded in previous opinions<sup>45</sup> and in his audit report of 24 May 2023<sup>46</sup>, the EDPS recalls that 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.
59. First, according to the Court's settled case-law, the choice of legal basis for a Community measure must rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure.<sup>47</sup> If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.<sup>48</sup> Exceptionally, if on the other hand it is established that the act simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will have to be founded on the various corresponding legal bases.<sup>49</sup>
60. EUROSUR was established by Regulation 1052/2013<sup>50</sup>, which is based on Article 77 (2) (d) of the TFEU, as a measure necessary for the gradual establishment of an integrated management system to support the efficient monitoring of the crossing of external borders. EUROSUR has then been further developed and encompassed in the EBCG Regulation which establishes Frontex and whose legal basis also include Article 77(2)(b) (i.e. checks to which persons crossing external borders are subject) and Article

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<sup>45</sup> EDPS supervisory Opinion of 7 June 2022 on the rules of processing operational personal data by the European Border and Coast Guard (Frontex) (Case 2022-0147) and EDPS supervisory Opinion of 11 May 2023 on the processing of personal data relating to 'associates' and 'contacts' as categories of data subjects processed by the European Border and Coast Guard (Frontex) for the purposes of identifying suspects of cross-border crime pursuant to Article 90 of Regulation (EU) 2019/816 (Case 2023-0118).

<sup>46</sup> Case 2022-0749.

<sup>47</sup> See Case C-178/03 Commission v Parliament and Council, paragraph 41, and Case C-155/07 Parliament v Council [2008] ECR I-0000, paragraph 34

<sup>48</sup> See Case C-178/03 Commission v Parliament and Council, paragraph 42, and Case C-155/07 Parliament v Council, paragraph 35

<sup>49</sup> See Case C-211/01 Commission v Council [2003] ECR I-8913, paragraph 40, and Case C-178/03 Commission v Parliament and Council, paragraph 43

<sup>50</sup> Regulation N°1052/2013 of the European Parliament and of the Council establishing the European Border Surveillance System (Eurosir), OJ, 06.11.2023, L 295, pp11-26.



79(2)(c) (i.e. illegal immigration and unauthorised residence, including removal and repatriation of persons) of the TFEU.

61. The EDPS notes that in accordance with the case law cited above, the legislator has decided to rely on provisions of the TFEU that relate to asylum, border checks and migration only. He therefore concludes that it is clear from the explicit choice of the legal bases of the TFEU for the EBCG Regulation, which encompasses EUROSUR, that border management is the predominant purpose while activities related to the detection, prevention and combating of cross-border crimes are incidental.
62. Second, the EDPS notes that pursuant to Article 90 and Recital 41 of the EBCG Regulation, the legislator considers that, given its activities at the EU external borders, Frontex should *contribute* to prevent and detect cross-border crimes directly linked to unauthorised crossing of the external borders where it is appropriate for it to act and where it had obtained relevant information through its activities. This can be done only in the framework of cooperation with Europol and Eurojust and when providing support to national authorities in their tasks of detection, prevention and combating of serious cross-border crimes. To this end, the legislator authorises Frontex to process operational personal data collected while monitoring migratory flows, carrying out risk analysis or in the course of operations for the purpose of identifying suspects of cross-border crime. It also defines the data protection rules applicable to such processing in Article 90 EBCG Regulation, which refers to Chapter IX of the Regulation.
63. Any activities by Frontex outside the areas of asylum, border checks and migration must thus be considered as merely incidental. It is against this background that Article 90 of the EBCG Regulation must be interpreted. The EDPS also notes that Recital 41 of the EBCG Regulation refers to relevant information obtained by Frontex through its activities at the external borders and Article 90 of the same Regulation to personal data collected by Frontex while performing border management tasks.
64. Consequently, Frontex cannot conduct activities aiming at the collection of personal data for the sole purpose of Article 90 of the EBCG Regulation. Only data collected for the purposes of its border management tasks, i.e. monitoring migratory flows, carrying out risk analysis or in the course of operations, can be further used for the specific purpose of Article 90 EBCG Regulation.
65. In light of the above, the EDPS considers that **the processing of personal data within the framework of EUROSUR falls under the general rules of Regulation 2018/1725. Only if, incidentally, personal data processed for EUROSUR purposes would reveal information that would fall under the scope of Article 90 EBCG Regulation, such data should be processed according to the provisions of this article and of Chapter IX of Regulation 2018/1725. Such**

**information is limited to personal data that would support Europol, Eurojust and Member States' needs in their fight against cross-border crimes, more particularly for the identification of suspects.**

## **4. CONCLUSIONS**

66. On the question if ships and aircraft identification numbers are personal data, the EDPS is of the opinion that they are personal data, as expressly stated by the legislator in Article 89 of the EBCG Regulation.
67. On the issue of controllership, the EDPS is of the opinion that the Member State is the controller for the national situational picture and Frontex the controller for the European situational picture. Frontex is controller for the specific situational picture it establishes and maintains. If Frontex and Member States maintain and establish a specific situational picture together and jointly further determine its purpose and means, they are joint controllers. As regards the EUROSUR fusion services, Frontex is acting as a controller (i) when processing personal data derived from the EUROSUR fusion services for the transmission of such data to the Member States at their request pursuant to Article 28 (1) of the EBCG Regulation and (ii) when using the EUROSUR fusion services for collecting information that is relevant for the European situational picture in accordance with Article 28 (4) of the EBCG Regulation.
68. On the applicable data protection framework, the EDPS is of the opinion that processing of personal data for the purposes of EUROSUR falls under the general rules of the Regulation, i.e. outside Chapter IX. Chapter IX of the Regulation only applies when personal data collected by Frontex in the framework of EUROSUR are used for the specific purpose of cooperation with Europol, Eurojust and/or of support to Member States' competent authorities provided in Article 90 of the EBCG Regulation.

Done at Brussels on 20 February 2024

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI