Council of the European Union

Brussels, 31 March 2016
(OR. en)

7459/16

Interinstitutional File:
2015/0310 (COD)

FRONT 154
SIRIS 58
CODEC 354
COMIX 252

COVER NOTE

From:	European Data Protection Supervisor
date of receipt:	30 March 2016
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EU

Delegations will find attached a copy of the above-mentioned opinion.

EUROPEAN DATA PROTECTION SUPERVISOR

GIOVANNI BUTTARELLI
SUPERVISOR

SECRÉTARIAT GÉNÉRAL DU
CONSEIL DE L'UNION EUROPÉENNE
SGE16/02975
Reçu le 30 -03- 2016
DEST. PRINC. Mme ROGER
DEST. COPISTES Service Juridique
Mme LOPEZ RUIZ

President of the Council of the European Union
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Council of the European Union
Rue de la Loi 175
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Brussels, 18 March 2016
GB/LS/cpl/D(2016)0663 **C 2016-0040**

Subject: Opinion on the Proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC

Dear Mr President,

With regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of data by the Community institutions and bodies and on the free movement of such data, and in particular its Article 28(2), I send you an Opinion on the Proposal for a regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC.

I have written in similar terms to the President of the European Commission and the President of the European Parliament.

Yours sincerely,

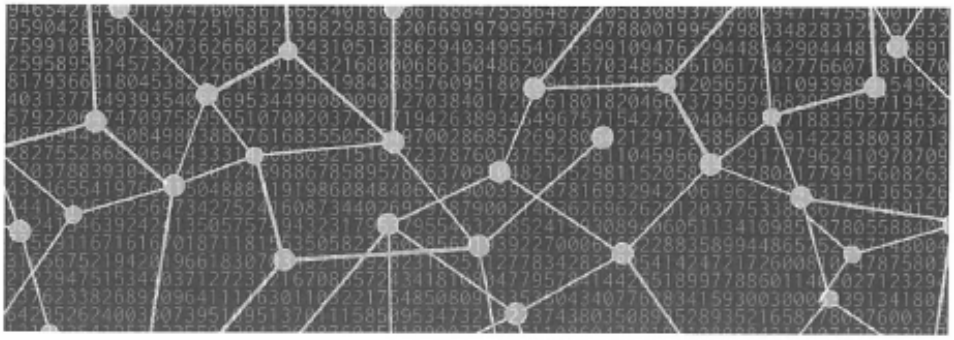
Giovanni BUTTARELLI

Annex: Opinion

Cc: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General
Mr Peter DE GOOIJER, Permanent Representative of the Netherlands
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EUROPEAN DATA PROTECTION SUPERVISOR

Opinion 02/2016

EDPS' recommendations on the proposed European Border and Coast Guard Regulation

EDPS

18 March 2016

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 41(2) of Regulation 45/2001 'With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies', and '...for advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data'. Under Article 28(2) of Regulation 45/2001, the Commission is required, 'when adopting a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data...', to consult the EDPS.

He was appointed in December 2014 together with Assistant Supervisor with the specific remit of being constructive and proactive. The EDPS published in March 2015 a five-year strategy setting out how he intends to implement this remit, and to be accountable for doing so.

This Opinion relates to the EDPS' mission to advise the EU institutions on the data protection implications of their policies and foster accountable policymaking - in line with Action 9 of the EDPS Strategy: 'Facilitating responsible and informed policymaking'. The EDPS considers that compliance with data protection requirements will be a key to the success of the European Border and Coast Guard initiative.

Executive Summary

Europe is today faced with a pressing migration crisis and increased terrorist threats. The EU therefore wants to strengthen management of its external borders. In that context, the proposed European Border and Coast Guard Regulation aims to establish general principles of European integrated border management and will reinforce the mandate of the Frontex agency.

The EDPS recognises this need for more effective manage of migration and for reinforcing internal security, which requires processing of personal data. However, the Commission's Proposal could also create a serious intrusion into the rights of migrants and refugees, a vulnerable group of people in particular need of protection.

This Opinion address the five main data protection concerns and calls for further improvements of the proposed text to ensure full compliance with data protection principles. The EDPS considers that such compliance will be a key to the success of the initiative and its ability to withstand legal scrutiny. We specifically recommend:

• on the purposes of the Proposal, separate assessments of the necessity and proportionality of the measures for meeting the two identified aims of migration and security, noting that the aims will trigger the application of different data protection rules;

• on the collection of personal data, clarification of the scale and scope of processing activities by the Agency. since the current Proposal implies that the new Agency will turn into a personal data hub where massive amounts of personal information would be;

• clear delineation of responsibilities between the new Agency and the EU Member States so that there is no blurring of accountability in the data protection obligations of each controller;

• clarifications on transfers of personal data to third countries and international organisations, bearing in mind that such transfers must be based either on an adequacy assessment or on the use of appropriate safeguards;

• on the respect for fundamental rights of migrants and refugees, guarantees on the ground that migrants and refugees are informed of their rights in way that they can reasonably understand and exercise those rights.

Overall, the new Agency must be sufficiently equipped and capable of discharging its responsibilities for complying with data protection rules and safeguarding the interests and rights of individuals to whom the personal data being processed relates.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty of the Functioning of the European Union, and in particular its Article 16,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, and in particular Articles 28(2), 41 (2) and 46 (d) thereof,

Having regard to Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters,

HAS ADOPTED THE FOLLOWING OPINION:

1. Context of the Proposal

1. On 15 December 2015, the Commission released an important set of measures better known as the 'Borders Package'[1], with the objective to strengthen the management of the European Union's external borders and better protect the Schengen area. The main initiative of this package is the Proposal for a regulation establishing a European Border and Coast Guard[2] (hereinafter "the Proposal"), which provides for the general principles of European integrated border management and is a follow up to the Commission's own Agenda on Migration[3] and to some extent to its Agenda on Security[4], both tabled earlier in Spring 2015.

2. On 17 December 2015, the European Council called for a swift adoption of the Proposal and asked the Council of the EU to reach a political agreement before the term of the current Presidency.[5] The co-legislators have accelerated their deliberations on the Proposal. The Dutch Presidency intends to meet the requested deadline[6], while the European Parliament has tentatively scheduled a plenary sitting to scrutinise the Proposal in early June[7].

3. The EDPS acknowledges the migration crisis and terrorist threats that the EU is today facing, and the importance of taking swift and meaningful measures to tackle this situation at EU level. He welcomes the efforts of the European Commission to react swiftly to the current turn of events. Nevertheless, it is the EDPS' role to recall the importance of respecting the fundamental right to data protection and to advice on better ways to include data protection safeguards in new legislative measures, in the light of Articles 7 and 8 of the Charter of Fundamental Rights of the EU[8] (hereinafter "the Charter") and Article 16 of the Treaty of the Functioning of the European Union. We regret that the above mentioned agenda has not allowed for the consultation of the EDPS at an earlier stage of the legislative process.

4. In the present Opinion, the EDPS has idenfied five main areas of concern which require further improvements of the proposed text so as to ensure compliance with the data protection framework. He will focus his comments on the purposes of the Proposal, the collection of personal data, the responsibility for processing personal data, transfers of personal data to third countries and international organisations, and the respect for fundamental rights of migrants and refugees. Finally he will highlight aspects of the Proposal where important clarifications are needed.

2. Purposes of the Proposal

5. The Proposal serves two different purposes: the management of migration and ensuring internal security within the Union. The clear definition of purposes for which personal data are processed is key to ensure a correct assessment of the respect for data protection principles. The EDPS has concerns about the mixed purposes pursued by this initiative, which has legal as well as practical consequences because it requires different assessments of the necessity and proportionality of the measure, and because it triggers the application of different data protection rules.

6. Recital 2 of the Proposal states that *"European Border integrated management is central to improving migration management and ensuring a high level of internal security within the Union"*. To this end, the Proposal sets up a European Border and Coast Guard (hereinafter "the EBCG") that will consist of the European Border and Coast Guard Agency (hereinafter "the Agency"), replacing the existing Frontex[9] Agency, and Member States' national authorities in charge of border management[10]. It also creates a close cooperation between the Agency at Union level and the competent authorities at national level by entrusting them with the shared responsibility to: *"secure the European Union's external borders, manage migration more effectively and improve internal security of the EU, while safeguarding the principle of free movement of persons"* (Article 1 of the Proposal).

7. Pursuant to Article 46 of the Proposal, the Agency will be able to process personal data collected and transmitted to it concerning *"persons who are suspected (...) of involvement in cross-border criminal activities, including in facilitating irregular immigration activities, in trafficking in human beings or terrorism"* and of *"persons who cross the external borders illegally"* in a series of cases. The latter addition constitutes a substantial change compared to the present competences of Frontex, which should not take place without a thorough analysis in terms of necessity and proportionality.

8. Although we consider that the two purposes of migration management and internal security might be complementary, separate assessments are required of their legitimacy and of the necessity and proportionality of the collection and use of personal data as prescribed by law. The necessity and proportionality of a processing operation is to be measured in advance against the purposes for which the data are collected and further used[11]. The fact that one purpose meets the privacy and data protection standards does not necessarily mean that the other meets them as well. In this respect, the justification does not appear to be complete at this stage.

9. Furthermore, national authorities responsible for border management will have to comply with different data protection rules according to the purposes of processing. According to recital 38 of the Proposal, *"Any processing of personal data by Member States*

within the framework of [the proposed] Regulation should be conducted in accordance with Directive 95/46/EC" and *"Council Framework Decision 2008/977/JHA"*[12]. Therefore, where their processing activities are related to migration management, the national competent authorities[13] shall comply for the time being with the national laws transposing Directive 95/46/EC[14], whereas for processing activities related to internal security, they shall comply with Framework Decision 2008/977/JHA[15] in so far as they fall within its scope.

10. The Proposal does not systematically distinguish between processing of personal data by the Agency for migration purposes and for internal security purposes. Those two purposes are envisaged together specifically in Article 10 (to read in conjunction with Article 45(1)) in relation to risk analysis, in Article 46 with regard to joint operations and other operational tasks, and in Article 51 with regard to cooperation with EU bodies and international organisations (to read in conjunction with Article 44(4)). Therefore, it remains unclear which set of rules will be applicable given the mixed purposes pursued by the Proposal.

11. The need for better clarity on how the provisions of the Proposal relate to migration management or to internal security, and thus to the current Directive 95/45/EC or Framework Decision 2008/977/JHA, is even stronger knowing that the future European data protection framework now politically agreed on and soon to be formally adopted, maintains this difference in regime between a General Data Protection Regulation[16] and a Data Protection Directive in criminal matters[17] for law enforcement purposes.

12. **Given all the considerations above, we recommend that these two purposes are more explicitly and separately detailed throughout the Proposal, which also should facilitate carrying out a prior assessment of the necessity and proportionality of the processing activities envisaged for each purpose.**

3. Collection of personal data

13. The EDPS asks for clarifications regarding the scale and scope of personal data concerning migrants and refugees that the Agency will be able to process.

14. Article 46(1)(b) of the Proposal introduces an important change compared to Frontex's current mandate. Pursuant to Article 46(1)(b), the Agency will be allowed to process personal data *"regarding persons who cross the external borders illegally and whose data is collected by the [EBCG Teams], including when acting in the framework of the migration management support teams"*.

15. Currently, Article 11(c) of the Frontex Regulation allows Frontex to further process personal data concerning persons suspected by Member States' competent authorities, on reasonable grounds, of involvement in cross-border criminal activities, in facilitating illegal migration activities or in human trafficking activities (which is broadly similar to Article 46(1)(a) of the Proposal but which adds terrorism to the list of offences). In comparison, Article 46(1)(b) will allow the Agency to process personal data relating to all irregular migrants - instead of only processing personal data of suspected smugglers and traffickers, the Agency's mandate would therefore also cover their victims as well as any other irregular migrants.

16. Furthermore, we take note of the first sentence of Article 46(1) which, on the one hand refers to personal data *"collected and transmitted to [the Agency] by Member States or its own staff in the context of joint operations [and other operational activities]"* while Article 46(2)(b), on the other hand would allow onward transfers by the Agency to relevant Member State authorities for border control, migration, asylum or law enforcement purposes. Taken together, Articles 46(1)(b) and (2)(b) could be read as transforming the Agency into a central personal data hub for border management, which implies a massive change in the present mandate of Frontex.

17. Albeit for perfectly legitimate purposes, tens of thousands of migrants and refugees will potentially be affected by this initiative. We understand from Article 46 of the Proposal that the Agency will be allowed to process any kind of personal data collected during joint operations and other operational tasks. Article 46(1) points (a) and (b) only mention that the use of personal data by the Agency is limited to personal data regarding certain categories of persons: irregular migrants and persons suspected of cross-border criminal activities. **For the sake of clarity and transparency, we ask for additional clarification as to the extent of these processing activities and we recommend exhaustively listing in Article 46 categories of personal data that could be used and/or pass through the Agency in relation to both purposes for processing linked to Article 46 and laid down in Article 45(1)(a) and (d).**

18. In addition, while Article 46(1), points (a) and (b) refer to data regarding certain categories of *persons*, Article 46(1) point (c) refers to certain categories of *data*, namely license plates, telephone numbers and ship idenfication numbers, that are *"necessary for investigating and analysing routes and methods used for irregular immigration and cross-border criminal activities"*. Article 46(1)(c) could be interpreted as a general authorisation to process these categories of data, irrespective of a connection to the categories of persons defined in points (a) and (b). **We therefore recommend clarifying Article 46(1) to the effect that these categories of data are listed as examples of the information that may be processed concerning the categories of persons referred to in points (a) and (b), such as for instance phone numbers of suspected smugglers or number plates of cars used by suspected traffickers.**

4. Responsibility for processing

19. The Proposal brings a further shift towards a more operational role of the Agency in the management of the external borders compared to Frontex[18] and extends its mandate to process personal data. The Proposal lacks clarifications regarding the respective responsibilities of the Agency and of Member States for processing personal data, which is essential for the attribution of controllership. Of course it is essential that, in entrusting this new Agency with major new responsibilities and tasks which will affect the rights of thousands of individuals to protection of personal data, the body must be fully equipped and capable of discharging this role.

20. The Proposal sets up a rapid reserve pool of minimum 1500 border guards and creates the new concept of "European Border and Coast Guard Teams" (hereinafter "EBCG Teams") that will consist of *"border guards and other relevant staff from participating Member States, including national experts that are seconded by Member States to the Agency"* (Article 2(3)), which will be deployed from this pool to Member States where necesssary. Thes EBCG

teams are meant to support Member States' competent authorities in carrying out their tasks related to the control of external borders, such as for instance assisting in the screening, identification and fingerprinting of arriving migrants and refugees at hotspot areas (Article 24(1)(g)).

21. We understand from Article 39 of the Proposal that all members of the EBCG teams will act under the authority of and on behalf of the host Member State in which they are deployed, including team members who are part of the Agency own staff. Therefore, we infer that the relevant host Member State authorities will be the controllers for processing of personal data and will thus be accountable for the processing activities. **We stress that joint operations of the Agency and Member States should not lead to a blurring of accountability between the Agency, the host Member State and home Member States.**

22. Furthermore, Article 46(1) of the Proposal refers to *"personal data collected and transmitted to [the Agency] by Member States or its own staff in the context of joint operations [and other operational activities]"*. For the application of this provision, it should be very clear which information will reach the Agency, thus triggering its responsibility as controller, and which information will remain at Member State level, for which thus Member States' competent authorities will remain accountable as controllers. **Therefore, we recommend clarifying Article 46 in order to make explicit the circumstances in which personal data collected in operations at the border will be transmitted to the Agency**.

5. Transfers of personal data to third countries

23. The proposed Regulation would increase cooperation between the Agency and Member States' competent authorities, and cooperation between the Agency and other entities both inside and outside the EU. Such increased cooperation will entail multiple and diverse exchanges of information that in some cases will include personal data. It should be underlined that special data protection requirements apply when transferring personal data outside of the EU.

24. The Proposal aims to enable the Agency to cooperate with other international organisations and competent authorities of third countries (Articles 51 and 53). The Proposal would also regulate processing activities of the Agency and Member States that may or may not take place on grounds of data protection (Articles 44 and 48).

25. In this regard, we welcome the prohibition under Article 44(4) of the Proposal of the *"transfer of personal data processed by the Agency and the onward transfer by Member States to authorities of third countries or third parties processed in the framework of the [proposed] Regulation"*, with the exception of personal data processed in the context of return operations and return interventions provided for specifically in Article 47. We understand that the expression "third parties" includes international organisations as well, which are therefore also concerned by this prohibition. Transfers of personal data outside the EU are indeed subject to the same rules, be it a transfer to a state authority or to an international organisation. **Therefore, we recommend including an explicit reference to international organisations in Article 44(4).**

26. Article 53 envisages the future cooperation between the Agency and third countries. Article 53(4) stipulates that "*Where the personal data of returnees are not transmitted to the*

carrier by a Member State, the Agency may transfer such data". If read jointly with Article 44(4), the EDPS understands that this paragraph foresees the only scenario in which the proposed Regulation will allow the Agency to transfer personal data to a third country, namely when providing personal data of returnees to an airline from a third country[19].

27. In any event transfers of personal data to third countries by the Agency or by Member States will require either an adequacy assessment or the use of appropriate safeguards, in accordance with Article 9 of Regulation (EC) 45/2001 and Articles 25 and 26 of Directive 95/46/EC.

28. With regard to cooperation with international organisations, Article 51 addresses in one single provision the cooperation of the Agency with the EU institutions, agencies, bodies and offices and with international organisations. The EDPS considers that addressing cooperation with these entities in the same provision may lead to confusion, as EU institutions, agencies and bodies are not subject to the same transfer rules as international organisations. The wording of this provision may therefore create legal uncertainty. All three sentences of Article 51(4) refer to a number of different entities, the first and third sentences including international organisations and the second one excluding international organisations, which makes the paragraph difficult to read and could create misinterpretations. **Therefore, we recommend clarifying this paragraph and the provision as such, preferably by dividing it in two distinct articles to address cooperation among EU entities and with international organisations separately.**

29. In addition, the first sentence of Article 51(4) provides that *"international organisations (...) shall use information received by the Agency only within the limits of their competences and in compliance with fundamental rights, including data protection requirements"*. This suggests that transfers of personal data between the Agency and international organisations will take place, which is in principle contradictory to Article 44(4) which, to our understanding, forbids such transfers. **We ask for clarifications as to the transfer of personal data by the Agency to international organisations and we recall that, should transfer of personal data to international organisations be explicitly foreseen in specific circumstances, it will be subject to the same conditions as transfers to third countries, including the assessment of adequacy and specific safeguards cited above in accordance with Article 9 of Regulation (EC) 45/2001.**

6. Ensuring rights of migrants and refugees

30. The fundamental rights of migrants and refugees must be fully respected in this context, including the right to personal data protection. Therefore we urge the future Agency and Member States to be as transparent as possible concerning how they process migrants and refugees' personal data, to inform these individuals in a clear manner appropriate to their circumstances, and we recommend the adoption of specific user-friendly procedures to allow data subjects to exercise their rights effectively.

31. When migrants and refugees reach EU territory, they find themselves in a particularly precarious situation due to several factors: they have commonly fled their home country seeking for international protection, some face the risk of being returned, most of them are unable to communicate fluently in the language of the Member State they arrive in or are relocated to, and they are unfamiliar with the legal system in place.

32. In this context, the EDPS welcomes the Proposal's explicit requirement that the EBCG will *"guarantee the protection of fundamental rights in the performance of its tasks under this Regulation"* (Article 33(1)), and the Proposal's numerous references to respect for fundamental rights set out in the Charter, including specific references to the right to data protection[20] in Recital 29 and Article 34(2). We also welcome the Proposal's provisions for several mechanisms to ensure respect for fundamental rights of migrants and refugees, some of which already exist in the current Frontex Regulation, as detailed below:

- Article 33(1) requires the drawing up and implementation of a Fundamental Rights Strategy[21];

- Article 34 requires the further development of a Code of Conduct for border guards during border control operations coordinated by the Agency laying down procedures to guarantee the respect for fundamental rights[22], as well as the development of a Code of Conduct concerning return operations in order to ensure return of illegally staying third country nationals with full respect for fundamental rights, including the right to the protection of personal data[23];

- Articles 71 and 72 set up a new complaint mechanism and provides for the appointment of a Fundamental Rights Officer (hereinafter "FRO") who will be responsible for handling complaints concerning possible violations of fundamental rights by the Agency, and who will forward similar complaints concerning national border guards to their home Member State;

- Article 80(1) provides for a specific analysis[24] on the way the Charter will have been complied with in the application of the proposed Regulation three years after its entry into force. We assume that this assessment will include a dedicated part to the respect for Articles 7 and 8 of the Charter on the rights to privacy and personal data protection.

33. **We wish to point out that there might be an overlap between the function of FRO and that of Data Protection Officer ("DPO"), and this should be clarified for the benefit of data subjects, for instance by inserting a new paragraph in Article 72 that would specify that data protection rights and related complaints will be dealt with separately by the DPO in accordance with Article 44(1) of the Proposal, and within a written understanding between the future FRO and DPO of the Agency.**

34. Transparency is a precondition to ensure that data protection rights can be effectively exercised, and ultimately to ensure that data protection principles are respected. As controllers, the Agency and Member States have an obligation of transparency under Articles 11 and 12 of Regulation (EC) 45/2001 and Articles 10 and 11 of Directive 95/46/EC. Accordingly, migrants and refugees should at least be informed of the processing of personal data concerning them, the purpose(s) of the processing and the specific rights that they are entitled to as data subjects.

35. We therefore stress the importance of ensuring in practice that migrants and refugees are properly informed in a form that they can reasonably understand. **This information should be conveyed in an age-appropriate manner when the person concerned is a minor, using**

clear and simple language, knowing that that their mother tongue is likely not among the official languages of the EU, and avoiding legal terminology that they might not be familiar with[25].

36. In addition, the future Agency will have to put specific procedures in place to guarantee the exercise of data subjects' rights. We welcome Article 44(2) which obliges the Management Board to establish measures for the application of Regulation (EC) 45/2001 with the prior consultation of the EDPS. We assume that these measures will include procedures to answer data subjects' requests for access, rectification and blocking, in line with Articles 13, 14 and 15 of Regulation (EC) 45/2001.

37. In this regard, we also welcome Article 15, (3), l), which requires the future operational plan for joint operations at external borders to include a referral mechanism, whereby migrants and refugees will be directed to competent national authorities for assistance. **As data protection laws are complex by nature, we recommend including national data protection authorities in the list of authorities referred to, which could offer assistance and advice to migrants and refugees with regard to the exercise of their specific data protection rights.**

7. Comments on specific aspects of the Proposal

7.1. Further use and compatibility requirements

38. The EDPS stresses the importance of fully respecting the purpose limitation principle, considered a key principle of data protection law. The principle is laid down in Article 6(1)(b) of Directive 95/46/EC and provides that data must be *"collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes"*[26].

39. In the light of this principle, we welcome Article 45 (1) of the Proposal which exhaustively lists the purposes for which the future Agency will process personal data, as well as requires such processing to be strictly limited to personal data necessary to achieve those purposes (Article 45 (2)). **In order to ensure consistency, we suggest including in the list the "administrative purposes" that are currently envisaged in Article 44(3).**

40. We note nevertheless that Article 45 (3) permits processing of information by the Agency *"for a different purpose than the one in paragraph 1 if authorised by the data provider of the information"*. This provision may allow for any use of information, including any personal data, on the sole condition that the source of the information agrees to it, even beyond the exhaustive list of purposes for processing of personal data in Article 45(1). Such processing of personal data would be in clear breach of the purpose limitation principle. We understand that the intention of this provision was rather to subject the use for a different purpose *among those exhaustively listed* in Article 45(1) to the agreement of the source. **We recommend, in that sense, that the provision is redrafted to explicitly forbid the further processing of retained personal data for other purposes than the ones defined in Article 45(1).**

41. Nevertheless, such a clarification while necessary is not sufficient: changing the purpose of processing among those listed in Article 45(1) based on the agreement of the source of

information might not be in line with the purpose limitation principle if the further purpose(s) of processing is not compatible with the initial one(s). Indeed, processing personal data of refugees in a migration context is not automatically compatible with their use for the fight against terrorism. The compatibility of purpose(s) defined subsequently should be assessed on a case-by-case basis. **Therefore, we recommend verifying the compatibility in between the different purposes listed in Article 45(1) and explicitly referring to the compatibility of *"the purpose or the purposes as referred to in paragraph 1 for which it shall be further processed"* in the previous sentence[27].**

42. Finally, we note that the Commission shared in the Explanatory Memorandum to the Proposal its intention to explore the possibility of giving the future Agency access to existing European databases, such as the second generation of the Schengen Information System ("SIS II") and EURODAC, and will consider tabling proposals modifying the legal acts establishing these systems in that sense. The EDPS seriously questions the basis for this, not least because there is no explicit mention of SIS II and EURODAC in the text of the Proposal.

43. The EDPS will closely follow these developments. **In the meantime, we would again call[28] the attention of the EU legislator to the fact that further processing of data stored in existing databases for different purposes incompatible with the original purpose(s) of collection would entail a breach of the purpose limitation principle, and result in a separate interference with the right to personal data protection. This would create a need to provide clear evidence of the necessity and proportionality of such measure.** A database regarded as proportionate when used for specific purposes from its start can become disproportionate and even irrelevant when used for additional incompatible purposesat a later stage.

7.2. Data retention periods

44. The EDPS welcomes the Proposal's strict limits on how long the Agency will be able to process personal data, which will reduce the extent of the interference with the fundamental right to personal data protection.

45. Pursuant to Article 46(3), the Agency must delete all personal data collected during joint operations and other operational activities at the external borders *"as soon as they have been transmitted to the European Asylum Support Office, Europol or Eurojust or to the competent authorities of Member States or used for the preparation of risk analyses"*, which in any event cannot be longer than three months after "*the date of collection of the data*". We welcome the provision for a maximum data retention period of three months.

46. Article 46(1) of the Proposal refers to *"personal data collected and transmitted to [the Agency] by Member States or its own staff"*. We query whether the date of collection mentioned in Article 46(3) refers to the date of the original collection by Member States' national competent authorities, or whether it refers to the date when the Agency further receives the data transmitted to it by Member States or EBCG Teams. **We ask for clarification in this regard.**

47. Pursuant to Article 47(3), the Agency must delete all personal data of returnees collected *"as soon as the purpose for which they have been collected has been achieved and no later*

than 30 days after the end of the return operation or the return intervention". We welcome this paragraph as well.

7.3. Access rights of liaison officers

48. The Proposal establishes the new role of liaison officers of the Agency to be deployed to Member States[29]. The EDPS questions the necessity of granting access to "national and European information systems" to these officers as provided for in Article 11 of the Proposal.

49. Liaison officers will act on behalf of the Agency and will report regularly to its Executive Director. From the description of their role in Article 11(3) of the Proposal, we understand that liaison officers are meant to increase the presence of the Agency on the ground to ensure more effective monitoring of the management of external borders and to foster cooperation between the Agency and Member States' competent authorities in this regard. For these purposes, liaison officers will *"have access to national and European information systems available in the national coordination centre, on condition that he or she complies with the national and EU security and data protection rules"* (Article 11(4)).

50. We welcome the condition imposed on liaison officers to comply with data protection rules in order to access national and European information systems. However, we query whether liaison officers exercise an operational role in Member States. We understand that they will not be members of the EBCG Teams. Therefore, we fail to identify a sound base for granting them access rights to these databases. **Unless the need for such an access is properly demonstrated, we recommend removing this possibility from the final text.**

7.4. Security of the technical equipment

51. The Proposal will enable the Agency to acquire technical equipment (for instance fingerprinting equipment) and sets up a new pool of technical equipment to be deployed rapidly at the external borders where necessary. The EDPS has concerns as regards the security of the technical equipment and by extension of the personal data processed through the use of this equipment as described in Articles 37 and 38 of the Proposal.

52. On the one hand, the equipment from the pool will be provided by the Member States, by the Agency itself or in co-ownership with a Member State, or will be leased by the Agency. It will be registered in one Member States in accordance with the relevant legislation of that Member State. On the other hand, when using this equipment later on, the members of the EBCG Teams will act under the authority of and on behalf of the host Member State in which they are deployed.

53. As technical equipment changes hands between the Agency and Member States and between members of the EBCG Teams, it is important to ensure a level of security appropriate to the risks involved throughout the duration of the operations. **Thus, we recommend clarifying the responsibilities for ensuring the security of the equipment used by the EBCG Teams which should be defined at all steps of the lifecycle of the equipment, namely from its acquisition, throughout its storage and use, and ending with its disposal.**

8. Conclusion

The EDPS welcomes several aspects of the Proposal, especially the fact that some safeguards have been included in the text, for instance to limit the data retention periods. However, considering the impact of the interference with fundamental rights of migrants and refugees, the EDPS considers more generally that a separate assessment of the necessity and proportionality of the processing activities envisaged for each purpose of the Proposal should be carried out. The compatibility in between the different purposes for processing envisaged in Article 45(1) of the Proposal should be verified as well.

In order to ensure legal certainty and compliance with data protection principles, the EDPS recommends, in particular, that the following improvements and clarifications be introduced in the final text of the initiative:

- Purpose specification and limitation

  - detail more explicitly and separately the two purposes pursued by the Proposal throughout the text;
  - ensure compatibility in the way data are being processed and refer explicitly to the compatibility of purposes in Article 45(1);
  - redraft Article 45(3) to explicitly forbid personal data retained being further processed for other purposes than the ones defined in Article 45(1);

- Responsibilities of the Agency

  - clarify the extent of processing activities by the Agency upon personal data collected during joint operations and other operational tasks, by exhaustively listing in Article 46 the categories of data that could be used and/or pass through the Agency;
  - avoid ambiguity as to the accountability for processing activities and compliance between the Agency, the host Member State and home Member States in case of joint operations;
  - clarify in Article 46 in which circumstances data collected at the border by Member States will be transmitted to the Agency, thus triggering its responsibility as controller;

- Quality and security of data

  - clarify Article 46(1)(c) so it will not be interpreted as a general authorisation to collect such data irrespective of the categories of persons defined in Article 46(1)(a) and (b);
  - clearly define the responsibility for the security of the equipment used by the EBCG and referred to in Articles 37 and 38 at all steps of the equipment lifecycle;

- Transfers

  - make reference to international organisations in Article 44(4) as regards the prohibition to transfer personal data, and bring Article 51(4) in line;

- clarify Article 51 by redrafting its paragraph 4 and by dividing it in two provisions in order to address cooperation of entities within the EU and cooperation with international organisations separately;

➢ Rights of data subjects

- specify in Article 72 that data protection rights and related complaints will be dealt with separately by the DPO;
- ensure that information provided to data subjects in this context is conveyed in an age appropriate manner, using clear and simple language and avoiding legal terminology;
- include national data protection authorities in the list of authorities referred to provide for by Article 15, (3), l);
- remove the possibility for liaison officers to access national and European information systems from Article 11(4) if evidence of such need is not provided.

Done in Brussels, 18 March 2016

Giovanni BUTTARELLI

European Data Protection Supervisor

Notes

[1] The Borders Package includes in total 13 legislative documents: a proposal to establish the European Border and Coast Guard accompanied by a Commission Communication, a proposal to amend the Schengen Borders Code to introduce mandatory systematic checks on EU citizens entering and leaving the EU, a proposal to establish a European travel document for the return of illegally staying third country nationals, a Practical Handbook for implementing and managing the European Border Surveillance System, a Progress Report on the Implementation of the hotspots in Greece, a Progress Report on the Implementation of the hotspots in Italy, a proposal for a temporary suspension of Sweden's obligations under the EU relocation mechanism, a Commission Recommendation for a voluntary humanitarian admission scheme with Turkey, a Report on the follow-up to the Leaders' Meeting on refugee flows along the Western Balkans Route, a proposal to amend the establishing act of the Community Fisheries Control Agency and a proposal to amend the establishing act of the European Maritime Safety Agency. All documents are available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/index_en.htm.

[2] Proposal for a Regulation on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC (COM(2015) 671 final).

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A European Agenda on Migration", Brussels, 13.5.2015,COM(2015) 240 final; at that time, the Commission had already identified that: *"The scaling up of action in the Mediterranean exposes the reality of the management of external borders increasingly being a shared responsibility. As well as a European System of Border Guards, this would cover a new approach to coastguard functions in the EU, looking at initiatives such as asset sharing, joint exercises and dual use of resources as well as a the possibility of moving towards a European Coastguard."*

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "The Agenda on Security", Strasbourg, 28.4.2015, COM(2015) 185 final.

[5] See Conclusions of the European Council meeting on 17 and 18 December 2015 available at: http://data.consilium.europa.eu/doc/document/ST-28-2015-INIT/en/pdf.

[6] See main results of the Justice and Home Affairs Council meeting on 25 February 2016 available on the Council website at: http://www.consilium.europa.eu/en/meetings/jha/2016/02/25/.

[7] See the dedicated webpage to the file on the European Parliament Legislative Observatory: http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2015/0310(COD).

[8] Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, p. 1.

[9] The European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union was created by Council Regulation (EC) 2007/2004 and is commonly referred to as "Frontex"; Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25.11.2004, p. 1 (hereinafter "the Frontex Regulation").

[10] The EBCG includes coast guards to the extent that they carry out border control tasks; see Articles 3 and 5 of the Proposal.

[11] Article 6(1)(b) Directive 95/46/EC and 4(1)(b) Regulation (EC) 45/2001.

[12] Article 72(10) of the Proposal states in a similar way that *"Any personal data contained in a complaint shall be handled and processed by Member States in accordance with Directive 95/46/EC and Council Framework Decision 2008/977/JHA"* without further clarification.

[13] Similarly, in accordance to Article 39 of the Proposal, members of the European Border and Coast Guard Teams will have to comply with the national law of the Member State in which they are deployed while performing their tasks, which includes the national data protection law of the host Member State.

[14] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

[15] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350, 30.12.2008, p. 60.

[16] Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012)11.

[17] Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation,

detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data COM(2012)10.

[18] Originally, Frontex had a role focused on coordination and its processing of personal data were relatively limited. In 2011, amendments were introduced in the Frontex Regulation that included specific rules concerning the processing of personal data done by Frontex and extended its mandate to process such data. Nevertheless, the processing of personal data for operational tasks, and notably the processing of personal data relating to migrants and refugees, is not Frontex' main task.

[19] Note that when the Agency leases a plane, it has to be registered in a Member State in accordance with Article 37(3)(b) of the Proposal.

[20] See Correlation Tables in the Annex to the Proposal to make a comparison with the provisions of the Frontex Regulation that the Proposal will replaces, available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/securing-eu-borders/legal-documents/docs/regulation_on_the_european_border_and_coast_guard_annex_en.pdf.

[21] Similar to Article 26a of Frontex Regulation.

[22] Similar to Article 2a of Frontex Regulation.

[23] Similar to Article 9 (1a) of Frontex Regulation.

[24] Similar to Article 33 (2b) of Frontex Regulation; see "External Evaluation of the Agency under Art. 33 of the Frontex Regulation - Final Report", 28.07.2015, available on Frontex' website at http://frontex.europa.eu/assets/Publications/General/Final_Report_on_External_Evaluation_of_Frontex.pdf.

[25] See "Eurodac Supervision Coordination Group Second Inspection Report" on information to data subjects, available at: http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Eurodac/09-06-24_Eurodac_report2_EN.pdf.

[26] The same principle is laid down in Article 4(1)(b) of Regulation (EC) 45/2001.

[27] For more information on the compatibility assessment see the Working Party 29 Opinion 3/2013 on purpose limitation, available at: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf.

[28] EDPS Opinion of 5 September 2012 on the amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of Regulation (EU) No (.../...) (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person), and on the proposal for a Council Decision on requesting comparisons with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (Recast version), OJ C 92, 10.4.2010, p. 1.

[29] The Proposal also envisages the possibility of deploying liaison officers of the Agency in third countries in Article 29.