

From: [REDACTED]
To: [REDACTED] 'DPF Data Protection Function' <DPF@europol.europa.eu>
CC: [REDACTED]
Sent at: 16/04/21 17:40:08
Subject: Informal comments on EBCG internal rules

Dear [REDACTED]

Thank you for your informal consultation on the applicability of the EBCG internal rules.

Please find our comments attached.

Please note that this is informal advice at staff level and does not bind the EDPS.

Kind regards

[REDACTED]



INFORMAL CONSULTATION FROM FRONTEX'S DPO ON INTERNAL RULES
ON REGULATION 2018/1725
(Case 2021-0204)

Article 86 (2) of Regulation 2019/896 requires Frontex's Management Board to adopt internal rules on the application of Regulation 2018/1725 to the Agency, including rules concerning the data protection officer of the Agency. The same provision also allows the Agency to adopt internal rules to restrict data subjects' rights in accordance with Article 25 of Regulation 2018/1725.

We understand that currently two decisions about internal rules on data protection have been adopted by Frontex's management board. These decisions are:

- 1) The Management Board ('MB') Decision No 34/2015 of 10 September 2015 adopting implementing measures for the application of Regulation (EC) No 45/2001. This Decision specifies the tasks, duties and powers of the data protection officer ('DPO'). It was amended by the MB Decision No 34/2016 of 28 October 2016 as regards the period of appointment of the DPO.
- 2) The MB Decision No 58/2015 of 18 December 2015 adopting Implementing Measures for processing personal data collected during joint operations, pilot projects and rapid interventions.

Both decisions are respectively based on Articles 11a and 11c of Regulation 2007/2004 (as amended by Regulation 1168/2011) and in accordance with Regulation 45/2001.

In the meantime, Regulation 2007/2004 was replaced by Regulation 2016/1624 which, in turn was modified by Regulation 2019/896 (the 'EBCG Regulation'). In addition, Regulation 45/2001 was replaced by Regulation 2018/1725 (the 'EU DPR')

In this context, the DPO is asking about the applicability of MB Decisions 34/2015 (as amended by Decision 34/2016) and 58/2015 considering that these decisions have been neither updated nor replaced yet.

EU law is based on primary legislation (i.e. the Treaties, the Charter of fundamental rights and the general principles of law) and secondary legislation. Secondary legislation comprises all acts adopted by the EU institutions which enable the EU to exercise its powers. As part of secondary legislation, acts adopted by EU institutions can be divided between acts referred to in Articles 288 to 292 of the TFEU (regulations, directives, decisions, recommendations, opinions, delegated and implementing acts) and those which are not (atypical acts).

The EBCG Regulation and the EU DPR are legislative acts adopted under the EU ordinary legislative procedure (Articles 288 and 289 of the TFEU). Such regulations are binding in their entirety and directly applicable.

Internal rules adopted by EU institutions and bodies are atypical acts. They are internal because they govern the internal functioning of the institutions. They are based on the power of self-organisation given by the Treaties to EU institutions and are binding for the institutions they govern.¹ EU institutions cannot abrogate or deviate from their internal rules except if they adopt new internal rules amending or abrogating the existing ones. Even if the internal rules are based on a legal framework that in the meantime has been amended, they are still applicable as long as they do not contradict the new legal framework.

By adopting internal rules, the EU institutions establish an administrative practice, which can be perceived as an accountability tool that contributes both to increase legal certainty and to the right of good administration referred to in Article 41 of the EU Charter of Fundamental rights.

Under the EU hierarchy of norms, regulations as referred to in Article 288 of the TFEU prevail on internal rules adopted by EU institutions in their power of self-organization.

In light of the above, data protection internal rules adopted by Frontex must always be compatible with the EU DPR and the relevant provisions of the EBCG Regulation. These two regulations are binding and directly applicable. In the absence of a MB decision abrogating or amending Frontex existing internal rules, these rules are still applicable unless they contradict the EU DPR and/or the EBCG Regulation. In this case, the contradicting rules are not valid anymore and must be disregarded.

The DPO is also asking whether the standing corps of Frontex (i.e. the EBCG standing corps) could collect operational personal data from joint operations while Article 1 of the MB Decision N° 58/2015 only regulates the data collected by Member States. In addition, the DPO is asking whether the standing corps in all its forms are part of the Agency (as set out in Article 5 of EBCG Regulation 2020/2223) and whether for data protection purposes they may constitute or represent another Member State controller.

The EBCG standing corps would be allowed to collect personal data as far as 1) they have a legal basis in the EBCG Regulation to do so and 2) they do it in compliance with this Regulation and the EU DPR.

Pursuant to Article 5 of the EBCG Regulation, the Agency includes the EBCG standing corps referred to in Article 54 with a capacity up to 10 000 operational staff in accordance with Annex 1. Article 54 repeats that the EBCG standing corps are part of the Agency and groups them in 4 categories. The number of standing corps for each category is determined in Annex 1. The EBCG standing corps are also referred to in the definition of “member of the teams” (Article 2 (17) of the EBCG Regulation).

In this context, we understand from Article 88 (1) §2 that EBCG standing corps may collect personal data in the context of joint operations as this provision states that: “(...) the Agency shall only process the following categories of personal data collected by the Member States, by members of the team, by its staff or by EASO that have been transmitted to it in the context

¹ Article 335 of the TFEU provides that: “In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.”

of joint operations, return operations, return interventions, pilot projects, rapid border interventions, and migration management support team deployments: (...)”. Where the EBCG standing corps process personal data only on behalf of and under the sole instructions of the Agency, they do not constitute or represent another controller such as their home Member State.

This is informal advice at staff level and does not bind the EDPS. Should Frontex need a formal reply (letter signed by Head of Unit or Supervisor), we can arrange that as well.

16 April 2021