



Formal comments of the EDPS on the Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action 98/700/JHA, Regulation (EU) 1052/2013 of the European Parliament and of the Council and Regulation (EU) 2016/1624 of the European Parliament and of the Council

1. Introduction and background

The present formal comments follow a consultation of the EDPS by the European Parliament on 7 November 2018, following a request from the Chair of the Committee on Civil Liberties, Justice and Home Affairs, in accordance with Article 46(d) of Regulation (EC) No 45/2001 (hereinafter, ‘the Regulation’)¹ on the proposal for a Regulation on the European Border and Coast Guard adopted by the Commission on 12 September 2018 (hereinafter, ‘the Proposal’)². Given the short deadline requested by the Parliament, the present comments focus on the most important aspects and are without prejudice to further inputs that the EDPS may decide to provide at a later stage.

The EDPS welcomes that he has been consulted by the Parliament. Given the numerous references in the Proposal to the Regulation and its impact in terms of data protection, the EDPS **regrets not having been consulted** by the European Commission, either formally or informally.

The main objectives of the Proposal is to increase the ‘**operational capacity**’ of the European Border and Coast Guard (hereinafter, ‘the EBCG’) in terms of expanded operational competences, and increase in budget, staff and equipment. It would also replace the legal act establishing the EBCG, namely Regulation (EU) 2016/1624³ that entered into force on 6 October 2016.

We point out, in particular, to the following novelties to be introduced by the Proposal:

- the Proposal incorporates the “framework for information exchange and cooperation between the Member States and the Agency”, “**EUROSUR**” under the legal act establishing the EBCG (Articles 18-29), repealing the EUROSUR Regulation⁴;

¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, L8 of 12.1.2001.

² Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, COM(2018) 631 final.

³ Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, L251 of 16.9.2016.

⁴ Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur), L295 of 6.11.2013.

- under Article 37(7), the EBCG would participate in the deployment of migration support teams in “**hotspots**”, as well as in “**controlled centres**” (defined under Article 2(24));
- concerning **returns** (Articles 49-54), the EBCG may **prepare itself “return decisions”** (even though the Proposal specifies that the final decision on the return would be taken by the competent Member State) and provide “return teams” (Article 53);
- the EBCG “**standing corps**”⁵ would have **executive powers** similar to the border guards and return specialists of the Member States (Article 55(3)), and would be made up of “permanent, fully trained staff of the Agency that can be deployed at any time anywhere”⁶;
- there would be a new “**rapid border intervention**” procedure (Article 40);
- in the context of “migration management support teams” (Article 41), the EBCG may assist the competent authorities in the screening of third country nationals, acquisition of travel documents and other tasks;
- the EBCG may launch border control operations pursuant to Article 43 (Situation at the external borders requiring urgent action).

It is already apparent from this first overview of the novelties brought by the Proposal that the **accrued executive powers**, the **new operational mandate**, and the **direct control** on deployed personnel and equipment by the EBCG would trigger a **key change** also in terms of EBCG’s responsibilities and obligations pursuant to the applicable data protection law, namely Regulation (EU) 2018/1725, that will enter into force on 11 December 2018 and replace the Regulation 45/2001 (hereinafter, ‘Regulation 1725’)⁷.

Considering the complexity and the impact of the Proposal on the overall system of migration management (also in terms of financial implications) and on fundamental rights, the EDPS **regrets** that the Proposal has not been accompanied by an **impact assessment** by the Commission in accordance with its ‘Better Regulation’ methodology⁸. Since the Proposal is not accompanied by such **assessment**, it is not possible to fully assess and verify its attended benefits and impact, notably on fundamental rights and freedoms, including the right to privacy and to the protection of personal data.

2. Comments

2.1. Preliminary remarks

As a preliminary remark, the EDPS observes that many of the comments already made on previous occasions⁹ having regard to the ‘to be repealed’ Regulation (EU) 2016/2024 remain valid, and even increased in importance in the context of the Proposal, notably in relation to:

- (i) the (lack of clear) **allocation and definition of responsibilities** between the EBCG and the Member States; and

⁵ “Standing corps of 10 000 operational staff”, referred to under Article 5(2).

⁶ See at page 5 of the Explanatory Memorandum.

⁷ Regulation (EU) 2018/1725 of the European Parliament and of 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, L 295, 21.11.2018.

⁸ Commission staff working document, “Better Regulation Guidelines”, SWD(2017)350, 7 July 2017.

⁹ EDPS Opinion 02/2016, “EDPS’ recommendations on the proposed European Border and Coast Guard Regulation”, available at: https://edps.europa.eu/sites/edp/files/publication/16-03-18_ebcg_en.pdf

(ii) the (lack of clear) identification of and distinction between the **purposes** of the data processing (border control, security, police and judicial cooperation).

In addition, and as the first and foremost concern, the EDPS notes that this initiative (relating to the establishing legal act of the EBCG) would affect (and may not always be consistent with) the relevant (administrative) substantial rules and procedures set out in other EU legal instruments (in particular, the regulation on the Visa Information System¹⁰; the ‘recast Eurodac Regulation’¹¹; the ‘Asylum Procedures Directive’¹²; the ‘Return Directive’¹³).

Pushing it to the extreme for the sake of clarity, a ‘reversed’ legislative roadmap/methodology (‘front-loading’ the revision of the legal acts establishing the EU bodies in charge of applying the procedures, instead of reviewing the relevant procedures first) may lead to situations of uncertainty on: ‘*who does what*’; ‘*according to which procedure*’; on the conditions and limits for the exchange and processing of personal data with other EU Agencies, Member States and third Countries; on the *remedies* available to the persons concerned. This would ultimately adversely affect the rights and freedoms of these persons, including their right to privacy and to the protection of personal data.

This ‘reversed roadmap’ may also be detrimental to the requirement of the ‘quality of the law’¹⁴, which is of paramount importance for all cases of measures limiting the rights enshrined under Articles 7 and 8 of the Charter of Fundamental Rights of the EU (hereinafter, ‘the Charter’) and Article 16 of the Treaty on the Functioning of the EU (hereinafter, ‘the TFEU’).

Hence, the EDPS recommends to **reassess the relevant provisions of the Proposal** to ensure **consistency with the currently applicable EU legislation**, in particular on Asylum and Return procedures.

¹⁰ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), L218, 13.8.2008, see Article 31 “Communication of data to third countries or international organisations.”

¹¹ Proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM/2016/0272 final, see (new) Article 37 “Prohibition of transfers of data to third countries, international organisations or private entities.”

¹² Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, L180, 29.6.2013, laying down the applicable procedure and guarantees for the persons concerned.

¹³ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, L348, 24.12.2008.

¹⁴ On this notion, the criteria developed by the European Court of Human Rights (ECtHR) should be used as suggested in several cases and opinions of the Court of Justice of the European Union (CJEU), see for example Advocate General Opinions in joined cases C-203/15 and C-698/15, *Tele2 Sverige AB*, paragraphs 137-154; C-70/10, *Scarlet Extended*, paragraphs 88-114; and C-291/12, *Schwarz*, paragraph 43. This approach is followed in the General Data Protection Regulation, Recital 41: “Such [a legal basis or] legislative measure should be **clear** and **precise** and its application should be **foreseeable to persons subject** to it, in accordance with the case-law of the Court of Justice of the European Union (the ‘Court of Justice’) and the European Court of Human Rights.”

2.2. Allocation and definition of responsibilities for the processing of personal data

The Proposal brings forward the shift of the EBCG towards an *operational* (as opposed to ‘merely strategical/programming’) role. The observation made by the EDPS in his Opinion 02/2016, relating to the lack of clarity regarding the **respective responsibilities of the EBCG and of Member States** for the processing of personal data, which is essential, from a data protection viewpoint, for the attribution of the responsibilities of ‘controller’, become even more relevant having regard to the Proposal.

Article 5(3) lays down that “the Agency shall facilitate and **render more effective** the application of existing and future Union measures relating to the management of the external borders and return, in particular the Schengen Borders Code established by Regulation (EU) 2016/399.” (*emphasis added*).

The new Article 7 on ‘Shared responsibility’ (corresponding to Article 5 of the currently applicable EBCG legal basis) emphasises the **operational** dimension of the EBCG involvement: on the one hand, it reaffirms the rule according to which Member States shall retain the responsibility for the management of their sections of the external borders and for issuing return decisions and measures pertaining to the detention of returnees (Article 7(1) and (2)); on the other hand, the Proposal lays down that the Agency shall provide technical and operational assistance in the implementation of measures relating to the enforcement of return decisions and the management of the external borders (Article 7(2) and (4)).

In addition, the Proposal provides (under Article 10(10)) for **joint operations** of the EBCG and the competent authorities of the Member States. Moreover, according to the Proposal, the EBCG can deploy “return teams” at the request of a Member State or on its own initiative (pursuant to Article 53).

This increased operational capability by the EBCG with the participation of one or more Member States may lead to an increased risk of a **‘blurring of accountability’** between the EBCG and the Member States. For example, Article 49(1)(a) specifies that the EBCG shall **‘prepare’ the return decision**, without further clarifying the extent of this ‘drafting power’. This may lead to uncertainties relating to the data protection obligations (identification of ‘controller’) and, ultimately, to the identification of the entity *towards whom* the person concerned shall exercise his or her data protection rights (for example, of rectification).

Likewise, the **‘integration’ of EUROSUR** in the Proposal also does not lead to a clearly specified set of applicable rules and the allocation of responsibilities between the EBCG and the Member States is unclear (see paragraph 6 of these comments).

A novel, and particularly serious concern, relates to the **‘executive powers’** of the EBCG’s statutory staff members of the standing corps¹⁵. The EDPS considers that in most cases under

¹⁵ The Explanatory Memorandum of the Proposal refers to such powers at page 7, “The essential feature of this new approach is the inclusion of **the Agency’s statutory staff as members of the European Border and Coast Guard standing corps** having all the necessary powers to carry out border control and return tasks, including the tasks requiring executive powers. Article 77(2) (d) of the Treaty on the Functioning of the European Union (TFEU) provides that the Union shall adopt any measure necessary to the gradual establishment of an integrated management system for external borders. This provides the legal basis to confer powers of law enforcement to the agents acting on behalf of the Union when conducting the tasks related to the introduction of an integrated management system for external borders. However, such powers and tasks should be clearly defined to match the objective of the establishment of an integrated management system for external borders. Therefore, the list of such tasks is part of the proposal. The Agency’s staff under Category 1 would be a new type of EU staff within

the new regulatory framework provided by the Proposal the EBCG staff concerned would not act ‘under the authority of and on behalf of’ a Member State, but under the **full and direct responsibility** of the EBCG. It is thus clear that the latter -as a rule, to be verified under the different scenarios- can be considered the ‘controller’ for the data processing activities performed by its standing corp in its executive capacity.¹⁶ Nonetheless, also in this case, that is having regard to the activities of the EBCG standing corps acting in the exercise of executive powers, the responsibilities of the EBCG and of the (host) Member States are **not clearly defined**¹⁷.

Given the increase in the operational activities to be performed by the EBCG, and the associated increase in terms of EBCG’s direct responsibilities, the EDPS considers that **all** (each and every) activities should be **clearly** specified having regard to: (i) the **responsible entity** (the EBCG, the Member States, the third Countries, international organization); (ii) the **applicable data protection law** (Regulation 1725 vs the General Data Protection Regulation or the Law Enforcement Directive); (iii) the data protection **supervision** system (the competent data protection authorities responsible, alone or jointly, for the oversight of the data processing).

2.3. Purposes of the EBCG’s activities pursuant to the Proposal

The EDPS considers that the issue of ‘**mixed purposes**’ pursued by the legislative initiative already flagged in his Opinion 02/2016 is also relevant for the Proposal. In fact, the Proposal adds to the border management and to the police and justice dimension, the objectives of the ‘integrated’ EUROSUR Regulation, as well as the ones pertaining to the “Common Security and Defence Policy”¹⁸.

the Agency on which executive powers are conferred, **including the use of force**, when acting as team members deployed from the European Border and Coast Guard standing corps.” (*emphasis added*).

Even though this not *stricto sensu* a data protection issue, the EDPS points out to the **necessity of clear, detailed and exhaustive definition - in the legislation - of these powers**; of the **tasks** for which the powers would be used; under which **circumstances**; and the **applicable safeguards** for the individuals concerned.

Annex II of the Annexes to the Proposal provides the “**list of tasks** to be carried out by the Agency’s statutory staff as team members deployed from the European Border and Coast Guard standing corps and requiring executive powers”, listing nine tasks, but does not always specify for each task the **conditions and limits** (pursuant to which EU law the tasks shall be performed by the EBCG) and the applicable **safeguards**.

Annex V details “**Rules on the use of force, including the supply, training, control and use of service firearm weapons and non-lethal equipment applicable to the Agency’s statutory staff when acting as team members during their deployment from the European Border and Coast Guard standing corps**”. The provisions contained in the Annex seriously impact the persons concerned. Some of them have more direct data protection relevance (for instance, on reporting). In any case, the EDPS cannot refrain from pointing out in this regard: (i) that such “rules” should be included in the legal text of the Proposal rather than in one of its annexes; (ii) to difficulties that may arise from the application of the rules on the use of force following “the receipt of authorization from the competent authorities of the host member State”; (iii) to the need for clear and complete set of safeguards for the persons affected by the use of force by the EBCG, in particular having regard to the possibility of review and redress.

¹⁶ As referred to at page 15 of the Explanatory Memorandum, the Proposal introduces “the concept of operational staff of the European Border and Coast Guard standing corps as being border guards, return escorts, return specialists and other relevant staff. They would be deployable in the framework of three types of teams: border management, return and migration management support.” Moreover, “in view of deployment of teams from the European Border and Coast Guard standing corps in the territory of third countries, the Agency should develop the capabilities for their own command and control structures.”

¹⁷ See for instance the rules on the use of force by EBCG standing corps, under Annex V to the Proposal, allowing the use of force “following the receipt of authorization from the competent authorities of the host member State”.

¹⁸ Article 69(1)(k). In this regard, we point out that, as specified in the ‘Regulation 1725’ (recital 15), (the Regulation 1725) should apply to the processing of personal data by Union institutions, bodies, offices or

In this regard, we stress that the differentiation between purposes is also needed to identify **the applicable data protection law** (that is, the ‘General Data Protection Regulation’¹⁹ or the ‘Law Enforcement Directive’²⁰).

Furthremore, we point out that a clear indication of the scope, extent and level of intrusiveness of the proposed measure having regard to **each distinct purpose** (objective) pursued is needed to assess the **necessity and proportionality** of the measure at stake.

We note that the purposes of the processing of personal data by the EBCG are (exhaustively) listed under Article 88. These purposes relate to: migration operations; return operations; “facilitating” the exchange of information with Member States, EASO, Europol or Eurojust in cases described under Article 89; risk analysis; identifying and tracking vessels in case described under Article 90; administrative tasks. Article 88(2) specifies that: “A Member State or other Union agency providing personal data to the Agency shall determine the purpose or the purposes for which those data shall be processed as referred to in paragraph 1. The Agency may process such personal data for a **different purpose** which also falls under paragraph 1 only if authorised by the provider of the personal data.”

Given the broad array of purposes included in Article 88(1), ranging from administrative tasks to return activities and facilitation of information exchanges with Europol, the EDPS has concerns on the processing for a purpose other than that for which the personal data have been collected. Hence, in case of processing of personal data pursuant to the aforesaid Article 88(2), the EDPS recommends, as possible safeguard, that the EBCG performs and keeps written record of a case-by-case ‘compatibility assessment’.²¹

With specific reference to **Article 29** (EUROSUR Fusion Services), we note that this Article does **not** clearly specify the purpose of the processing operations, while allowing the collection and processing by the EBCG of manifold types of information (not ruling out the processing of *personal* data in the context of such broad processing). Under Article 29(2)(g), the Proposal refers to the purpose of “preventing illegal immigration or cross border crime”; under letter (f), to the monitoring of migratory flows (hence, an ‘administrative purpose’); under letters (a) to (c) and (e), reference is made again to “illegal immigration²² or [sic] cross-

agencies carrying out activities which fall within the scope of **Chapter 2 of Title V** of the Treaty on the European Union (TEU). This Regulation should **not** apply to the processing of personal data by missions referred to in Articles 42(1), 43 and 44 TEU, which implement the **common security and defence policy**. Where appropriate, relevant proposals should be put forward to further regulate the processing of personal data in the field of the common security and defence policy.”

¹⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119 of 4.5.2016.

²⁰ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, L119 of 4.5.2016.

²¹ See EDPS Opinion 02/2016, at pages 12-13: “changing the purpose of processing among those listed in Article 45(1) based on the agreement of the source of information might not be in line with the purpose limitation principle if the further purpose(s) of processing is not compatible with the initial one(s). Indeed, processing personal data of refugees in a migration context is not automatically compatible with their use for the fight against terrorism. The compatibility of purpose(s) defined subsequently should be assessed on a case-by-case basis.”

²² We recall that “illegal” (*rectius*, irregular) migration is not a criminal offence (contrary, for example, to the ‘facilitation of irregular migration’) but an administrative infraction. The wording “illegal immigration or crime” is misleading since it suggests the assimilation of irregular migration to crime and should therefore be avoided.

border crime”. This Article, in its current text, is an example of difficult -if not impossible- applicability of the **necessity and proportionality** tests²³ due to the **unclear definition** of the purpose of the measure. The unclear definition of the purposes is also reflected in the unclear and incomplete reference to the **applicable data protection law** (Article 29 refers to the applicability of the Law Enforcement Directive under Article 29(2)(g), but does not refer to the General Data Protection Regulation, even though this may also be applicable in the context of the EUROSUR Fusion Services’ activities).

Further example of unclear definition of the specific **purpose(s)** of the processing (as well as of the (categories of) **personal data** to be processed), is Article 50 (Information exchange systems and management of return), according to which the EBCG “shall set up, operate and maintain a **central system** for processing **all information and data, automatically communicated by the Member States’ national return management systems, necessary** for the Agency to provide technical and operational assistance in accordance with Article 49”, and “develop, deploy and operate information systems and software applications allowing for the exchange of (...) information for the purpose of return within the European Border and Coast Guard and for the purpose of exchanging personal data referred to in Articles 87-89” (we already stressed the lack of adequate purpose definition under Article 88; the same consideration applies to the range of purposes (“cases”) referred to under letters (a)-(e) of Article 89(2)).

As ‘horizontal’ recommendation, applicable in particular to the aforesaid Article **29** (EUROSUR Fusion Services) and **50** (Information exchange systems and management of return), but to be streamlined **throughout the whole Proposal**, the EDPS, in accordance with consolidated case law of the Court of Justice of the European Union²⁴, urges the legislator **to exhaustively list the categories of data that can be collected and used by the EBCG in relation to each specified purpose**, as well as the **conditions and limits for the data processing, the access regimes, the applicable data retention periods**.

2.4. Cooperation of the EBCG with other EU institutions and bodies

Article 69, under Sub Section 1 of Section 11, refers to the cooperation of the EBCG with Union institutions, bodies, offices, agencies, and international organisations. As a first remark, we reiterate the recommendation made in the EDPS Opinion on the currently applicable EBCG Regulation: “With regard to cooperation with international organisations, Article 51 (corresponding to Article 69 of the Proposal) addresses in **one single provision** the cooperation of the Agency with the EU institutions, agencies, bodies and offices **and with international organisations**. The EDPS considers that addressing cooperation with these entities in the same provision may lead to confusion, as EU institutions, agencies and bodies are **not** subject to the same transfer rules as international organisations²⁵. The wording of this provision may therefore create legal uncertainty. (...) Therefore, we recommend clarifying this

²³ On the ‘necessity test’, see EDPS “Necessity toolkit on assessing the necessity of measures that limit the fundamental right to the protection of personal data”, available at:

https://edps.europa.eu/data-protection/our-work/publications/papers/necessity-toolkit_en

²⁴ See the Opinion of the Advocate General on the the draft Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, Opinion 1/15. Critical aspects highlighted by the Court relate to: (i) the identification of the competent authority responsible for processing the data; (ii) automated processing (lack of safeguards identified at paras. 258-260); (iii) conditions for access to retained data by law enforcement authorities; (iv) data retention period; (v) disclosure and transfer of data; (vi) oversight by an independent authority. The aforesaid requirements are also recurring in cases *Digital Rights*, *Tele2* and can hence be considered established principles of EU law.

²⁵ Specific rules for transfers of personal data to third countries and international organizations are laid down in ‘Regulation 1725’ under Chapter V.

paragraph and the provision as such, preferably by dividing it in **two distinct articles to address cooperation among EU entities and with international organisations separately.**" Hence, we recommend addressing the issue of transfers to **international organizations** under **Sub Section 2, "Cooperation with third Countries",** instead of under Sub Section 1, "Cooperation within the EU".

Article 69(1) provides a *non exhaustive* list of "Union institutions, bodies, offices and agencies, and international organisations", including: (a) the Commission and the European External Action Service; (b) the European Police Office (Europol); (c) the European Asylum Agency; (d) the European Union Agency for Fundamental Rights; (e) Eurojust; (f) the European Union Satellite Centre; (g) the European Maritime Safety Agency and the European Fisheries Control Agency; (h) the European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice; (i) the European Aviation Safety Agency and the Network Manager established under the Regulation (EU) No 677/2011 laying down detailed rules for the implementation of air traffic management (ATM) network functions; (j) the Maritime Analysis and Operations Centre - Narcotics (MAOC-N); (k) Missions and operations of the Common Security and Defence Policy (hence, CSDP missions').

Specifically, on transfers pursuant to Article 69(1)(k), the EDPS has **strong reservations regarding the exchange of personal data by the EBCG with CSDP missions.** In particular, we consider that the risks for the individuals arising from the exchange of personal data between entities serving different purposes are further increased by the current **absence of general data protection framework applicable to the CSDP missions**²⁶. The *ad hoc* data protection rules provided in the context of these missions (for each mission) usually do not qualify as a robust data protection framework.

Hence, we recommend addressing the issue of the EBCG's cooperation with CSDP missions under a **dedicated legal instrument**, proving among others for data protection rules ensuring an adequate level of protection of the fundamental rights at stake, including the right to privacy and to the protection of personal data.

Article 69(2) specifies that cooperation of EBCG with such,regrettably, not exhaustively identified,EU bodies and international organizations shall take place within the framework of **working arrangements** to be concluded by the EBCG following **the Commission's approval.**

In this regard, the EDPS recalls that according to Article 41 (Information and consultation) of the 'Regulation 1725' "The Union institutions and bodies shall inform the European Data Protection Supervisor when drawing up administrative measures and internal rules relating to the processing of personal data by a Union institution or body, whether alone or jointly with others."

Article 69(5) further elaborates that: "**Onward transmission or other communication** of personal data processed by the Agency to other Union institutions, bodies, offices and agencies shall be subject to **specific working arrangements** regarding the exchange of personal data and **subject to the prior approval** of the European Data Protection Supervisor." This provision is unclear: it seems that, prior to the onward transfer, the EBCG should: (a) stipulate a specific working arrangement; (b) obtain the prior approval by the EDPS on the onward transfer.

In this regard, we consider that, also in terms of workload and administrative efficiency, it would be more suitable that the **EDPS previously approves the working arrangements** (to simplify, regardless of the fact that they provide for onward transfers or not), while it would be for the EBCG to keep track (record) of the onward transfers and of the justification for

²⁶ See footnote 13 of these comments on the non applicability of Regulation (EC) No. 45/2001 (as well as of 'Regulation 1725') to CSDP missions.

such transfers, allowing the EDPS to verify their lawfulness and, in particular, compliance with the principles of necessity and proportionality.

Hence, we recommend to amend Article 69(2) introducing the wording “and the EDPS [prior approval] in so far as the working arrangements concern the exchange of personal data” after “the Commission’s”, and to amend Article 69(5) deleting the wording “and” after “specific working arrangements regarding the exchange of personal data”.

Concerning the **communication network** to be used for the purpose of information exchanges pursuant to Article 69(6), in these formal comments we point out to the legal requirements laid down under Article 33 (on security measures), and 34 and 35 (on data breaches) of the Regulation 1725. The latter is indeed applicable to the “**communication network**” (under Article 14, referred to under the aforesaid Article 69(6)), as well as to the “**information exchange systems and applications managed by the Agency**” (under Article 15 of the Proposal).

In both cases, the EDPS recalls the importance of complying with data protection principles having regard to **all life cycle phases** of the IT systems (from inception to operations and maintenance)²⁷.

2.5. Transfers of personal data to third countries

The Proposal, under SubSection 2 of Section 11 of Chapter II, strengthens the external dimension of the EBCG.

In particular, the EBCG shall **cooperate with third Countries** for the purpose of border management and migration policy, including returns (Article 72); can deploy **border management and return teams to a third Country** where the EBCG standing corps would exert executive powers, subject to the conclusion of a “**status agreement**” with the third Country concerned (Article 74(3)); cooperate with third Countries within the framework of “**working arrangements**” (Article 74(4)); provide technical and **operational assistance to third Countries** (Article 75); **exchange information with third Countries** in the framework of EUROSUR (Article 76); deploy liaison officers in third Countries (Article 78).

As specified under Article 87(3), having regard to the processing of personal data: “The Agency may transfer personal data **to an authority of a third country or to an international organisation** in accordance with the provisions of [Regulation (EC) No 45/2001] insofar as such transfer is **necessary** for the performance of the Agency’s tasks **in the area of return activities.**”

In order to ensure consistency, the EDPS recommends amending this provision so as to cover **all EBCG’s activities listed under the aforesaid Sub Section 2** in so far as they imply the transfer of personal data to third Countries (that is, not limiting it to return activities). The EDPS’ drafting suggestion is to **delete the wording “in the area of return activities”** in Article 87(3).

We also point out that the transfers of personal data by the EBCG to third Countries or international organizations are be subject in particular to the following provisions of the ‘new Regulation 1725’:

- Article 46 (General principle for transfers)²⁸;

²⁷ See “EDPS guidelines on the protection of personal data in IT governance and IT management of EU institutions”, March 2018, available at:

https://edps.europa.eu/sites/edp/files/publication/it_governance_management_en.pdf

²⁸ “Any transfer of personal data which are undergoing processing or are intended for processing after transfer to a third country or to an international organisation shall take place only if, subject to the other provisions of this

- Article 47 (Transfers on the basis of an adequacy decision): in case of transfers to so-called **adequate Countries**;

- Article 48 (Transfers subject to appropriate safeguards). According to this Article, in case of ‘structural’ transfers to non-adequate Countries, the EBCG could rely in particular upon:

- (i) a legally binding and enforceable instrument between public authorities or bodies;
- (ii) standard data protection clauses;
- (iii) provisions to be inserted into **administrative arrangements** between public authorities or bodies which include enforceable and effective data subject rights, subject to the authorisation from the EDPS.

In this regard, the EDPS considers that -in so far as they provide for the transfer of personal data- **status agreements** and **working arrangements** between the EBCG and the third Countries (as **administrative arrangements** between public authorities including data protection safeguards) should be subject to the **prior authorization by the EDPS**. We recommend including a provision in this regard under Article 74.

We note that Article 90(5) specifies that “**Onward transmission** or other communication of information exchanged under Article 73(2), Article 74(3) and Article 75(3) to other third countries or to third parties shall be prohibited.”

We consider that this provision leaves uncertainty on whether and in which cases (falling outside of the -unspecified- “framework of EUROSUR”) the “onward transmission or other communication of information exchanged under Article 73(2), Article 74(3) and Article 75(3) to other third countries or to third parties” remains possible, and on the exact identification of the “third parties” referred to.

The EDPS recommends to better define **the scope** of the prohibition of onward transmission and the “**third parties**” referred to under Article 90(5).

Similarly, as example of **unclear scope** of application of the rule, we note that according to Article 90(4): “Any exchange of information under Article 73(2), Article 74(3) and Article 75(3) which provides a third country with information that could be used to identify persons or groups of persons whose request for access to international protection is under examination or who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be **prohibited**.” Also in this case, it is unclear whether the prohibition only applies in the framework of EUROSUR or, as we strongly recommend, is an **absolute prohibition**.

The EDPS recommends to clarify the scope of the prohibition under Article 90(4), making clear that it applies to **any exchange** of information with third Countries.

As a more general issue, applying to all transfers of personal data to third countries, but especially in the context of the implementation of policies on migration and asylum, the EDPS considers that a ‘**fundamental rights assessment**’ (on the level of compliance with fundamental rights by the third country, including the assessment of the ‘level of data protection’ of the third Country) should always be performed by the EBCG before the latter engages in any **operational** cooperation with third countries²⁹.

Regulation, the conditions laid down in this Chapter are complied with by the controller and processor, including for onward transfers of personal data from the third country or an international organisation to another third country or to another international organisation. All provisions in this Chapter shall be applied in order to ensure that the level of protection of natural persons guaranteed by this Regulation is not undermined.”

²⁹ See, in this regard, the EDPS Opinion 2/2018, “EDPS Opinion on eight negotiating mandates to conclude international agreements allowing the exchange of data between Europol and third countries”, available at:

https://edps.europa.eu/sites/edp/files/publication/18-03-19_opinion_international_agreements_europol_en.pdf

At page 15, the EDPS, with reference to Europol, but with conclusions applicable, *mutatis mutandis*, to the EBCG, specifies: “The necessity and proportionality of the international agreements envisaged to allow (Europol) to regularly transfer data to the competent authorities of the eight third countries in question need to be

The EDPS recommends inserting a provision regarding the aforesaid ‘fundamental rights assessment’ under SubSection 2 (Cooperation with third Countries) of Section 11 (Cooperation) of Chapter II (Functioning of the European Border and Coast Guard) or under Section 1 (General rules) of Chapter IV (General provisions).

2.6. EUROSUR

The Proposal repeals the EUROSUR Regulation³⁰ and incorporates (reinstates) parts of the provisions of the latter under Articles 18-29 Section 3 of Chapter II [namely, subject matter; scope (further expanded under the Proposal); components; situational awareness; EUROSUR Handbook]. It adds a specific article on ‘EUROSUR Fusion Services’ (Article 29, referred to under paragraph 2.3 of these comments). Specific rules on the processing of personal data are laid down under Article 90.

In his formal comments on the currently applicable EUROSUR Regulation³¹, the EDPS noted that “EurosUR is meant to facilitate the exchange of information between authorities in charge of border surveillance, FRONTEX, and in certain cases third countries, in order to increase situational awareness and reaction capability. Collecting and exchanging personal data is explicitly not an aim of the system. However, it may occur under certain circumstances. The explanatory memorandum is clear on the fact that processing of personal data is supposed to be the exception, stating on page 2 that *“In exceptional cases personal data may form part of the data shared by Member States with the Agency, provided that the conditions of Regulation (EC) No 2007/2004 of 26 October 2004 are met. To the extent personal data forms part of the national situational picture of neighbouring external border sections, it may be exchanged between neighbouring Member States only, under the conditions set by the horizontal EU legal framework on data protection”*. However, the provisions of the Proposal seem to leave more room.”

The **processing of personal data** with regard to EUROSUR is referred to in particular under Articles 29 and 90. The EDPS expects, as a consequence of the ‘incorporation/embedding’ of the EUROSUR framework for cooperation under the Proposal³² (see Article 69(1)³³, as well

fully assessed to ensure compliance with Article 52(1) of the Charter. To allow such an in depth assessment on a case-by-case basis, the EDPS recommends to **further narrow down and differentiate the needs for transfers** based on the **particular situation of each third country** and the **reality on the ground**. The **scope** of each international agreement and the **purposes** for transfers to each third country should be further specified accordingly in the Annexes. The EDPS recommends further carrying out **impact assessments to better assess the risks posed by transfers of data to these third countries for individuals’ rights to privacy and data protection, but also for other fundamental rights and freedoms protected by the Charter**, in order to define the precise safeguards necessary.” (emphasis added).

³⁰ EUROSUR Regulation, referred to under footnote no. 4.

³¹ EDPS comments on the proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) (COM(2011)873 final), available at:

https://edps.europa.eu/sites/edp/files/publication/12-02-08_eurosur_en.pdf

³² As specified by the Explanatory Memorandum to the Proposal (at page 6), “The EUROSUR Regulation adopted in 2013 established a framework for cooperation and information exchange between the Member States and the Agency but this framework is currently limited to the surveillance of sea and land borders. By **merging the two Regulations**, the proposal combines both the tasks of the Agency and the role that the Member States authorities must play in the functioning of the European Border and Coast Guard.” See also at page 9, “In order to better support the different components of Integrated Border Management, the scope EUROSUR will evolve from border surveillance to border control including the reporting on secondary movements and air borders. EUROSUR will be used for border operations and integrated planning. EUROSUR will also improve operational cooperation and information exchange with third Countries and third parties.”

as Articles 73(2), 74(4), 75(3), 76) a significant **increase in terms of processing of personal data** in this context, due to the enhanced dimension of operational cooperation.

The concerns already highlighted with reference to the Proposal as a whole are also a feature of 'EUROSUR', namely:

- (i) the need to **clarify the extent of processing activities** by the EBCG and the Member States (and third Countries) in order to avoid ambiguity as to the **accountability** for the data processing activities;
- (ii) the need to **detail specifically and separately the purposes** pursued in the context of EUROSUR³⁴ (management and control of migration and asylum; countering of crimes).

The lack of **specifications on the purpose** is reflected in the (not consistently made) references to: the Law Enforcement Directive (under Article 29(2)(g)); the General Data Protection Regulation under Article 90(1) and (3). We note in this regard, contrary to Article 90 (which only makes reference to the General Data Protection Regulation), the article of the currently applicable EUROSUR Regulation corresponding to Article 90 of the Proposal (Article 13) makes reference to *both* Directive 95/46/EC (now General Data Protection Regulation) and Framework Decision 2008/977/JHA (now Law Enforcement Directive). Since EUROSUR would also be used in the context of the prevention of cross-border crime, Article 90 should also refer to the applicability of the Law Enforcement Directive.

We recommend inserting under Article 90(3) after "Regulation (EU) 2016/679", the wording "or Directive (EU) 2016/680".

Having regard to **transfers of personal data to third countries** performed by the EBCG in the context of EUROSUR, the same considerations made under paragraph 2.5. of these comments (see *supra*) apply, in particular on the necessity to differentiate between cooperation activities within the EU, on the one hand; and activities with third countries and international organizations, on the other hand.

2.7. Hotspots and controlled centres

As specified by Recital 46: "Member States should be able to rely on **increased operational and technical reinforcement** by migration management support teams in particular at **hotspot areas or controlled centres.**" Recital 47 further elaborates that: "In **hotspot areas**, the Member States should **cooperate with relevant Union agencies which should act within their respective mandates and powers, and under the coordination of the Commission.** The Commission, in cooperation with the relevant Union agencies, should ensure that activities in hotspot areas comply with relevant Union law."

Article 2 provides a definition of 'hotspot' and 'controlled centre' under, respectively, number 23)³⁵ and 24)³⁶. The other provisions of the Proposal refer to both 'hotspot' and 'controlled

³³ Article 69(1): "The Agency shall cooperate with Union institutions, bodies, offices and agencies, and international organisations, within their respective legal frameworks **and make use of existing information, capabilities and systems available in the framework of EUROSUR.**"

³⁴ See EDPS Opinion of 7 July 2011 on the Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on migration. In such occasion, the EDPS stressed the importance of the principles of privacy by design and purpose limitation (par. 44).

The Opinion is available at: https://edps.europa.eu/data-protection/our-work/publications/opinions/migration_en

³⁵ 23) 'hotspot area' means **an area in which** the host Member State, the Commission, relevant Union agencies and participating Member States cooperate, with the aim of managing an existing or potential disproportionate migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders."

centre' mainly as 'geographical' areas where for instance migration management and control, return activities, may take place³⁷.

In this regard, the EDPS points out that the regulation of 'hotspots' (and of the newly introduced 'controlled centres') through a **stand-alone legal instrument**, taking into account the interactions with other relevant EU legal instruments, such as the 'Directive on Asylum Procedures'³⁸ and the 'Reception Conditions Directive'³⁹, may provide a higher level of legal certainty as safeguards for the individuals concerned⁴⁰.

On the contrary, making reference to the (not yet regulated, as specified above) 'hotspots' and 'controlled centres' under the Proposal (whose main purpose is to repeal the EBCG establishing regulation) would not be sufficient to provide a clear identification of the roles and responsibilities of the different EU bodies (EBCG, EASO, Europol, Member States' competent authorities) potentially involved, and therefore of the conditions and limitations for the respective actions.

The concern is that -we exemplify it for the sake of clarity- in a worse-case scenario, the 'location' or 'controlled centre' *in itself* triggers the applicability of a new (unspecified) procedure (for instance, a 'simplified rapid procedure'), not in line with the procedures already in place and regulated under EU law (for example, on the examination of application for international protection).

The principle of 'quality of law'⁴¹, in particular, requires that limitations of fundamental rights (such as the ones that can be imposed in the context of migration and asylum procedures, or for the prevention of cross-border crimes) are established in a specific and clear way at a legislative level. The EDPS considers that **administrative agreements** to be stipulated by the EU Agencies (in this case, the EBCG) with the host Member States or **the**

³⁶ 24) 'controlled centre' means a **centre**, established at the request of the Member State, **where** relevant Union agencies in support of the host Member State and with participating Member States, distinguish between third-country nationals in need of international protection and those who are not in need of such protection, as well as carry out security checks and where they apply **rapid procedures** for international protection and/or return."

³⁷ See Articles 10(1)no.12; 27(3)(c); 27(4); 37(2)(d); 41(1); 43(3)(b); 47(5); 51(7).

³⁸ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, L180, 29.6.2013.

³⁹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, L 180, 29.6.2013.

⁴⁰ In this sense, see, at page 9, the Study for the European Parliament "On the frontline: the hotspot approach to managing migration", 2016. The Study is available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU\(2016\)556942_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU(2016)556942_EN.pdf)

See also the Study (referring to the currently applicable EBCG Regulation) "The proposal for a European Border and Coast Guard: evolution or revolution in external border management?", page 6: "The hotspot approach and its legal and operational framework require prior definition, preferably in a separate legal framework, before making the Agency responsible for its functioning." The Study is available at:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU\(2016\)556934_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556934/IPOL_STU(2016)556934_EN.pdf)

⁴¹ As stated by the CJEU in the Opinion of the Advocate General on the draft Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data, Opinion 1/15, at para. 193: "According to the case-law of the ECtHR, that expression requires, in essence, that the measure in question be **accessible and sufficiently foreseeable**, or, in other words, that its terms be sufficiently clear to give an adequate indication as to the circumstances in which and the conditions on which it allows the authorities to resort to measures affecting their rights under the ECHR."

The Advocate General in his Opinion on the Tele2 case, at para. 139-140, further elaborates that: "According to that body of case-law, the expression 'provided for by law' means that the legal basis must be adequately accessible and foreseeable, that is to say, **formulated with sufficient precision to enable the individual — if need be with appropriate advice — to regulate his conduct**. The legal basis must also provide adequate protection against arbitrary interference and, consequently, must define with sufficient clarity the scope and manner of exercise of the power conferred on the competent authorities (the principle of the supremacy of the law). In my view, the meaning of that expression 'provided for by law' used in Article 52(1) of the Charter needs to be the same as that ascribed to it in connection with the ECHR."

monitoring by the Commission (referred to under Recital 47) could not be sufficient to meet this key standard.

We note that the aforesaid considerations, relevant (especially in case of location of such centres in third countries) under a fundamental rights viewpoint, are *also* relevant having regard to data protection principles (lawfulness and fairness of the processing; data quality; purpose limitation; exercise of data subjects' rights).

We therefore urge the Commission to **reconsider, via an in-depth fundamental rights and data protection impact assessment, the implications of the introduction of the references to 'hotspots' and 'controlled centres'** in the Proposal, also ensuring consistency with the procedures (for instance, on return activities) as described under currently applicable EU law.

2.8. On the data subjects' rights and on the complaint mechanism

As stated in the EDPS Opinion 02/2016 on the currently applicable EBCG regulation: "The **fundamental rights of migrants and refugees** must be **fully respected** in this context, **including the right to personal data protection**. Therefore we urge the future Agency and Member States to be as transparent as possible concerning how they process migrants and refugees' personal data, to inform these individuals in a clear manner appropriate to their circumstances, and we recommend the adoption of specific user-friendly procedures to allow data subjects to exercise their rights effectively."⁴²

Compliance with this principle, and full accountability by the EBCG in this respect, is even more crucial having regard to the accrued and 'direct' (own initiative) executive powers conferred on the EBCG by the Proposal.

Having regard to the fundamental right to the protection of personal data, we note that according to Article 87(3): "In application of [Article 25(1)(c)] of [Regulation (EC) No 45/2001]⁴³, [Article 19⁴⁴] thereof shall not apply to the processing of data for the purpose of return by the Agency, for as long as the third country national is **not returned**. The Agency may provide for **internal rules on restricting the application of the rights under [Articles 17⁴⁵ and 18⁴⁶] of [Regulation (EC) No 45/2011] on a case by case basis** as long as the exercise of such right would risk to jeopardise the return procedure."

In this regard, the EDPS notes the following: the data subjects' rights belong to the core essence of the right to the protection of personal data as enshrined in the Charter. Therefore, limitations to data subjects' rights cannot be so extensive and/or intrusive as to devoid them of their basic content.

In the light of the Charter⁴⁷, Article 25 of 'Regulation 1725' provides that any restriction to the data subjects' rights shall:

- (i) be either based on a legal act adopted on the basis of the Treaties or on internal rules of the Union institutions or bodies;
- (ii) respect the essence of the fundamental rights and freedoms and be a necessary and proportionate measure in a democratic society, and
- (iii) imposed in order to safeguard one of the objectives mentioned in the same provision (Article 25 (1)(a)-(i)).

⁴² EDPS Opinion 02/2016, "EDPS recommendations on the proposed European Border and Coast Guard Regulation", page 10.

⁴³ Reference is made in the legal text of the Proposal to the articles of 'Regulation 1725'.

⁴⁴ Article 19: Right to erasure ('right to be forgotten').

⁴⁵ Article 17: Right of access by the data subject.

⁴⁶ Article 18: Right to rectification.

⁴⁷ Article 52 of the Charter provides strict requirements regarding the limitation of the rights recognised thereof.

In line with the case law of the ECtHR regarding the foreseeability of legal acts imposing limitations on fundamental rights⁴⁸, Article 25(2) of the ‘new Regulation 45’ provides for specific elements that shall be contained in the legal act or internal rule restricting data subjects’ rights⁴⁹.

Article 87(3), as further specified under Recital 85, provides for a **significant limitation** of the right of the ‘returnees’ to obtain restriction of the processing until they are returned to their country of origin. The provision does **not** meet the strict requirements stated in Article 25 of ‘Regulation 1725’, for the following reasons:

(i) the restriction applies throughout the ‘return operation’ (until the third country national is returned to its country of origin) and in that sense it **devoids the data subjects’ right of its content**, as the exercise of the right is postponed to a point when it may be ‘meaningless’/no longer usefully exercised (for instance, the ‘return operation’, based on inaccurate personal data, is concluded);

(ii) the provision imposing the restriction **does not include elements** stated in Article 25(2) of the ‘new Regulation 45’, notably **the categories of personal data** for which the data subjects’ right is restricted, that seem necessary in this case to meet the aforementioned requirement of foreseeability.

In light of the above, the EDPS recommends **to delete** in Article 87(3) the wording: “[Article 19⁵⁰] thereof shall not apply to the processing of data for the purpose of return by the Agency, for as long as the third country national is not returned.”; and to add after “The Agency may provide for internal rules on restricting the application of the rights under [Articles 17⁵¹ and 18⁵²] of [Regulation (EC) No 45/2011] on a case by case basis as long as the exercise of such right would risk to jeopardise the return procedure”, the wording: “Such restrictions shall respect the essence of the fundamental rights and freedoms and be necessary and proportionate to the objective pursued, taking into account the risks to the rights and freedoms of the persons concerned.”

Hence, the sentence would read as follows: “In application of Article 25(1)(c) of Regulation (EU) 2018/1725, the Agency may provide for internal rules on restricting the application of the rights under [Articles 19, 17⁵³ and 18⁵⁴] of [Regulation (EU) 2018/1725] on a case by case basis as long as the exercise of such right would risk to jeopardise the return procedure. Such restrictions shall respect the essence of the fundamental rights and freedoms and be necessary and proportionate to the objective pursued, taking into account the risks to the rights and freedoms of the persons concerned.”

⁴⁸ According to the case law of the ECtHR the law must be **sufficiently foreseeable** in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, the authorities are entitled to resort to measures affecting individual’s rights under the European Convention on Human Rights. See indicatively *Fernández Martínez v. Spain* [GC], para. 117.

⁴⁹ Article 25(2) lays down: “In particular, any legal act or internal rule referred to in paragraph 1 shall contain specific provisions, where relevant, as to:

- (a) the purposes of the processing or categories of processing;
- (b) the categories of personal data;
- (c) the scope of the restrictions introduced;
- (d) the safeguards to prevent abuse or unlawful access or transfer;
- (e) the specification of the controller or categories of controllers;
- (f) the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing; and
- (g) the risks to the rights and freedoms of data subjects.”

⁵⁰ Article 19: Right to erasure (‘right to be forgotten’).

⁵¹ Article 17: Right of access by the data subject.

⁵² Article 18: Right to rectification.

⁵³ Article 17: Right of access by the data subject.

⁵⁴ Article 18: Right to rectification.

Regarding Article 87(3), last sentence, enabling the EBCG to provide for **internal rules** restricting the right of access and the right to rectification, the EDPS notes that the EBCG shall comply with the provisions of Article 25 of the ‘Regulation 1725’, thus ensuring that the restrictions adopted meet the strict standards stated thereof, and recommends the EBCG to **consult the EDPS** about these rules before adopting them.

Concerning compliance with fundamental rights, the EDPS welcomes the articles on the **Fundamental rights officer** (Article 107) and on the **complaints mechanism** (Article 108). However, regarding complaints concerning the protection of personal data, we stress that the responsibility and the decision on the complaint shall be the **sole responsibility of the EBCG’s executive director** (and not of the DPO). The legal text of Article 108(6), mentioning that “the executive director shall involve the data protection officer of the Agency” (without further specification) may be misleading in this regard.

Hence, the EDPS recommends to replace the aforesaid wording with the following: “the executive director shall consult the data protection officer of the Agency before taking her or his decision on the complaint”.

3. Conclusions and recommendations

The EDPS has issued these comments taking into account the potentially high impact of the Proposal on the fundamental rights and freedoms of the persons concerned (migrants, persons applying for international protection, persons to whom the return procedure is applied), notably having regard to the right to privacy and to the protection of personal data.

The **main concerns** (as more ‘systemic issues’) and **recommendations** of the EDPS to ensure legal certainty and compliance having regard to the protection of personal data relate to the following:

- since the Proposal is not accompanied by the Commission’s **impact assessment**, it is not possible to fully assess and verify its attended benefits and impact, notably on fundamental rights and freedoms, including the right to privacy and to the protection of personal data;
- the Proposal, despite its main objective of reforming the establishing act of the EBCG, impacts more broadly on the management of migration and border control operations. The EDPS therefore recommends to **reassess the relevant provisions of the Proposal** to ensure **consistency with the currently applicable EU legislation**, in particular on Asylum and Return procedures;
- due to the increased ‘operational nature’ of the EBCG, it is even more important (compared to the currently applicable EBCG Regulation) that **all** (each and every) **data processing** activities are **clearly** specified in the legal text of the Proposal, having regard to: (i) the **responsible entity** (the EBCG, Member States, third Countries, international organizations); (ii) the **applicable data protection law** (‘Regulation 1725’ vs the General Data Protection Regulation or the Law Enforcement Directive); (iii) the data protection **supervision** system (the competent data protection authorities responsible, alone or jointly, for the oversight of the data processing);
- given the broad array of purposes included in Article 88(1), the EDPS has concerns on the processing by the EBCG for a purpose other than that for which the personal data have been collected. Hence, in case of processing of personal data pursuant to the aforesaid Article 88(2), the EDPS recommends, as possible safeguard, that the EBCG performs and keeps written record of a **case-by-case ‘compatibility assessment’**;
- as ‘horizontal’ recommendation, applicable in particular to the aforesaid Article **29** (EUROSUR Fusion Services) and **50** (Information exchange systems and management of return), but to be streamlined **throughout the all Proposal**, the EDPS urges the legislator **to**

exhaustively list the categories of data that can be collected and used by the EBCG in relation to each specified purpose, as well as the conditions and limits for the data processing, the access regimes, the applicable data retention periods.

Other recommendations to further improve the Proposal are the following.

(i) on the cooperation of the EBCG with other EU institutions and bodies:

- to address the issue of transfers to **international organizations** under Sub Section 2, “Cooperation with third Countries”, instead of under Sub Section 1, “Cooperation within the EU”;
- to address the issue of the EBCG’s cooperation with **CSDP missions** under a dedicated legal instrument, providing among others for data protection rules ensuring an adequate level of protection of the fundamental rights at stake, including the right to privacy and to the protection of personal data;
- to amend Article 69(2) introducing the wording “and the EDPS [prior approval] in so far as the working arrangements concern the exchange of personal data” after “the Commission’s”, and to amend Article 69(5) deleting the wording “and” after “specific working arrangements regarding the exchange of personal data”;
- with reference to the “**communication network**” (Article 14) and to the “**information exchange systems and applications managed by the Agency**” (Article 15), we recall the importance of complying with data protection principles having regard to **all life cycle phases** of the IT systems.

(ii) on the transfers of personal data to third countries:

- to amend Article 87(3) so as it covers **all EBCG’s activities listed under the aforesaid Sub Section 2** in so far as they imply the transfer of personal data to third Countries (that is, not limiting it to return activities), **deleting the wording “in the area of return activities”**;
- in so far as they provide for the transfer of personal data, **status agreements and working arrangements** between the EBCG and the third Countries (as **administrative arrangements** between public authorities including data protection safeguards) should be subject to the **prior authorization by the EDPS**. We recommend including a provision in this regard under Article 74;
- to better define **the scope** of the prohibition of onward transmission and the “**third parties**” referred to under Article 90(5);
- to clarify the scope of the prohibition under Article 90(4), making clear that it applies to **any exchange** of information with third Countries;
- to insert a provision regarding a ‘**fundamental rights assessment**’, including the assessment of the **level of data protection of the third Country**, under SubSection 2 (Cooperation with third Countries) of Section 11 (Cooperation) of Chapter II (Functioning of the European Border and Coast Guard) or under Section 1 (General rules) of Chapter IV (General provisions);

(iii) on EUROSUR:

- to **clarify the extent of processing activities** by the EBCG and the Member States (and third Countries) in order to avoid ambiguity as to the **accountability** for the data processing activities also in the context of EUROSUR;
- to **detail specifically and separately the purposes** pursued in the context of EUROSUR (management and control of migration and asylum; countering of crimes);
- to insert under Article 90(3) after “Regulation (EU) 2016/679”, the wording “or Directive (EU) 2016/680”

(iv) on hotspots and controlled centres:

- to reconsider, via an in-depth fundamental rights and data protection impact assessment, the implications of the introduction of the references to ‘hotspots’ and ‘controlled centres’ in the Proposal, also ensuring consistency with the procedures (for instance, on return activities) as described under the currently applicable EU law.

(v) On the restrictions to data subjects’ rights and on the complaint mechanism:

- **to delete** in Article 87(3) the wording: “[Article 19⁵⁵] thereof shall not apply to the processing of data for the purpose of return by the Agency, for as long as the third country national is not returned.”; and to add after the sentence “The Agency may provide for internal rules on restricting the application of the rights under [Articles 17⁵⁶ and 18⁵⁷] of [Regulation (EC) No 45/2011] on a case by case basis as long as the exercise of such right would risk to jeopardise the return procedure” the following one: “Such restrictions shall respect the essence of the fundamental rights and freedoms and be necessary and proportionate to the objective pursued, taking into account the risks to the rights and freedoms of the persons concerned.”;

- the EBCG should **consult the EDPS on these internal** rules before their adoption;

- to replace the wording in Article 108(6) “the executive director shall involve the data protection officer of the Agency” with the following: “the executive director shall consult the data protection officer of the Agency before taking her or his decision on the complaint”.

These comments are not exhaustive. The EDPS will continue to analyse the Proposal, put forward recommendations and follow the negotiations. In the meantime, we remain available for any queries or requests for consultation, notably from the Commission, the European Parliament and the Council.

Brussels, 30 November 2018

⁵⁵ Article 19: Right to erasure (‘right to be forgotten’).

⁵⁶ Article 17: Right of access by the data subject.

⁵⁷ Article 18: Right to rectification.