



EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

## **EDPS Decision temporarily authorising the use of the administrative arrangement between the Single European Sky ATM Research 3 Joint Undertaking ('SESAR') and the European Organisation for the Safety of Air Navigation ('Eurocontrol') in the context of Eurocontrol's in-kind contributions to SESAR**

**(Case 2022-0933)**

### *Summary:*

This Decision addresses the request from Single European Sky ATM Research 3 Joint Undertaking ('SESAR') pursuant to Article 48(3)(b) of Regulation (EU) 2018/1725 (the 'Regulation').<sup>1</sup> In accordance with Article 57(1)(n) and Article 58(3)(f) of the Regulation, the EDPS authorises until 30 June 2024 the use of the Administrative Arrangement as a means for adducing appropriate safeguards under Article 48(3)(b) of the Regulation.

In the present Decision, the EDPS makes several recommendations for changes to be introduced in the Administrative Arrangement. SESAR may request in due time, and at the latest 3 months before the expiry of the present authorisation, a renewed authorisation under Article 48(3)(b) of the Regulation taking effect at the expiry of the present authorisation. Together with that request the EDPS asks to be provided a report illustrating SESAR's follow-up given to the recommendations formulated in points 3.7-3.10 and 3.17 of this Decision. The EDPS expects such a request for renewed authorisation to include specific information concerning the use of automated decision-making and the modernised data protection framework at Eurocontrol as laid down in point 3.26 of this Decision.

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<sup>1</sup> Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.

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# 1. PROCEEDINGS

- 1.1. This Decision concerns the authorisation of the Data Protection Administrative Arrangement ('AA') to be concluded between SESAR and Eurocontrol in the context of Eurocontrol's in-kind contributions to SESAR under Article 146(2), in conjunction with Articles 157 and 158, of Council Regulation (EU) 2021/2085 of 19 November 2021 establishing the Joint Undertakings under Horizon Europe (the 'Single Basic Act').<sup>2</sup>
- 1.2. The EDPS issues this Decision in accordance with Article 57(1)(n) and Article 58(3)(f) of the Regulation.
- 1.3. This Decision is addressed to SESAR.

# 2. BACKGROUND INFORMATION

- 2.1. Pursuant to Articles 144(1)(b) and 146(2) of the Single Basic Act, Eurocontrol is one of the members of SESAR.<sup>3</sup> Eurocontrol's contributions to SESAR shall consist of financial contributions and in-kind contributions to operational activities, and in-kind contributions to additional activities.<sup>4</sup>
- 2.2. According to Article 157 of the Single Basic Act, Eurocontrol's role and contribution to SESAR shall be set out in an administrative agreement describing Eurocontrol's tasks, responsibilities and contribution to the specifically listed activities of SESAR.<sup>5</sup> In addition, the back office arrangement shall be provided by Eurocontrol.<sup>6</sup>
- 2.3. In line with Article 35 of the Single Basic Act, the processing of personal data under the administrative arrangement shall be carried out in accordance with the Regulation.

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<sup>2</sup> Council Regulation (EU) 2021/2085 of 19 November 2021 establishing the Joint Undertakings under Horizon Europe and repealing Regulations (EC) No 219/2007, (EU) No 557/2014, (EU) No 558/2014, (EU) No 559/2014, (EU) No 560/2014, (EU) No 561/2014 and (EU) No 642/2014, OJ L 427, 30.11.2021, p. 17–119.

<sup>3</sup> Article 146 in conjunction with Article 3 of the Single Basic Act.

<sup>4</sup> Article 146 in conjunction with Article 11(4) of the Single Basic Act.

<sup>5</sup> Article 157(1) of the Single Basic Act lists the following activities of SESAR: a) organising Eurocontrol's research, development and validation activities in accordance with the work programme of the Single European Sky ATM Research 3 Joint Undertaking; (b) providing specialist support and advice to the Single European Sky ATM Research 3 Joint Undertaking on its request; (c) supporting and advising on the common developments for the future European ATM systems, in particular related to the future airspace architecture; (d) supporting the monitoring of the implementation of SESAR Solutions in line with the European ATM Master Plan; (e) engaging with Eurocontrol Member States to secure wide support for the Union's policy objectives and results of research, validation and demonstration activities amongst pan-European network partners; (f) providing support to programme management; (g) contributing to the administrative costs of the Single European Sky ATM Research 3 Joint Undertaking and providing information technology, communications and logistics support to the Single European Sky ATM Research 3 Joint Undertaking.

<sup>6</sup> Article 158 of the Single Basic Act.

- 2.4. Having negotiated the AA with Eurocontrol in line with EDPS’s informal comments provided at staff level on an earlier version of the AA, on 16 September 2022, SESAR submitted a request for an authorisation of the negotiated AA under Article 48(3)(b) of the Regulation. The submitted AA is part of the broader framework agreement between SESAR and Eurocontrol under Article 157 of the Single Basic Act.

### 3. LEGAL ANALYSIS

- 3.1. Transfers of personal data to third countries outside the European Economic Area (‘EEA’) or to international organisations 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 EEA.<sup>7</sup> For this reason, specific rules for such transfers have been set out in Chapter V of the Regulation (Articles 46 to 51 of the Regulation).
- 3.2. The first mechanism is the adoption by the European Commission of an adequacy decision recognizing that a third country or an international organisation provides a standard with regard to data protection that is essentially equivalent to that within the EU.<sup>8</sup> However, so far the Commission has not adopted any adequacy decision concerning Eurocontrol.
- 3.3. In the absence of an adequacy decision, transfers can take place through the provision of appropriate safeguards for the protection of personal data and on the condition that enforceable rights and effective legal remedies are available to individuals.<sup>9</sup> A legally binding and enforceable instrument between public authorities or bodies may provide for such appropriate safeguards.<sup>10</sup> Such safeguards may also be provided, subject to the authorisation of the EDPS, by inserting provisions into administrative arrangements between public authorities and bodies which include enforceable and effective data subject rights.<sup>11</sup>
- 3.4. The EDPB Guidelines 2/2020 on Articles 46(2)(a) and 46(3)(b) of Regulation 2016/679 (‘GDPR’)<sup>12</sup> for transfers of personal data between EEA and non-EEA public authorities and bodies (‘EDPB Guidelines’)<sup>13</sup> provide useful guidance to establish the set of minimum safeguards to be included in an administrative arrangement. Since the criteria for appropriate safeguards under Article 48(3)(b) of the Regulation are

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<sup>7</sup> Recital 71 of the Regulation.

<sup>8</sup> Article 47 of the Regulation.

<sup>9</sup> Article 48(1) of the Regulation.

<sup>10</sup> Article 48(2)(a) of the Regulation.

<sup>11</sup> Article 48(3)(b) of the Regulation.

<sup>12</sup> 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.

<sup>13</sup> Available

at [https://edpb.europa.eu/sites/default/files/files/file1/edpb\\_guidelines\\_202002\\_art46guidelines\\_internationaltransferspublicbodies\\_v2\\_en.pdf](https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202002_art46guidelines_internationaltransferspublicbodies_v2_en.pdf) [accessed 03 November 2022].

the same as under Article 46(3)(b) of the GDPR, the EDPB Guidelines constitute appropriate guidance for administrative arrangements concluded between European institutions, bodies, offices and agencies and public authorities in third countries or international organisations, such as the AA in question.

- 3.5. As a preliminary remark, the EDPS is satisfied that under the AA, its provisions and its annexes prevail over any other document referred to therein or the body of the framework agreement in case of a conflict.<sup>14</sup>
- 3.6. However, the EDPS is of the opinion that the following changes should be made in the body of the AA in order to improve the protection provided by the appropriate safeguards contained in the AA.

### 3.1. Improvements to the definitions of the key concepts

- 3.7. As a general rule, the definitions of the key concepts in the AA should replicate the ones under the Regulation. Hence, the EDPS **recommends** that in Article 1 of the AA be specified that:

- ) the definition of a ‘processor’ should mean a natural or legal person, public authority, agency or other body which processes personal data on behalf of **the controller**<sup>15</sup>, instead of ‘*on behalf of the Party*’. The AA covers the transfers between the Parties to this AA regardless of their role under the Regulation, and each Party’s role may differ depending on the specific processing operation. In addition, the EDPS recommends removing the second sentence of the current definition since it is a part of substantive agreements between the Parties, and not of the definition itself;
- ) the definition of a ‘recipient’ should mean a natural or legal person, public authority, agency or another body, **to which the personal data are disclosed, whether a third party or not**;
- ) the definition of a ‘transfer’ should not include its second part stating that ‘*whereas the Receiving Party is an international organisation*’ because in line with the definition of a ‘receiving party’ under the AA, either of the Party may be a receiving party depending on the transfer in question, while SESAR is an EU body<sup>16</sup>;
- ) the AA should in addition include the definitions of a ‘third party’<sup>17</sup> and ‘restriction of processing’<sup>18</sup>.

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<sup>14</sup> Article 1 of the draft AA.

<sup>15</sup> The words **in bold** in points 3.7-3.10 are the words that must be especially added to the mentioned clauses.

<sup>16</sup> Article 3(1)(h) of the Single Basic Act.

<sup>17</sup> Article 3(14) of the Regulation.

<sup>18</sup> Article 3(4) of the Regulation.

## 3.2. Improvements to the definitions of key data subject rights

3.8. The AA must guarantee that the essential data subject rights are respected. The draft AA does so and provides at Article 8 for the right of access. However, the EDPS **recommends** that Article 8(2)(1) of the AA should be amended so that, in addition to the information already envisaged in that provision, data subjects are clearly given the right to obtain information concerning:

- ) recipients or categories of recipients to whom the personal data **have been** or **will be** disclosed,
- ) any available information as to **the source of the personal data** where such data is not collected from the data subject,
- ) **appropriate safeguards in place relating to the transfers**, pursuant to Article 48 of the Regulation,

and **oblige the controller to provide a copy** of the personal data undergoing processing to the data subject where it does not adversely affect the rights and freedoms of others.

3.9. Concerning automated decision-making, the EDPS notes that SESAR informed<sup>19</sup> that no automated decision-making, including profiling, referred to in Article 24 of the Regulation will take place with respect to the data transferred from SESAR to Eurocontrol under the AA. It follows that there is no need to inform the data subjects in accordance with Article 17(1)(h) of the Regulation.

Nevertheless, since the AA foresees anyway for a ‘right to not to be subject to automated decision-making’ at Article 8(2)(1) of the AA, the EDPS **recommends** to:

- Z either explicitly rule out the taking of decisions by Eurocontrol based solely on automated decision-making, including profiling, which produces legal effects on data subjects or similarly affects them significantly, or
- Z to include a clear obligation to inform the data subject about the existence of such processing, in accordance with Article 17(1)(h) of the Regulation,

as otherwise the existence of the right to not be subject to automated decision-making referred to in Article 24 of the Regulation would be undermined. Indeed, the data subject cannot exercise this right if he or she is not aware of the existence of this particular kind of processing operations.

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<sup>19</sup> E-mail exchange between SESAR’s Data Protection Officer and Eurocontrol’s Data Protection Officer as forwarded to the EDPS on 12 December 2022 at 17:12 registered as A(2022)4417.

### 3.3. Integrity and confidentiality - Improvements concerning remedial action following data breaches

- 3.10. The EDPS **recommends** that Article 10(3) of the AA additionally require that where a Party becomes aware of a personal data breach concerning personal data processed under the AA, that Party should **without undue delay take reasonable and appropriate means to remedy the personal data breach and minimise its potential adverse effects.**

### 3.4. Independent oversight mechanism and judicial redress - Improvements and need to reassess

- 3.11. The EDPS would like to remind that in order to guarantee enforceable and effective data subjects rights the AA must provide for a system that enables data subjects to continue to benefit from redress mechanisms after their data has been transferred to Eurocontrol. These mechanisms must provide recourse for individuals who are affected by non-compliance with the provisions of the AA 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. In particular, the data subject must be ensured an effective way to lodge a complaint with an **independent oversight mechanism** as well as access to effective **judicial redress.**<sup>20</sup>
- 3.12. Since there is no supervisory authority specifically in charge with the supervision of data protection law at Eurocontrol, the need for an independent, effective and impartial supervisory oversight mechanism needs to be fulfilled by other means.<sup>21</sup> If no external independent oversight can be ensured from a structural or institutional point of view, oversight could be guaranteed through functionally autonomous mechanisms. The latter must be a body that, while not external itself, carries out its functions independently, i.e. free from instructions, with sufficient human, technical and financial resources. Eurocontrol shall be bound by the decisions of such an oversight body.<sup>22</sup>
- 3.13. In addition, the AA should allow for a judicial remedy including compensation for damages - both material and non-material - as a result of the unlawful processing of the personal data. If there is no possibility to ensure effective judicial redress, the AA must provide for alternative safeguards offering the data subject guarantees essentially equivalent to those required by Article 47 of the Charter of Fundamental Rights of the European Union ('Charter').<sup>23</sup> The EDPS notes that in such a case it is possible that the AA creates a structure which enables the data subject to enforce his/her rights outside the courts, for example through '*quasi-judicial, binding*

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<sup>20</sup> Para 50 of the EDPB Guidelines.

<sup>21</sup> Para 63 of the EDPB Guidelines.

<sup>22</sup> Para 64 of the EDPB Guidelines.

<sup>23</sup> Para 52 of the EDPB Guidelines.

*mechanisms such as arbitration [...], which would guarantee an independent review and bind the receiving public body*.<sup>24</sup> In order for these alternative bodies to offer guarantees essentially equivalent to those required by Article 47 of the Charter<sup>25</sup>, the EDPS underlines that they must be permanent, independent and impartial, include an *inter-partes* procedure, have compulsory jurisdiction and apply rules of law.<sup>26</sup> In addition, where the exercise of a judicial remedy by a person is subject to the prior exhaustion of other remedies available to him/her before an oversight mechanism, there must be practical arrangements ensuring that the obligation to first exhaust such remedies does not disproportionately affect the right to an effective remedy under Article 47 of the Charter.<sup>27</sup> The EDPS recalls that the prior exhaustion of the available remedies before an oversight mechanism must not lead to a substantial delay in bringing a legal action, that it must involve a suspension of the limitation period of the rights concerned and that it must not involve excessive costs.<sup>28</sup>

- 3.14. In the light of the foregoing, the EDPS notes that Eurocontrol is currently modernising its internal data protection framework. As understood by the EDPS, one of its goals is to align this framework with the requirements of EU data protection rules, specifically with regard to the oversight mechanism and judicial redress. The project is expected to be finalised by the end of 2023, and the new framework should entry into force by 1 January 2024 at latest.
- 3.15. In light of these ongoing modernisation efforts, the AA includes two sets of procedures: one binding until 31 December 2023, and another starting from 1 January 2024.<sup>29</sup>
- 3.16. Until 31 December 2023, which is a transition period covering the period of the modernisation project at Eurocontrol, the function of both oversight mechanism and judicial redress will be played by the International Court of Arbitration of the International Chamber of Commerce ('ICC') in accordance with the ICC's Arbitration Rules in effect at the time of filing the claim.<sup>30</sup>

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<sup>24</sup> Cf. para 53 of the EDPB Guidelines and the case law cited therein.

<sup>25</sup> CJEU Judgment of 16 July 2020, C-311/18, *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems*, ECLI:EU:C:2020:559, para 197.

<sup>26</sup> CJEU Judgment of 17 September 1997, C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, ECLI:EU:C:1997:413, para. 23.

<sup>27</sup> CJEU Judgment of 27 September 2017, C-73/16, *Peter Puškár v. Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy*, ECLI:EU:C:2017:725, para 76.

<sup>28</sup> *Ibid.*

<sup>29</sup> Article 12(4)-12(6) of the draft AA.

<sup>30</sup> Article 12(4) of the draft AA reads: 'During a transition period finishing by 31 December 2023, if the Data Subject believes that the complaint was not resolved appropriately by EUROCONTROL, he or she may seek administrative redress and remedies, including compensation for material and non-material damages, towards EUROCONTROL by arbitration by filing a claim before the International Court of Arbitration of the International Chamber of Commerce ("ICC") in accordance with the ICC's Arbitration Rules in effect at the time of filing the claim. The arbitral award of the ICC shall be binding on all parties and shall not be subject to appeal'.

- 3.17. The EDPS welcomes Eurocontrol’s commitment to ensure a mechanism for oversight and judicial redress during the transition period. Nevertheless, such a transitional mechanism must ensure the essentially equivalent standard of protection mentioned above. As such, the EDPS **recommends** that SESAR ensures that filing a claim by a data subject against Eurocontrol to the ICC is free of charge for that data subject.
- 3.18. Before the end of 2023, Eurocontrol is to ‘*establish an independent, effective and impartial oversight supervisory body, as a functionally autonomous mechanism with the authority to issue binding instructions to EUROCONTROL, to handle complaints from Data Subjects*’.<sup>31</sup> Hence, starting from 1 January 2024, the oversight mechanism is to be ensured by the to-be-created ‘Eurocontrol’s supervisory body’.
- 3.19. Likewise, starting from 1 January 2024, Eurocontrol is to ‘*enable a data subject, who believes that his/her complaint was not resolved appropriately by the EUROCONTROL supervisory body [...], to obtain effective redress and remedy, including compensation for material and non-material damages, before a permanent mechanism with compulsory jurisdiction that ensures independent and impartial inter partes adjudication, in accordance with the principles of due process, and whose decisions are binding on all parties and not subject to appeal., access to such mechanism shall be free of charge for the data subject*’.<sup>32</sup>
- 3.20. However, the final establishment and entry into force of the **oversight and judicial redress mechanisms** are ‘*subject to the approval of the EUROCONTROL Permanent Commission*’.<sup>33</sup> The EDPS welcomes Eurocontrol’s commitment to modernise its internal data protection framework to enhance the rights of data subjects. Nevertheless, the future Eurocontrol’s framework must ensure the essentially equivalent standard of protection mentioned above. As such, SESAR must ensure that:
- i. Eurocontrol establishes an independent oversight mechanism which is a functionally autonomous mechanism within Eurocontrol, i.e. free from instructions, with sufficient human, technical and financial resources, and which has the authority to issue decisions binding Eurocontrol;
  - ii. Eurocontrol establishes a mechanism that enables a data subject to obtain effective redress and remedies, including compensation for material and non-material damages, before a permanent mechanism with compulsory jurisdiction that ensures independent and impartial inter-partes adjudication, in accordance with the principles of due process, and whose decisions are binding on all parties; access to such mechanism shall be free of charge for the data subject.

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<sup>31</sup> Article 12(5) (first sentence) of the draft AA.

<sup>32</sup> Article 12(6) of the draft AA.

<sup>33</sup> Article 12(7) of the draft AA.

## 4. CONCLUSION

### 4.1. Temporary authorisation valid until 30 June 2024

- 3.21. In light of the temporary nature of the oversight and judicial redress mechanism binding until the end of 2023, and the uncertainty remaining on the approval and the nature of the mechanisms resulting from the modernisation project at Eurocontrol, the EDPS considers it necessary to have the opportunity to reassess Eurocontrol's future modernised data protection framework in light of point 3.20 above once that framework is finally approved and enters into force.
- 3.22. Furthermore, in points 3.7-3.10 and 3.17 above, the EDPS identified changes to the text of the AA that the EDPS recommends to introduce in order to improve the protection afforded by the appropriate safeguards adduced by SESAR within the meaning of Article 48(3)(b) of the Regulation.
- 3.23. Therefore, pursuant to Article 57(1)(n) and Article 58(3)(f) of the Regulation, **the EDPS authorises until 30 June 2024 the use of the AA as a means for adducing appropriate safeguards under Article 48(3)(b) of the Regulation.**
- 3.24. The EDPS **recommends** to introduce in the AA **the changes suggested in the points 3.7-3.10 and 3.17.**
- 3.25. SESAR may request in due time, and at the latest 3 months before the expiry of the present authorisation, a renewed authorisation under Article 48(3)(b) of the Regulation taking effect at the expiry of the present authorisation. Together with that request the EDPS asks to be provided a report illustrating SESAR's follow-up given to recommendations formulated in points 3.7-3.10 and 3.17.
- 3.26. The EDPS expects such a request for renewed authorisation to:
- Z inform that the text of the AA is amended to either explicitly rule out the taking of decisions by Eurocontrol based solely on automated decision-making, including profiling, which produces legal effects on data subjects or similarly affects them significantly, or to include a clear obligation to inform the data subject in accordance with Article 17(1)(h) of the Regulation, in line with point 3.9 of the present Decision;
  - Z include detailed information about the updated data protection framework of Eurocontrol, in particular in relation to oversight and redress, in line with the conditions laid down in point 3.20 of the present Decision.

Done at Brussels, 14 December 2022

*[e-signed]*

Wojciech Rafał WIEWIÓROWSKI