



EDPS
EUROPEAN DATA PROTECTION SUPERVISOR

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

1. INTRODUCTION

1. This Opinion relates to the Management Board Decision 68/2021 of 21 December 2021 adopting the rules on the processing of personal data by Frontex (the ‘Decision’).
2. The Decision was adopted in accordance with Article 86 (2) of Regulation (EU) 2019/1896¹ (the ‘EBCG Regulation’), which provides that the Management Board shall adopt internal rules on the application of Regulation 2018/1725. The annex of the Decision (the ‘Annex’) lays down Frontex’s rules on the general implementation of Regulation 2018/1725, applicable to all processing activities conducted by Frontex outside the scope of Chapter IX of this Regulation.
3. Chapters I to III of the Annex contains the internal rules applicable to the processing of personal data for all purposes referred to in Article 87 EBCG Regulation, except the processing of personal data for facilitating the exchange of information with the Member States’ law enforcement authorities, Europol or Eurojust (Article 87 (1) (d) EBCG Regulation). The internal rules applicable to such processing are specified in another decision of the Management Board². Chapter IV of the Annex contains additional specific rules for the processing of personal data for the purposes referred to in Article 87 (1) (a), (c) and (e) EBCG Regulation.

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

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

4. On 31 January 2022, pursuant to Article 41 of Regulation (EU) 2018/1725³, Frontex communicated the Decision to the EDPS. On 8 February 2022, following the EDPS request, the Data Protection Officer ('DPO') of Frontex sent to the EDPS the DPO opinion on the draft Decision.⁴
5. The EDPS notes that he was informed about the Decision after its adoption by the Management Board. He recalls that he stands ready to provide advice prior to the adoption of internal rules on the processing of personal data.
6. Considering that the Decision raises important concerns in particular as regards the critical matters of legal certainty as to conditions of the processing operations covered, and the legal basis used by Frontex to process special categories of personal data, the EDPS is hereby issuing an own initiative opinion pursuant to Article 58 (3) (c) of Regulation 2018/1725.

2. FINDINGS AND RECOMMENDATIONS

2.1. Minimum content of internal rules

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

³ Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

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

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

9. According to these requirements, such rules must be:
 - clear and precise and their application predictable for those subject to them.⁶
 - accessible to the person concerned and foreseeable, i.e. drawn up with sufficient precision to enable the individual to regulate his conduct⁷. It is "essential [...] to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards concerning, inter alia, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness."⁸
10. Individuals should know with sufficient precision the purpose(s) of the processing of their data, the categories of data, the categories of data subjects, the safeguards to prevent abuse or unlawful access or transfer, the controller or categories of controllers, the retention periods of the data and the applicable safeguards taking into account the nature, scope and purposes of the processing.⁹

2.2. Elements not sufficiently specified in the Decision

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

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

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

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

⁸ See paragraph 77 of the aforementioned judgment of the Court of Justice on Österreichischer Rundfunk.

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

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

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

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

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

2.2.1. Processing of personal data for purpose of returns

15. The EDPS points out the increasing role of Frontex in the area of return operations. In addition to assisting Member States in a number of pre-return and return-related activities (including identifying irregularly staying third-country nationals, assisting in obtaining travel documents and preparing return decisions¹¹), Frontex has also started coordinating and organising return operations on its own initiative under Article 50 (1) EBCG Regulation.¹² These activities entail several personal data processing activities, which contrary to the requirements established above in para 14, are not further developed in the Annex.
16. The EDPS recommends Frontex therefore to include a dedicated chapter on the processing of personal data for the purpose of return. This chapter should contain provisions on the categories of data processed for each return activities (i.e. information collected for issuing return decisions, for identifying third country nationals subject to return activities, for the acquisition of travel documents, etc.), the controller or categories of controllers, the safeguards to prevent abuse for unlawful access of transfer and the specific related data retention period.

2.2.2. Processing of personal data for purposes of EUROSUR

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

¹¹ Article 48 of EBCG Regulation.

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

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

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

¹³ See Article 10 (1) of the Annex.

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

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

24. Article 87 (1) (h) EBCG Regulation allows Frontex to process personal data for operating the FADO system which is established in accordance with Joint Action 98/700/JHA.¹⁵ Article 2 (b) of the joint Action 98/700/HA¹⁶ provides that the database shall contain - among other things - images of genuine documents, which would imply the processing of personal data. The EDPS notes that the Decision does not contain any specific rules for the processing of personal data for the purpose of operating the FADO system”. The EDPS recalls the specific legal obligation imposed to Frontex by the legislator under Article 86 (2) EBCG Regulation to adopt internal rules on the application of Regulation 2018/1725 as a whole and not only when such regulation requires it.¹⁷
25. As a consequence, the EDPS recommends Frontex to include in the Decision the key data protection elements related to Frontex’s data processing activities for all purposes mentioned in Article 87 EBCG Regulation, including the purpose of operating the FADO system. These elements are the categories of data subjects, the categories of data processed, the controller or categories of controller, the safeguards to prevent abuse for unlawful access of transfer and the data retention period.

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

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

¹⁵ Article 79 EBCG Regulation.

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

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

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

2.2.6. Special categories of data

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

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

3. CONCLUSION

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

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

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

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

Done at Brussels on 7 June 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI