



EDPS comments on the model for working arrangements to be concluded by the European Border and Coast Guard Agency with the authorities of third countries

1. Introduction and background

Pursuant to Article 73(3) of Regulation (EU) 2019/1896 on the European Border and Coast Guard¹, in circumstances requiring the deployment of border management teams to a third country where the members of the teams will exercise executive powers, a status agreement shall be concluded by the Union with the third country concerned. Article 76(1) of the EBCG Regulation provides that the Commission, after consulting the EDPS, shall draw up a model status agreement for actions conducted on the territory of third countries. The EDPS issued formal comments on the model status agreement on 29 May 2020.

Pursuant to Article 73(4) of the EBCG Regulation, where available, the European Border and Coast Guard agency ("the Agency") shall also act within the framework of working arrangements concluded with the authorities of third countries in accordance with Union law and policy.

Article 76(2) of the EBCG Regulation provides that after consulting the EDPS, the Commission shall draw up a model for the working arrangement. This consultation also falls within the EDPS task to advise all EU institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data (Article 57(1)(g) of Regulation 2018/1725²).

While the draft model working arrangement submitted to the EDPS for consultation (the "draft model") may have impact on a number of fundamental rights, the comments below are limited to issues pertaining to data protection.

2. Comments

Pursuant to Article 76(2) of the EBCG Regulation, the model working arrangement shall include provisions related to fundamental rights and data protection safeguards addressing practical measures.

The EDPS notes that several provisions of the draft model refer to the processing of personal data. For instance, point 1.1. of the draft model provides that partnerships in the area of integrated border management, including in detecting, preventing and combatting irregular migration and cross-border crime as well as in the area of return shall be set up in conformity with the applicable national, European and international legal frameworks, including on the protection of personal data.

¹ Regulation (EU) 2019/1896 of the European Parliament and of the Council, of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1724, OJ, 14.11.2019, L 295, p.1 (The EBCG Regulation).

² 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, OJ, 21.11.2018, L.295, p.39 (Regulation 2018/1725).

Point 3.11. of the draft model provides that, when the Agency invites observers from competent authorities of third countries to participate as experts in its activities, the respective modalities of the information exchange and cooperation should be in full compliance with the applicable provisions of Union and national law related to human rights, including data protection. Point 3.15 of the draft model provides that the arrangement may cover also cooperation in the area of return, including *inter alia* identification of persons who are in an irregular situation on the territory of Member States of the EU or Schengen Associated Countries. Point 8 contains specific rules as regards the processing of personal data.

The EDPS therefore understands that the draft model aims *inter alia* at regulating the processing of personal data including their transfer to a third country by the Agency. He recalls that transfer of personal data should be broadly understood as communication, transmission, disclosure or otherwise making available of personal data, conducted with the knowledge or intention of a sender subject to the Regulation that the recipient(s) will have access to it³. It includes "deliberate transfer" of personal data and "permitted access" to personal data, but excludes cases of access through illegal actions (e.g. hacking).

Chapter V of Regulation 2018/1725 provides for specific mechanisms and conditions to allow transfers of personal data by EU institutions and bodies, to a third country.⁴ These mechanisms and conditions aim to ensure that the level of protection of natural persons guaranteed by the EU data protection legislation is not undermined.

The first mechanism is the adoption by the EU Commission of an adequacy decision recognizing that the third country provides a standard with regard to data protection that is essentially equivalent to that within the EU⁵. However, the list of countries recognized by the Commission as providing adequate protection is currently quite short⁶.

In the absence of an adequacy decision, a transfer can take place through the provision of appropriate safeguards and on the condition that enforceable rights and effective legal remedies are available for individuals⁷. A legally binding and enforceable instrument between public authorities or bodies may provide for such appropriate safeguards.⁸ Such safeguards may also be provided, subject to the authorisation from the EDPS, by inserting provisions into administrative arrangements between public authorities of bodies which include enforceable and effective data subject rights⁹.

If a transfer of personal data is envisaged to a third country that is not the subject of an adequacy decision and if appropriate safeguards are absent, a transfer can be made based on a number of derogations for specific situations¹⁰. However, data exporters should first endeavor possibilities to frame the transfer with one of the mechanisms providing appropriate safeguards.

³ See point 3.1 of the [EDPS Position paper on the transfer of personal data to third countries and international organisations by EU institutions and bodies](#)

⁴ Article 86(3) of EBCG Regulation refers to Chapter V of Regulation 2018/1725 as regulating transfers of data by Frontex to third countries and international organisations.

⁵ Article 47 of Regulation 2018/1725.

⁶ see the [List](#) of the third countries subject to an adequacy decision.

⁷ Article 48(1) of Regulation 2018/1725.

⁸ Article 48 (2) (a) of Regulation 2018/1725.

⁹ Article 48 (3) (b) of Regulation 2018/1725.

¹⁰ Article 50 of Regulation 2018/1725.

For exchanges with public authorities, as in the case of the envisaged model, the EDPS considers that binding international agreements¹¹ or administrative arrangements are the relevant transfer instruments to be used¹².

As the EDPS already set out in his formal comments on the model status agreement, in the absence of an adequacy decision, each status agreement concluded with a specific third country could be the legal basis for the transfer of personal data to that third country provided that it would be legally binding and enforceable vis-à-vis all parties and that it would include all the required appropriate data protection safeguards. In such case, the working arrangement to be concluded between the Agency and the competent authorities in the third country could merely refer to the safeguards included in the status agreement and, where necessary, provide further details for the implementation of those safeguards.

In the absence of a status agreement or in case the status agreement does not aim at regulating personal data processing or does not contain comprehensive and sufficient data protection safeguards, the working arrangement as such could provide a legal basis for the transfer of personal data pursuant to Article 48(3) (b) of Regulation 2018/1725.

The use of these types of arrangements for transfer of personal data would require an authorisation by the EDPS both under Regulation 2018/1725¹³ and Article 73(4) third subparagraph of the EBCG Regulation.

The EDPS notes that the preamble of the draft model states that “The European Data Protection Supervisor gave its prior approval on matters of transfer of personal data, as provided for by Regulation (EU) 2018/1725”. The EDPS understands that this sentence will be included in each specific working arrangement duly approved by the EDPS. He would like to recall that the present consultation cannot be considered as the prior authorisation of a specific set of clauses to provide appropriate safeguards for transfers required under Article 73(4) third subparagraph of the EBCG Regulation and Article 48(3)(b) of Regulation 2018/1725.

In other words, irrespective of the present EDPS consultation on the draft model, each specific working arrangement to be concluded between the Agency and a specific third country providing for the transfer of personal data will have to be authorized by the EDPS. For each specific working arrangement, the EDPS will assess whether appropriate data protection safeguards have been included.

A list of minimum safeguards can be found in the European Data Protection Board (EDPB)-guidelines adopted on 18 January 2020 on Articles 46(2)(a) and 46(3)(b) of the GDPR¹⁴ for transfers of personal data between EEA and non-EEA public authorities and bodies.¹⁵ As a matter of example, the EDPS has adopted a [decision](#)¹⁶ on the safeguards to be included in an administrative arrangement for transfers of personal data between an EU agency and an international organisation pursuant to Article 48(3)(b) of Regulation 2018/1725.

¹¹ Article 48 (2) (a) of Regulation 2018/1725.

¹² Article 48(3)(b) of Regulation 2018/1725.

¹³ Article 48(3), introductory sentence of the Article.

¹⁴ These provisions correspond to Article 48(2)(a) and 48(3)(b) of Regulation 2018/1725.

¹⁵ [EDPB guidelines 02/2020](#) on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies (the ‘EDPB guidelines’).

¹⁶ EDPS Decision of 13 March 2019 concerning the use of the IOSCO-ESMA Administrative Arrangement by the European Securities and Markets Authority (the ‘EDPS decisions’).

Since the objective of the Commission appears to be to use the draft model as a reference document to draft future administrative arrangements covering transfer of personal data, the EDPS recommends that the Commission already include these safeguards in the draft model. These safeguards will then be completed and specified in each specific working arrangement, where relevant. Besides Article 76 (2) of the EBCG Regulation also foresees that the model shall include provisions related to fundamental rights and data protection safeguards addressing practical measures.

The EDPS welcomes that the draft model includes data protection safeguards on:

- the scope and principle of purpose limitation (point 8.1),
- data accuracy and data minimisation including instructions in case of processing inaccurate data (point 8.2),
- storage limitation, allowing to keep the data in a form which permits identification of data subjects only for the time necessary for the purposes the data was transferred and processed as referred in point 2 of the working arrangement (point 8.3),
- the need that parties commit and ensure to have appropriate technical and organisational measures in place to ensure security and confidentiality of the processing of personal data (point 8.4),
- the prohibition of further transfers or sharing of personal data to a third party or to a third country in line with the requirement of Article 86(5) of the EBCG Regulation (point 8.5),
- transparency obligations towards data subjects; in particular that the parties should inform data subjects on how and why they may process and transfer personal data, the relevant tool used for the transfer, the entities to which such data may be transferred, the rights available to data subjects and applicable restrictions, available redress mechanisms and contact details for submitting a dispute or claim (point 8.6),
- a list of data subjects’ rights listing the right to access, rectification, erasure and restriction of processing and where relevant the right to oppose to the data processing on grounds relating to his or her particular situation (point 8.7),
- a redress mechanism allowing data subjects to lodge a complaint for non-compliance with data protection provisions of the working arrangement and the possibility to have a judicial review in particular (point 8.8),
- an internal review mechanism (point 8.9).

At the same time, the EDPS recommends to amend or complement them as follows:

- Point 8 (first sentence) the wording “exchanges” of personal data should be changed to “processing and transfers” of personal data”. In the following sentence, the words “structural” should be deleted as in case personal data is transferred between the parties on the basis of the working arrangement, all transfers, even occasional, or limited transfers should be covered.
- Point 8.1 (scope) should further specify the scope of the envisaged exchanges of personal data as the one described in point 2 to which point 8.1 referred to is too wide from a data protection perspective.
- Point 8.3 (storage limitation) should include that retention periods shall comply with the applicable laws, rules and/or regulation governing the retention of such data.
- Point 8.4 (security and confidentiality) should provide that technical and organisational measures will include appropriate administrative, technical and physical security

measures, including for example, marking information as personal data, restricting who has access to personal data, providing secure storage of personal data, or implementing policies designed to ensure personal data are kept secure and confidential. The draft model should also provide for procedures for cases of personal data breaches and set out that if the receiving party becomes aware of a personal data breach, it informs the transferring Authority as soon as possible and use reasonable and appropriate means to remedy the personal data breach and minimize the potential adverse effects.

- Point 8.5 (onward transfers) should also provide that not only transfers of personal data, but also sharing of personal data with third parties is prohibited under the working arrangement¹⁷.
- Point 8.6 (transparency) should include that data subjects should be informed on which types of personal data are processed, how this notice should be provided to data subjects and if individual notice needs to be provided.
- Point 8.7 (data subjects' rights) should include:
 - a commitment that the parties will have in place appropriate measures to identify any personal data transferred to another authority under the working arrangement, to provide general information (including on an authority's website) about safeguards applicable to transfers, and to provide access to the personal data and confirm that the personal data are complete, accurate and, if applicable, up to date;
 - commitments, that requests related to the exercise of the listed data subjects' rights can be directly submitted to any authority which is processing the personal data;
 - commitment that each authority will address in a reasonable and timely manner a request from a data subject concerning the rights listed in the working arrangement. It should set out that an authority may take appropriate steps, such as charging reasonable fees to cover administrative costs or declining to act on a request, where a data subject's requests are manifestly unfounded or excessive.
 - a prohibition of using automated processing of personal data and should exclude that a decision concerning a data subject is based solely on automated processing of personal data, including profiling, without human involvement;
 - safeguards for and relevant restrictions to the exercise of the listed data subjects' rights in case parties are prevented from disclosing confidential information pursuant to professional secrecy or other legal obligations.
- Point 8.8 (redress mechanism) should provide for alternative dispute settlement mechanisms in case judicial remedies are not available in a third country signing the working arrangement. Other, alternative methods may be non-binding mediation or non-binding dispute resolution proceedings. There should also be provisions in the draft model allowing for suspension of data transfers in case the transferring party believes that the receiving party has not acted in relation to claims or disputes in line with the safeguards set out in the working arrangement. The draft model should provide that parties inform each other about disputes or claims related to the working arrangement and should use their best efforts to settle them amicably in a timely manner. Redress mechanisms should also be available for alleged data breaches. Situations where the third country authorities are unable to implement the safeguards of the arrangement should also be covered. In such cases the

¹⁷ as required by Article 86(5) of the EBCG CG Regulation.

Agency should be informed without delay and transfers should be suspended until the safeguards of the arrangement can be implemented.

- Point 8.9 (oversight mechanisms) must also provide for an external review mechanism in line with the EDPB guidelines, i.e. an independent supervision in charge of ensuring that the parties comply with the provisions set out in the agreement. It can invoke oversight by a competent supervisory authority in the third country receiving the personal data, or in the absence of such an authority, the need for an independent, effective and impartial supervisory oversight mechanism needs to be fulfilled by other means depending on the third country at hand. In such cases the draft model should provide that the existing oversight bodies in the third country (other than a supervisory authority in the area of data protection) should be mentioned in the working arrangement.

Moreover, the EDPS recommends to supplement the safeguards with additional provisions as follows:

- the definitions of the basic personal data concepts and rights (e.g. personal data, onward transfers, sharing of personal data, personal data breach, processing, professional secrecy, profiling, data subjects rights mentioning right of access, right of rectification, right of erasure, right of information, right of objection, right of restriction of processing, right not to be subject to automated decision making, ...);
- the scope of competencies and the list of the authorities in the third country that would receive the data,
- the categories of personal data affected and the type of processing of the personal data that are transferred and processed,
- the prohibition of further processing incompatible with the initial purpose of the exchange of data.

The EDPS also recommends that the draft model include:

- the voluntary commitment of the receiving party to cooperate with the EDPS as supervisory authority of the Agency and,
- the obligation provided in Article 86(3) of the EBCG Regulation, i.e. to indicate restrictions on access or use of the data.

As regards the definition of the concept of personal data and the categories of data affected, the EDPS would like to stress that pursuant to Article 90 of the EBCG Regulation, data processed by the Agency for the purpose of identifying suspects of cross-border crime can only be exchanged with Europol, Eurojust or the competent authorities of Member States. In other words, the Agency is not allowed to transfer these data (referred to as operational personal data under Article 90) to a third country. This should be clearly reflected in the draft model.

The EDPS also recalls that in case sensitive data¹⁸ might be exchanged, the draft model should include specific safeguards as regards this category of data, including for example restrictions (e.g. access restrictions, restrictions of the purposes for which the information may be processed) or specific safeguards (e.g. additional security measures, requiring specialized training for staff allowed to access the information).

In view of the above, the EDPS is of the opinion that the draft model as submitted for consultation lacks essential data protection safeguards. Consequently, any working arrangement that would be based on the draft model as it currently stands would need to

¹⁸ As defined in Article 10 of Regulation 2018/1725.

be further developed as regards the processing of personal data to ensure compliance with the EU data protection law.

Finally, the EDPS would like to recall the importance of gathering information on the level of protection of personal data of third countries, as well as on their political context, so as to be able to define the necessary safeguards, considering also that not all third countries have ratified the Council of Europe Convention 108.¹⁹ As already stressed in the EDPS comments on the EBCG Regulation²⁰ as well as in his Formal comments on the model status agreement, 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 Agency before the latter engages in any operational cooperation with third countries.

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(*e-signed*)