



EDPS Decision on the request for prior authorisation of the Working Arrangement establishing Operational Cooperation between the European Border and Coast Guard Agency and the Directorate for Territorial Surveillance of the Republic of Niger

(Case 2022-0647)

1. INTRODUCTION

- 1.1. This Decision concerns the request for prior authorisation of the Working Arrangement (WA) to be concluded between the European Border and Coast Guard Agency (hereafter Frontex) and the Directorate for Territorial Surveillance of the Republic of Niger.
- 1.2. The EDPS issues this Decision on the basis of Article 73(4) of Regulation (EU) 2019/1896 on the European Border and Coast Guard Regulation¹ (the EBCG Regulation), and in accordance with Article 57(1)(n) and Article 58(3) (f) of Regulation (EU) 2018/1725² ('the Regulation').
- 1.3. This Decision is addressed to Frontex.

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) 2016/1624, OJ L 295, 14.11.2019, p. 1–131.

² 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.



2. BACKGROUND INFORMATION

- 2.1. On 14 June 2022, the European Border and Coast Guard Agency ('EBCG' - also referred to as Frontex) submitted a request for prior authorisation, on the basis of Article 73(4) of Regulation (EU) 2019/1896 on the European Border and Coast Guard Regulation³ (the EBCG Regulation), regarding the WA to be concluded between Frontex and the Directorate for Territorial Surveillance of the Republic of Niger establishing Operational Cooperation regarding the fight against irregular migration and cross-border organised crime.
- 2.2. On 15 June 2022, the EDPS submitted a set of questions to the European Commission, including whether a third country assessment or 'transfer impact assessment' had been carried out by Frontex with regard to the transfers of personal data envisaged by the draft WA. On 21 June 2022, on receiving a negative answer during a trilateral meeting between the EDPS, Frontex and the European Commission's DG HOME, the EDPS requested Frontex to provide a transfer impact assessment setting out the data protection situation (overview of the national legislation, supervisory and judicial redress mechanisms in operation) in the Republic of Niger. On 29 June 2022 Frontex provided the requested transfer impact assessment.
- 2.3. The draft WA between Frontex and Niger builds on the Commission's model WA and model provisions on EUROSUR. The Commission model WA was drafted in accordance with Article 76(2) of the EBCG Regulation, and adopted on 21 December 2021.⁴ The EDPS had provided comments on the draft model WA on 3 July 2020.⁵ The Commission's model provisions for the exchange of information in the context of EUROSUR were adopted on 21 January 2022⁶ and have not been shared with the EDPS.
- 2.4. On the basis of the draft WA, Frontex and the Republic of Niger plan to exchange personal data in their capacity as public authorities engaged in **operational cooperation to counter irregular migration and cross-border organised crime**.⁷ The personal data of Frontex staff, members of the Frontex standing corps and staff of Member States national authorities will be exchanged in this context. The specific purposes of the envisaged transfer under the draft WA are 'the

³ 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) 2016/1624, OJ L 295, 14.11.2019, p. 1–131.

⁴ Commission Communication on Model working arrangement as referred to in Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard, COM(2021) 830, 21.12.2021.

⁵ The EDPS notes that a number of its comments provided on 3 July 2020 were not addressed in the final model WA adopted by the Commission on 21 December 2021.

⁶ See p. 1 of the transfer impact assessment communicated by Frontex.

⁷ Article 2 of the draft WA.

appointment of experts, establishment of networks, cooperation in capacity building activities, and delivery of trainings, deployment of staff, including staff exchanges and the facilitation and promotion of cooperation in actions, programmes or EU instruments'.⁸

- 2.5. In this context, based on the transfer impact assessment, the categories of personal data to be exchanged for Frontex staff and staff of national authorities include names, dates of birth, nationality, job title, travel document bio page travel and identity document (photo and numbers), email addresses and mobile numbers and arrival and departure information (date, airport, flight number). In addition to these categories, for standing corps duration and location of deployment, operational profile, home Member State and means of transportation will also be processed.⁹
- 2.6. In addition, Article 5 and Annex 1 of the draft WA provides for the **exchange of information within the framework of EUROSUR**, as provided for in Article 73(4) of the EBCG Regulation. Aircraft identification numbers would, in principle, be the only transfers of personal data in the framework of EUROSUR. However, Annex 1 allows for personal data other than aircraft identification numbers to be transferred in the context of EUROSUR where this is exceptionally required.¹⁰

3. LEGAL ANALYSIS

- 3.1. In accordance with Article 73 of the EBCG Regulation, Frontex may conclude WAs with third countries for the purpose of cooperation to the extent required for the fulfilment of its tasks. Where those WAs provide for the transfer of personal data and where provided for by Regulation (EU) 2018/1725, Frontex is required to request prior authorisation from the European Data Protection Supervisor (Article 73(4) of the EBCG Regulation and in compliance with Article 48(3)(b) of the Regulation).
- 3.2. Transfers of personal data to recipients outside the European Union ('the Union') may generate additional risks for data subjects, as the applicable data protection rules in the recipient's jurisdiction may be less protective than inside the Union. For this reason, the Union legislator adopted specific rules for such transfers in Chapter V of the Regulation (Articles 46 to 51).
- 3.3. The first mechanism is the adoption by the Commission of an adequacy decision recognising that the third country or an international organisation provides a

⁸ See Article 8 .1. of the draft WA.

⁹ See page 5 of the transfer impact assessment communicated by Frontex.

¹⁰ See Article 10 .2. of Annex 1 of the draft WA. See also Legal analysis in Section 3.2. of this Decision.

standard with regard to data protection that is essentially equivalent to that within the EU.¹¹ However, until now the Commission has not adopted any adequacy decision concerning the Republic of Niger.

- 3.4. 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 individuals¹². A legally binding and enforceable instrument between public authorities or bodies may provide for such appropriate safeguards.¹³ Such safeguards may also be provided, subject to the authorisation from the EDPS, by inserting provisions into administrative arrangements between public authorities and bodies, which include enforceable and effective data subject rights.¹⁴ The draft WA submitted to the EDPS by Frontex is an administrative arrangement under Article 48(3)(b) of the Regulation.
- 3.5. The EDPB Guidelines on Articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679¹⁵ for transfers of personal data between EEA and non-EEA public authorities and bodies (the 'EDPB guidelines')¹⁶ set a list of minimum safeguards to be included in an administrative arrangement. The criteria for appropriate safeguards for administrative arrangements under Article 48(3)(b) of the Regulation are the same as under Article 46(3)(b) of Regulation 2016/679. Therefore, the EDPB guidelines are directly relevant for the assessment of administrative arrangements to be concluded between European institutions, bodies, offices and agencies and public authorities in third countries, such as this draft WA.
- 3.6. The EDPS will first analyse the transfers envisaged by the draft WA to facilitate operational cooperation to counter irregular migration and cross-border organised crime excluding transfers of personal data in the framework of EUROSUR (Section 3.1.). The EDPS will then analyse the exchange of information within the framework of EUROSUR under Article 5 and Annex 1 of the draft WA (Section 3.2.)

¹¹ See Article 47 of the Regulation.

¹² See Article 48(1) of the Regulation.

¹³ See Article 48 (2) (a) of the Regulation.

¹⁴ See Article 48 (3) (b) of the Regulation.

¹⁵ 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), OJ L 119, 4.5.2016, p. 1–88.

¹⁶ [EDPB Guidelines 2/2020](#) 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').

3.1. Transfers of personal data for the purpose of facilitating operational cooperation between Frontex and public authorities of the Republic of Niger (excluding transfers in the context of EUROSUR)

- 3.7. Taking into account the above-mentioned EDPB guidelines, the draft WA should include a series of guarantees.
- 3.8. The EDPS is of the opinion that the draft WA provides sufficient guarantees as regards the purpose of the processing, rights of rectification and erasure and oversight mechanisms.
- 3.9. However, the draft WA does not meet all requirements for the following guarantees, as explained below.

Parties bound by the data protection requirements

- 3.10. The administrative arrangement under Article 48(3)(b) of the Regulation is an instrument to provide for appropriate safeguards for transfers from EUIs ensuring an essentially equivalent level of protection to what is guaranteed in the European Economic Area (EEA). It is therefore essential that both parties take the commitment to ensure the appropriate safeguards when transferring and receiving the personal data.¹⁷
- 3.11. Paragraph 2 of Article 8.1 of the draft WA sets out that only the transferring party will ensure the minimum safeguards listed in Article 8.1. This concerns in particular lawfulness of the processing, the principles of purpose limitation, data minimisation, accuracy of personal data, storage limitation, security of processing and handling of personal data breaches. Therefore, for these aspects the draft WA provides for appropriate safeguards only to a limited extent, since the obligations listed in Article 8.1 shall apply to both parties. The wording of the draft WA should be changed to commit both parties.

Scope

- 3.12. Transfers of personal data to third countries or international organisations are subject to a two-step test. First, each processing operation must in particular be lawful in accordance with Articles 5 and 10 of the Regulation and as a second step Chapter V of the Regulation must be respected.¹⁸

¹⁷ EDPB Guidelines, paragraph 17.

¹⁸ EDPB Guidelines, paragraph 5.

- 3.13. In this vein, any arrangement under Article 48(3)(b) of the Regulation should set out which categories of personal data it covers and the type of processing of the personal data, which are transferred and further processed.¹⁹
- 3.14. The EDPS observes that the draft WA does not set out types of personal data.
- 3.15. The EDPS recalls that the draft WA should set out types of personal data, the purpose(s) for which they are to be transferred and further processed as well as the type of processing. In addition, it is the responsibility of the transferring party to ensure that the personal data transferred is relevant and limited to what is necessary for the specific purposes for which they are transferred.²⁰

Definitions

- 3.16. Definitions of key concepts and rights of the EU data protection legal framework such as “personal data”, “processing of personal data”, “data controller”, “data processor”, “recipient” and “sensitive data” should be included in any administrative arrangement under Article 48(3)(b) of the Regulation.²¹
- 3.17. The EDPS observes that the draft WA does not contain definitions of key concepts, and data subject rights. The draft WA is an instrument under the Regulation to provide for appropriate safeguards for transfers from EUIs. Therefore, when it comes to personal data transferred by Frontex, definitions included should be in compliance with the Regulation.

Data protection principles

- 3.18. Any administrative arrangement under Article 48(3)(b) of the Regulation should contain specific wording that the core data protection principles are ensured by both parties.²²

Storage limitation principle

- 3.19. According to the storage limitation principle, personal data should be retained for no longer than is necessary for the purpose for which the data are processed in compliance with the applicable laws, rules and/or regulation governing the retention of such data.²³ When a maximum retention period is not already set in legislation, such period should be set in the text of the agreement.

¹⁹ EDPB Guidelines, paragraph 15.
²⁰ EDPB Guidelines, paragraph 23.
²¹ EDPB Guidelines, paragraph 16.
²² EDPB Guidelines, paragraph 17.
²³ Article 4 (1) (e) of the Regulation.

3.20. Unless Nigerien legislation sets out specific retention periods, the draft WA should include specific retention periods and the obligation for the receiving party to continue to process personal data in line with the WA even after termination of the WA. Personal data that are processed unlawfully or are no longer necessary for the purpose of processing should be permanently deleted.²⁴

Security of processing

3.21. The parties should commit to ensure the security and the confidentiality of the personal data processing and transfers they carry out. Any administrative arrangement under Article 48(3)(b) of the Regulation should provide for specific provisions, with the description of the technical and organisational measures implemented by the receiving party(ies) (including any relevant certifications) to ensure an appropriate level of security, taking into account the nature, scope, context and purpose of the processing, and the risks for the rights and freedoms of natural persons.

3.22. In particular, appropriate technical and organisational measures shall be in place to protect personal data against accidental or unlawful access, destruction, loss, alteration, or unauthorised disclosure (e.g., encryption including in transit, pseudonymisation, marking information as personal data transferred from the EEA, 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).²⁵

3.23. The EDPS welcomes that the parties commit to have appropriate technical and organisational measures in place to ensure security and confidentiality of the processing of personal data. In particular, the draft WA refers to the technical and organisational measures required by the Law no. 2017-28 of Niger regarding the protection of personal data.

3.24. The EDPS observes, however, that the draft WA does not contain specific provisions describing more in detail these technical and organisational measures to be implemented by the receiving party(ies) taking into account the nature, scope, context and purpose of the processing, and the risks for the rights and freedoms of natural persons.

Data subject rights

3.25. Any administrative arrangement under Article 48(3)(b) of the Regulation must include 'enforceable and effective data subject rights'. The rights available to the

²⁴ EDPB Guidelines, paragraph 24.

²⁵ EDPB Guidelines, paragraphs 25-26.

data subjects, including the specific commitment taken by the parties to provide such rights, should be listed in the administrative arrangement.²⁶

- 3.26. In particular, data subjects should be able to obtain confirmation of whether their data have been transferred and further processed. They should be provided with access to their personal data upon request as well as to specific information concerning the processing, including the purpose of the processing, the categories of personal data concerned, the recipients to whom personal data is disclosed, the envisaged storage period and redress possibilities.²⁷
- 3.27. In addition, data subjects may request that their data are rectified, erased, blocked or restricted and where relevant that they have the right to oppose to the data processing on grounds relating to his or her particular situation.²⁸
- 3.28. The arrangement should furthermore specify when these rights can be invoked and include the modalities how the data subjects can exercise these rights before both parties as well as on how the parties will respond to such requests by setting an appropriate time limit. The data subjects should be informed within a set time limit of the reasons and the available remedies if the parties do not take action on their request.²⁹
- 3.29. Any restriction to these rights has to be provided by law and is allowed only to the extent and for as long as this is necessary to protect confidentiality pursuant to professional secrecy or other legal obligations.³⁰
- 3.30. If relevant, the arrangement should, as a general principle, exclude that the receiving public body will take a decision based solely on automated individual decision-making, including profiling. Where the purpose of the transfer includes the possibility for the receiving public body to take decisions solely on automated processing in the sense of Article 24 of the Regulation, this should only take place under certain conditions set forth in the arrangement, such as the need to obtain the explicit consent of the data subject.³¹
- 3.31. Taking into account the above requirements, the EDPS notes that the current wording of Article 8.1 of the draft WA does not provide for the list and definition of data subject rights as set out in the Regulation, for the modalities on how data subjects can exercise the rights of access, rectification, erasure, restriction of processing and to object as well as on how the parties will respond to such requests.

²⁶ EDPB Guidelines, paragraph 28. These rights are further outlined in paragraphs 29-40.

²⁷ EDPB Guidelines, paragraph 34.

²⁸ EDPB Guidelines, paragraph 33.

²⁹ EDPB Guidelines, paragraphs 35-36.

³⁰ EDPB Guidelines, paragraph 40.

³¹ EDPB Guidelines, paragraph 38.

- 3.32. The EDPS welcomes that Article 8.1 (l) includes the right of data subjects to receive information on the processing of their personal data, access such data and rectification and erasure of inaccurate or unlawfully processed data, subject to certain limitations.
- 3.33. Article 8.1 (g) provides that both sides will take every reasonable step to rectify or erase without delay personal data as appropriate and will notify each other of the rectification and the erasure. However, the draft WA does not contain an obligation for the parties to notify each other if they become aware that inaccurate or out-of-date personal data is processed.
- 3.34. The EDPS observes that Article 8.1 (j) of the draft WA sets out that “*at the time of transferring the data the Sides shall indicate restrictions on access or use of the data.*” This provision does not meet the requirements of the Regulation and the EDPB guidelines as set out in point 3.28 of this Decision.

Right to transparency

- 3.35. As regards in particular the right to transparency, the draft WA should contain clear wording describing the transparency obligations of the parties, which include both a general information and individual information to data subjects.³² First, a general information notice should be made publicly available on Frontex’s website in relation to the processing carried out. This notice should include the transfer, the type of entities to which data may be transferred, the rights available to data subjects under the applicable legal requirements, including how to exercise those rights and information about any applicable restrictions on the exercise of such rights, available redress mechanisms and the contact details for submitting a dispute or claim. The draft WA should explain how this notice should be provided to data subjects.
- 3.36. The EDPS notes that the current wording of the draft WA does not specify the elements that should be included in the general notice to the data subjects.
- 3.37. The EDPS underlines that the general information cannot substitute individual information made available by the transferring body to data subjects in accordance with the notification requirements of Articles 15 and 16 of the Regulation.
- 3.38. The EDPS observes that the draft WA does not provide that individual notice needs to be provided to data subjects.
- 3.39. The parties to an administrative arrangement should also commit to make available the international agreement to data subjects upon request and to make the

³² EDPB Guidelines, paragraphs 29-31.

arrangement or at least a meaningful summary of the relevant provisions providing for appropriate safeguards publicly available on their websites.³³

- 3.40. The EDPS observes that the draft WA does not contain any commitment to make the WA available to data subjects or to publish at least a meaningful summary of the safeguards provided.

Sensitive data

- 3.41. The draft WA provides for the transfer of some sensitive personal data (photo and biometric page of travel documents)³⁴, which represents specific risks to the rights and freedoms of individuals. Therefore, in line with the two-steps-test (see also paragraph 3.10), the processing of sensitive data should first be lawful in line with Article 10 of the Regulation. As a second step, it should also comply with the provisions of Chapter V of the Regulation on transfers.
- 3.42. In view of these requirements, the necessity of each transfer of sensitive data should be assessed carefully, on a case-by-case, and additional safeguards should be implemented by the receiving public body or international organisation, should also be included as commitments in the draft WA. These could, for example, include encryption including in transit, pseudonymisation, restricting who has access to personal data, providing secure storage of personal data, implementing policies designed to ensure personal data are kept secure and confidential, as well as specific safeguards such as marking information as personal data transferred from the EEA, or requiring specialised training for staff processing data transferred from Frontex.³⁵
- 3.43. In the present case, it is not clear from the draft WA whether additional safeguards, have been added or considered in relation to transfers of sensitive personal data. Considering the circumstances of the transfer, in particular the nature and categories of personal data transferred as well as the entities involved in the processing, suitable and specific measures need to be added to the draft WA to safeguard and enhance the level of protection for individuals.

Onward transfers and sharing of personal data

- 3.44. Pursuant to Article 86(5) of the EBCG Regulation information that is transferred or disclosed to third countries pursuant to the EBCG Regulation must not be transferred or shared onward to third countries or third parties. Provisions to that effect shall be included in any agreement or arrangement concluded with a third country providing for the exchange of information. Article 86(5) of the EBCG Regulation applies to any third parties (to the administrative agreement) without making a distinction between internal or external third parties.

³³ EDPB Guidelines, paragraph 32.

³⁴ i.e. special categories of personal data in the sense of Article 10 of the Regulation.

³⁵ EDPB Guidelines, paragraph 49 (and paragraph 25 as regards security measures).

- 3.45. The EDPS notes that Article 8.1 (i) of the draft WA provides for a list of recipients, which may receive personal data: other than the offices of the Nigerien Directorate for Territorial Surveillance, also “the administrative and judiciary authorities upon the receipt of a formal request”. At the same time, Article 8.1 (i) excludes onward transfers and sharing of data to *external* third parties, except for other governmental bodies if the transferring side gave its prior authorisation.
- 3.46. The EDPS observes that the draft WA therefore intends to provide for the possibility of onward sharing of personal data to administrative and judiciary authorities without prior authorisation, and to other governmental bodies with prior authorisation of the transferring side. However, administrative and judiciary authorities, and other governmental bodies are not parties to this WA. As a consequence, the envisaged communication of personal data to these other Nigerien authorities seems to be not in line with Article 86(5) of the EBCG Regulation.
- 3.47. The EDPS in addition observes that in any case the recipient ‘administrative and judiciary authorities’ is too vague and the draft WA does not set out the type of personal data, nor the reasons and purposes for which it is necessary to transfer the personal data.
- 3.48. Since onward transfers are not allowed under the EBCG Regulation, any other recipient of personal data should be included in the WA as a party signing it, and committing to implement the safeguards provided. Recipients not signing the WA shall be deleted from the text of the WA.

Redress

- 3.49. Data subjects should continue to benefit from redress mechanisms after their data is transferred to a non-EEA country/entity. These redress mechanisms must provide recourse for individuals who are affected by non-compliance with the provisions of the administrative arrangement and thus the possibility for data subjects whose personal data have been transferred from the EEA to lodge complaints regarding such non-compliance and to have these complaints resolved.³⁶
- 3.50. In particular, the data subject must be ensured an effective route to complain to the public bodies that are parties to the administrative arrangement and to an independent oversight mechanism. Moreover, a judicial remedy including compensation for damages should be available.³⁷ Alternative dispute settlement mechanisms should be provided only if judicial remedies are not guaranteed in the third country. Furthermore, the administrative arrangement should contain an obligation for the parties to inform each other of the outcome of the proceedings, in particular if a complaint of an individual is dismissed or not resolved.³⁸
- 3.51. The redress mechanism must also be combined with the possibility for the transferring party to suspend or terminate the transfer of personal data under the

³⁶ EDPB Guidelines, paragraph 50.

³⁷ EDPB Guidelines, paragraph 50.

³⁸ EDPB Guidelines, paragraphs 51-54.

administrative arrangement where the parties do not succeed in resolving a dispute amicably until the issue has been satisfactorily addressed by the receiving party. Such a suspension or termination, if carried out, must be accompanied by a commitment from the receiving party to return or delete the personal data.³⁹

- 3.52. The EDPS notes that the transfer impact assessment⁴⁰ and the current wording of the draft WA states that data subjects have the right to effective administrative and judicial redress and that they have the right to bring complaints to the oversight body and to receive a response without undue delay.
- 3.53. In order to ensure effective and enforceable rights, the draft WA should contain assurances from the receiving party that individual rights are fully provided by its domestic law and can be exercised by EEA individuals under the same conditions as is the case for citizens and residents of the concerned third country. Especially the draft WA should clearly state that under the Nigerien legislation, there is (i) an effective route to complain to the public body that is party to the AA, (ii) to an independent oversight body (Data Protection Authority) and (iii) there exists judicial remedy including compensation for damages - both material and non-material.
- 3.54. In addition, the draft WA should set out that the receiving side shall put in place mechanisms to effectively and timely handle and resolve complaints of data subjects. The parties should be obliged to inform each other on the outcome of the proceedings, in particular if the complaint is dismissed or remains unsolved.
- 3.55. The draft WA should also include the possibility for the transferring party to suspend or terminate the transfer or personal data in case the parties do not succeed in resolving the dispute amicably, until the issues is considered to be addressed satisfactorily by the receiving party.

Oversight mechanism

- 3.56. The supervision oversight mechanism should consist of a combination of periodic reviews conducted externally and internally by each party. The combination of the external and internal oversight as well as the adopted possible consequences following a negative review—which may include a recommendation to suspend participation in the administrative arrangement – provide for a satisfactory level of protection.
- 3.57. Each party to the administrative arrangement should conduct periodic internal checks of the procedures put in place and of the effective application of the safeguards provided in the agreement. The periodic internal checks should also verify any changes in legislation that would prevent the party to comply with the data protection principles and safeguards included in the arrangement⁴¹
- 3.58. It could also be provided that a party to the agreement can also request from another party to the agreement to conduct such an internal review. The arrangement must

³⁹ EDPB Guidelines, paragraph 55.

⁴⁰ page 11 of the Transfer impact assessment provided by Frontex (DPO assessment).

⁴¹ EDPB Guidelines, paragraph 57.

require that the parties respond to inquiries from the other party concerning the effective implementation of the safeguards in the arrangement. Each party conducting a review should communicate the results of the checks to the other party. Ideally, such communication should also be made to the independent oversight mechanism governing the agreement. In addition, the arrangement must include the obligation that the parties inform each other without delay if they are unable to effectively implement the safeguards in the agreement for any reason.⁴²

- 3.59. The arrangement must also provide for independent supervision in charge of ensuring that the parties comply with the provisions set out in the arrangement⁴³. For instance, the arrangement can invoke oversight by a competent supervisory authority in the country of the public body receiving the EEA personal data. The EDPS also recalls that the arrangement needs to provide for the voluntary commitment of the receiving party to cooperate with the EDPS as supervisory authority of the EUI. Only in the absence of a supervisory authority specifically in charge with the supervision of data protection in the third country, there is a need to provide for alternative oversight.⁴⁴
- 3.60. The EDPS welcomes the internal and independent external oversight mechanisms included in the draft WA and described in the transfer impact assessment⁴⁵, in particular the oversight of the High Authority for the Protection of Personal Data in Niger.
- 3.61. The EDPS observes that the internal review mechanism provides for the communication of the results to the requesting party if the other is unable to implement the draft WA effectively. However, in such cases there is no possibility for the transferring party to suspend or terminate the transfer until the receiving body would be able to implement the safeguards of the WA again.

Termination Clause

- 3.62. Any administrative arrangement under Article 48(3)(b) of the Regulation should envisage that any personal data transferred from the EEA pursuant to the arrangement prior to its effective termination shall continue to be processed in accordance with the provisions of the arrangement.⁴⁶ The latter should also provide for a commitment of the Receiving party to return or permanently delete personal data that are processed unlawfully or are no longer necessary for the purpose of the processing.
- 3.63. The EDPS observes that there is no such termination clause in the draft WA, therefore it should be up-dated accordingly.

⁴² EDPB Guidelines paragraph 57.

⁴³ EDPB Guidelines paragraph 56.

⁴⁴ EDPB Guidelines, paragraph 61.

⁴⁵ See p. 9.

⁴⁶ EDPB Guidelines, paragraph 64.

3.2. Transfers of personal data within the framework of EUROSUR (Annex 1 of the WA)

- 3.64. Under Article 73(4) of the EBCG Regulation, WAs concluded with the authorities of third countries may include provisions concerning the exchange of information and cooperation in the framework of EUROSUR, in accordance with Article 74(3) of that Regulation (which lays down operational planning processes concerning operations on the territory of a third country, including the requirement for an operational plan to be in place between the agency and the third country concerned). The draft WA between Frontex and the Republic of Niger provides, in Article 5 and Annex 1, a set of provisions for the exchange of information in the framework of EUROSUR, including for the exchange of personal data.
- 3.65. Where the exchange of information in the framework of EUROSUR comprises personal data, processing must comply with Article 89 of the EBCG Regulation. Article 89(2) of the EBCG Regulation stipulates that ship and aircraft identification numbers shall be the only personal data that are permitted to be accessed in the European situational and specific situational pictures and the EUROSUR Fusion Services. Article 89(3) allows the processing of personal data other than ship or aircraft identification numbers, on an exceptional basis, where required.
- 3.66. As regards the exchange of personal data in the framework of EUROSUR with third countries, Article 89 lays down strict safeguards. Article 89(4) sets a high threshold for exchanges of personal data by requiring that they shall be “strictly limited to what is absolutely necessary for the purposes of this Regulation” and requires that any such exchange by Frontex shall take place in accordance with the conditions laid down in Chapter V of the Regulation.
- 3.67. The EBCG Regulation further stipulates, in Article 89(5), that “Any exchange of information under Articles 72(2), 73(3) and 74(3) which provides a third country with data 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.”

Transfer of Aircraft Identification numbers in the context of EUROSUR

- 3.68. The draft WA provides, under Article 7 of Annex 1, Frontex and the Republic of Niger to establish a specific situational picture⁴⁷ to share information with one another.

⁴⁷ Situational pictures compile information on events, activities, operations and relevant analyses linked to border management. In addition to national situational pictures and the European situational picture, specific situational pictures may be established to support specific operational activities at the external borders or to share information with third countries (Article 27 of the EBCG Regulation).

Within the context of that specific situational picture, the parties to the WA may report events and incidents linked to unauthorised border crossings and cross-border crime, share requests for information, and share watchlists.⁴⁸ Watchlists comprise a list of suspicious entities, behaviours or profiles, and can include suspected aircrafts, airports of origin or operators.⁴⁹

- 3.69. The Republic of Niger may also, under Article 8 of Annex 1 of the WA, call upon the support of EUROSUR Fusion Services to support its national activities. According to Article 8(1)(a), such support may include “monitoring of designated areas of air borders in order to detect, identify and track aircraft and other forms of equipment being used for, or suspected of being used for, irregular immigration or cross-border crime.”
- 3.70. In the context of the above-described activities, the draft WA provides the possibility for Frontex, under Article 10(1) to transfer to the Republic of Niger aircraft identification numbers. Aircraft identification numbers refer to the alphanumeric code required by international convention to be marked on the exterior of every civil aircraft and which is unique to each aircraft. Aircraft identification numbers may be considered personal data within the meaning of the Regulation (and are identified as such by the EBCG Regulation) because an aircraft identification number can enable the identification of the owner of an aircraft, its pilot and potentially the passengers associated with a particular flight. The Transfer Impact Assessment (TIA) conducted by Frontex notes that identification numbers of aircraft could be used to identify passengers, potentially including migrants and asylum seekers, travelling on that aircraft.⁵⁰
- 3.71. As noted above, any transfers of personal data within the framework of EUROSUR to third countries must meet the conditions laid down in Articles 89(4) and 89(5) of the EBCG Regulation.

Compliance with Article 89(4) of the EBCG Regulation

- 3.72. As concerns the first condition imposed by Article 89(4) to strictly limit exchanges to “what is absolutely necessary” for the purposes of the EBCG Regulation, the EDPS notes that neither the draft WA nor the TIA specifies the precise purpose for transfers of aircraft identification numbers beyond the general objective of preventing irregular migration and cross-border crime and providing technical and operational assistance to third countries in the context of European integrated border management. Frontex does not provide information about the operational needs that would support the monitoring of designated areas of air borders, presumably those of Niger (although this is not specified) in order to detect, identify

⁴⁸ Article 7 of Annex 1 of the WA.

⁴⁹ Article 15 of the Commission Implementing Regulation (EU) 2021/581 of 9 April 2021 on the situational pictures of the European Border Surveillance System (EUROSUR), OJ L 124, 12.4.2021, p. 3.

⁵⁰ Frontex report of 29 June 2018 on a General Transfer Impact Assessment - Niger, p.13.

and track aircraft is absolutely necessary to meet the purposes of the EBCG Regulation. In the absence of a documented, written justification of necessity, the EDPS cannot assess whether the exchanges of personal data implied by the exchange of aircraft identification numbers with the Republic of Niger meets the strict necessity condition of Article 89(4) of the EBCG Regulation.

- 3.73. Under the second condition of Article 89(4) of the EBCG Regulation, Frontex is required to demonstrate compliance with Chapter V of the Regulation. Under Chapter V of the Regulation, the controller must ensure that the transfer tool relied on ensures that data subjects whose personal data is transferred to a third country are afforded a level of protection in that third country that is essentially equivalent to that guaranteed within the EU.⁵¹ EUIs must carry out an individual case-by-case assessment in accordance with the Schrems II judgement to determine whether, in the context of the specific transfer, the third country of destination affords an essentially equivalent level of protection to that in the EU. Such an assessment should verify whether: (i) legislation in the third country formally meeting EU standards is manifestly not applied/complied with in practice; (ii) legislation in the third country is lacking or (iii) the transferred data and/or importer falls within the scope of problematic legislation.⁵²
- 3.74. With regard to the criteria (i) of the third country assessment, the TIA provided by Frontex indicates a likelihood that legislation in the third country formally meeting EU standards may not be applied or complied with in practice. The TIA notes that while the Niger Data Protection Law and subsequent amendments appear to offer a similar level of protection to those enjoyed in the EU, “there is a risk that officials may not act in full accordance with the national data protection legislation.” It describes difficulties in holding public officials to account, potentially leading to a culture of impunity, with potential adverse consequences for the respect for data protection as a fundamental right. While the TIA does not identify significant risks with respect to the operation of the judicial system and redress mechanisms available to data subjects, it does highlight a lack of resources affecting the work of the national data protection authority, and the risk that this may undermine the implementation of effective oversight and redress.⁵³ Statistics provided concerning the output of the Niger High Authority for the Protection of Personal Data (HAPDP) do not reference the handling of any data subject complaints.⁵⁴
- 3.75. With regard to criteria (iii) the application of problematic legislation to the transfer, the TIA conducted by Frontex notes that identification numbers of aircraft, which

⁵¹ See paragraphs 96 and 103 of the Schrems II judgment and recitals 65 and 70 and Article 46 of the Regulation.

⁵² EDPB recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, 18 June 2021.

⁵³ Frontex report of 29 June 2018 on a General Transfer Impact Assessment - Niger, p.12-13.

⁵⁴ Ibid, p.9.

could be used to identify passengers, potentially including migrants and asylum seekers, may fall under the scope of repressive migration legislation and categorises this scenario as a “medium risk.”⁵⁵ In its assessment of the human rights situation in the country of destination the TIA refers to a series of security-oriented legislative and policy measures undertaken by the Republic of Niger, resulting in reforms which have “undermined the human rights of migrants.”⁵⁶

- 3.76. The TIA cites, in particular, the Law on the Illicit Smuggling of Migrants, introduced by the Republic of Niger in 2015,⁵⁷ and draws on observations of the Office of the United Nations High Commissioner for Human Rights (OHCHR) which link the law to the criminalisation and mistreatment of migrants in Niger. That report details the detention of migrants subject to smuggling, without the authorities having specified the grounds for detention; unclear implementation of the law with regards to victims and perpetrators, and the law having resulted in arbitrary arrests, harassment and intimidation by law enforcement authorities.⁵⁸ The TIA further notes the detention of asylum seekers and migrants in Niger, in poor conditions and with limited judicial guarantees or access to asylum, as well as the extortion of bribes from migrants and asylum seekers by public officials.⁵⁹
- 3.77. The TIA further identifies, in relation to the transfer of aircraft identification numbers, the risk that, due to instability in the region, “the specific situational picture (if requested by the Nigerien authorities) may be used to track aircraft for alleged terrorism crimes which may be used however, for ulterior motives”. In this context the DPO recommends paying particular scrutiny to “what specific crime (if any) the transmission of aircraft identification numbers relates to.”⁶⁰
- 3.78. In this context, the EDPS notes that the human rights assessment of the TIA describes reports of inhuman or degrading treatment by the government of individuals more generally and reported abuse of detainees by security officials, particularly targeted at members of ethnic minority groups, or those accused of affiliation with extremist groups.⁶¹
- 3.79. “Problematic legislation” is defined by the EDPB as legislation which may affect the data transferred in a manner that may impinge on the transfer tool’s contractual guarantee of an essentially equivalent level of protection and which does not respect

⁵⁵ Ibid, p. 13.

⁵⁶ Ibid, p.13.

⁵⁷ Law 2015-36 of 26 May 2015.

⁵⁸ End of mission statement of the UN Special Rapporteur on the human rights of migrants, Felipe Gonzalez Morales, on his visit to Niger, 1-8 October 2018.

⁵⁹ Frontex report of 29 June 2018 on a General Transfer Impact Assessment - Niger, p.10 & p.12.

⁶⁰ Ibid, p.13.

⁶¹ Ibid, p.11.

the essence of the fundamental rights and freedoms recognised by the EU Charter of Fundamental Rights.⁶²

- 3.80. The EDPS considers that the above-described legislation and practices in the Republic of Niger, and their implications for the categories of individuals whose personal data may be the subject of transfers of aircraft identification numbers, could undermine the effectiveness of available mechanisms for such individuals to obtain redress against unlawful processing of their personal data. For instance, the EDPS questions the viability of exercising data subject rights or gaining access to effective judicial redress among the population targeted by this legislation, also in light of the above-described risks regarding compliance with data protection legislation in practice (see paragraph 3.72 of this Decision.)
- 3.81. In cases where an assessment may reveal that relevant legislation and practices in the third country may be problematic, and that the transferred data might fall within the scope of problematic legislation, the data exporter should either suspend the transfer; adopt supplementary measures to mitigate the risks of laws or practices of the third country impinging on the data transferred; or proceed with the transfer without supplementary measures, on condition that the exporter has detailed and documented in its assessment that such laws or practices will not apply to the transfers concerned.⁶³
- 3.82. As Frontex has neither proposed supplementary measures applying to the transfer of aircraft identification numbers, nor provided a detailed and documented report establishing that problematic legislation will not be applied in practice to the transferred data, the EDPS considers that Frontex has not demonstrated to a satisfactory level that the transfer of personal data implied by the exchange of aircraft identification numbers will be afforded an essentially equivalent level of protection.

Compliance with Article 89(5) of the EBCG Regulation

- 3.83. The EDPS notes that under Article 73(4) of the EBCG Regulation, WAs which insert provisions concerning the exchange of information and cooperation in the framework of EUROSUR, must do so in accordance with Article 74(3) of that Regulation. Article 74(3) of the EBCG Regulation requires that in the context of operations on the territory of a third country, an operational plan must be in place between the agency and the third country concerned. Such operational plans may include provisions concerning the exchange of information and cooperation for the purpose of EUROSUR in accordance with Articles 75 and 89 (Article 74(6)). It is the EDPS' understanding therefore that the inclusion of Annex 1 in the WA between

⁶² EDPB recommendations 01/2020 on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, 18 June 2021.

⁶³ Ibid, p.18.

Frontex and the Republic of Niger will consequently require the agreement of an operational plan to complement the implementation of the WA wherever this information is collected and exchanged in the context of an operation of Frontex in Niger.

- 3.84. Once a WA falls within the scope of Article 74(3) of the EBCG Regulation, it is subject to the requirement of Article 89(5), which prohibits the exchange of personal data within the framework of EUROSUR with third countries where such data 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.
- 3.85. Based on the information provided by Frontex in the TIA, (refer to paragraphs 3.72 - 3.78), the EDPS considers that it has not been proven to a sufficient standard that the transfer of aircraft identification numbers would not lead to the identification of individuals or groups of individuals who fall within the above-described categories. The inclusion of a fundamental rights safeguard in Article 10(4) of the WA is not sufficient to mitigate that risks, taking into account the non-legally binding nature of the WA.
- 3.86. In light of the above, the EDPS concludes that no aircraft identification number can be transferred to Niger for the purpose of EUROSUR, even if provided for in the context of an operational plan.

Transfer of other personal data in the context of EUROSUR on an exceptional basis

- 3.87. Article 10(2) of Annex 1 of the WA provides, in accordance with Article 89(3) of the EBCG Regulation, that where the processing of information in EUROSUR exceptionally requires it, Frontex may transfer other categories of personal data to the Republic of Niger, beyond aircraft identification numbers. It lays down conditions for this processing, including the conduct of a TIA by Frontex prior to the transfer and the requirement that the data will be deleted as soon as the purpose for which they have been collected has been achieved.
- 3.88. The TIA provided by Frontex does not specify the categories of personal data, data subjects, purposes nor the circumstances that may give rise to such exceptional personal data transfers under Article 10(2) of Annex 1 of the WA. Rather Frontex explains that the exceptional processing of personal data foreseen “has not yet been codified by the Agency”. It notes that “at the moment of drafting this TIA, it is not yet possible to foresee what exceptional circumstances would require such processing, nor whether they would require an international data transfer in accordance with Chapter V EUDPR. However, under such circumstances... should the need for a transfer of personal data other than aircraft identification numbers arise, prior to the conduct of the transfer, a TIA with specific data categories and

types of data subject, as well as with an appropriate transfer tool would then be conducted.”⁶⁴

- 3.89. As already mentioned under Section 3.1. of this Decision, the WA should define its purpose and scope in an explicit and specific way. In addition, it should clearly state the categories of personal data affected and the type of processing of the personal data which is transferred and processed under the arrangement.⁶⁵ This is not only a central requirement for an administrative arrangement providing for a transfer tool under Article 48(3)(b) of the Regulation, it is also a pre-condition for the EDPS to be able to authorise a draft WA. In the absence of this information, the EDPS cannot verify whether the categories of personal data to be transferred are adequate, relevant and limited to what is necessary in relation to the purpose for which they are collected.
- 3.90. Furthermore, the TIA provided by Frontex to the EDPS as a basis to assess the intended transfers and to authorise the draft WA is incomplete, as it does not map all of the transfers of personal data that are to be conducted with the foreseen transfer tool. It cannot therefore be assessed whether the safeguards included in the transfer tool are appropriate taking into account the law and/or practices in force in the third country that may impinge on the effectiveness of the appropriate safeguards relied upon. The requirement for a specific TIA to be conducted prior to each exceptional processing of personal data under Article 10(2), where this data is transferred to the Republic of Niger is not an equivalent safeguard in this regard, as those TIAs would not be subject to the scrutiny and authorisation of the EDPS.
- 3.91. Finally, the absence of any information regarding the data categories, data subjects, purposes and processing of the personal data transferred on an exceptional basis does not permit an assessment by the EDPS of compliance with Article 89(4) and Article 89(5) of the EBCG Regulation.
- 3.92. The EDPS therefore finds that the proposed transfers of personal data other than aircraft identification numbers foreseen under Article 10(2) of Annex 1 of the WA cannot be included within the scope of this WA.

⁶⁴ Frontex report of 29 June 2018 on a General Transfer Impact Assessment - Niger, p.3.

⁶⁵ EDPB Guidelines, paragraph 15.

4. CONCLUSIONS

- 4.1. In view of the above, **the EDPS is therefore not in a position to authorise** the use of the WA as a means for adducing appropriate safeguards under Article 48(3)(b) of the Regulation.
- 4.2. In order for the WA to be considered as adducing such adequate safeguards, the **following changes** are required in the draft WA:

General issues

- a) under second paragraph of Article 8.1: establish **obligations for both parties** to ensure the minimum safeguards for transfers of personal data set out in the draft WA;
- b) under Article 8 or in an annex: set out **types of personal data**, the purpose for which they have been transferred and further processed as well as the type of processing shall be set out in the draft;
- c) under Article 8: include **definition of key concepts** (“personal data”, “processing of personal data”, “data controller”, “data processor”, “recipient” and “sensitive data”, “onward transfers”, “sharing of personal data”) in line with the Regulation; complement the draft WA with definitions of the basic personal data concepts and rights;

Data protection principles

- d) complement Article 8.1(e) of the WA to indicate **retention periods**, either by including specific retention periods or by referring to Nigerian legislation setting them out;
- e) include in an annex specific provisions describing the **technical and organisational measures** implemented by the receiving party(ies) taking into account the nature, scope, context and purpose of the processing, and the risks for the rights and freedoms of natural persons;

Data subject rights in general

- f) under Article 8 include a list and definition of **data subject rights** as set out in the Regulation (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). Describe when these rights can be invoked and the modalities on how data subjects can exercise their rights. The WA shall foresee appropriate time limits (e.g. 1 month) to respond to such requests and to inform data subjects within a set time limit (e.g. 1 month) of the reasons and the available remedies (lodge a complaint and judicial redress) if the parties do not take action on their request.

- g) under Article 8.1 (g) include an obligation for the parties to notify each other if they become aware that inaccurate or out-of-date personal data is processed.
- h) under Article 8.1 (j) include specific references to the law setting out **restrictions** to the rights of data subjects.
- i) complement the WA to exclude that decisions concerning data subjects may be taken solely on the basis of **automated processing** in the sense of Article 24 of the Regulation;

Transparency

- j) under Article 8 include the obligation and the modality to provide a **general notice** to data subjects. The general notice shall set out the transfer, the type of entities to which data may be transferred, the rights available to data subjects under the applicable legal requirements, how to exercise those rights and information about any applicable restrictions on the exercise of such rights, available redress mechanisms and the contact details for submitting a dispute or claim.
- k) under Article 8 include an obligation for the transferring party to provide **individual information** to data subjects in accordance with the notification requirements of Articles 15 and 16 of the Regulation.
- l) under Article 8 include a commitment for the parties to **make available the WA** to data subjects upon request and to make the WA or at least a meaningful summary of the relevant provisions providing for appropriate safeguards publicly available on their websites.

Sensitive data

- m) include in an annex additional minimum safeguards⁶⁶ in relation to transfers of **sensitive personal data** considering the circumstances of the transfer, in particular the nature and categories of personal data transferred as well as the entities involved in the processing;

Onward transfers and sharing

- n) under Article 8.1(i): the wording on **onward sharing** of personal data to governmental bodies or to administrative and judicial authorities in Niger should be deleted, or any such receiving authority should be considered also as receiving party. The text should in any case state that onward transfers and sharing of personal data to any third country and any third party are prohibited.

⁶⁶ These could, for example, include encryption including in transit, pseudonymisation, restricting who has access to personal data, providing secure storage of personal data, implementing policies designed to ensure personal data are kept secure and confidential, as well as specific safeguards such as marking information as personal data transferred from the EEA, or requiring specialized training for staff processing data transferred from Frontex.

- o) under Article 8 complement the WA to refer to the availability of administrative and judicial redress including compensation for material and non-material damages and specify them. The receiving party shall provide assurance that individual rights are fully provided by its domestic law and can be exercised by EEA individuals under the same conditions as is the case for citizens and residents of the concerned third country.

Suspension and termination

- p) complement Article 8 to foresee the possibility to **suspend or terminate 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 or if the receiving party is not able to implement the safeguards of the WA.
 - q) complement the WA to explicitly provide for a **termination clause**, setting out that any personal data transferred from the EEA pursuant to the WA prior to its effective termination shall continue to be processed in accordance with the provisions of the WA;
- 4.3. As regards **transfers in the context of EUROSUR** and provided by Article 5 and Annex 1 of the draft WA, based on the information provided by Frontex in its TIA, Frontex should:
- a) **remove Article 10** from the text of Annex 1 of the draft WA;
 - b) include a new provision in Article 5 and Annex 1 stipulating that **no personal data shall be transferred** in the framework of EUROSUR to the Republic of Niger;
- or, if it intends to keep transfers in the context of EUROSUR in the draft WA,
- c) demonstrate to a satisfactory level that Frontex will ensure an **essentially equivalent level of protection** for the transfer of personal data implied by the exchange of aircraft identification numbers, by proposing supplementary measures applying to this transfer and/or by providing a detailed and documented report establishing that problematic legislation will not be applied in practice to the transferred data.
- 4.4. Once the requirements stipulated in paragraphs 4.2. and 4.3. above are met, the EDPS invites Frontex to file a new request for prior authorisation of the WA with the EDPS.

5. JUDICIAL REMEDY

- 5.1. Pursuant to Article 64 of the Regulation, any action against a decision of the EDPS shall be brought before the Court of Justice of the European Union within two months from the adoption of the present Decision and according to the conditions laid down in Article 263 TFEU.

Done at Brussels, 1st August 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI

Annex: Draft Working arrangement establishing operational cooperation between the European Border and Coast Guard Agency and the Directorate for Territorial Surveillance of the Republic of Niger regarding the fight against irregular migration and cross-border organised crime