

EDPS comments on the proposal for a Regulation of the European Parliament and of the Council establishing the European Border Surveillance System (EUROSUR) (COM(2011)873 final)

I. General remarks

- Although the scope of the proposal does not *ratione materiae* include processing of personal data within the scope of Regulation 45/2001, there are nevertheless possible situations when this could occur. Taking this into account, the EDPS has decided not to issue a full opinion on the proposal. Nevertheless, there are some data protection issues, which the EDPS will address in these formal comments. These comments mostly ask for clarification and do not raise fundamental questions.
- Already before the adoption of the proposal, the EDPS has been in contact with the Commission's services and has provided informal comments. The EDPS welcomes that some of his informal comments have been taken into account.

II. Scope

- Eurosur is meant to facilitate the exchange of information between authorities in charge of border surveillance, FRONTEX, and in certain cases third countries, in order to increase situational awareness and reaction capability. Collecting and exchanging personal data is explicitly not an aim of the system. However, it may occur under certain circumstances.
- The explanatory memorandum is clear on the fact that processing of personal data is supposed to be the exception, stating on page 2 that "*In exceptional cases personal data may form part of the data shared by Member States with the Agency, provided that the conditions of Regulation (EC) No 2007/2004 of 26 October 2004 are met. To the extent personal data forms part of the national situational picture of neighbouring external border sections, it may be exchanged between neighbouring Member States only, under the conditions set by the horizontal EU legal framework on data protection*". However, the provisions of the Proposal seem to leave more room.
- The EDPS welcomes the references to the fundamental right to the protection of personal data in recital 6 and the reference to applicable data protection law in recital 7.
- More importantly, he recommends introducing a provision explicitly and exhaustively enumerating the conditions under which personal data may be processed in EUROSUR.

III. Purpose limitation

- The explanatory memorandum mentions on page 2 that there will be a proposal for changing the purpose in the legal instrument for SafeSeaNet to enable its use for EUROSUR purposes. The EDPS notes that there is no similar statement for the other instruments mentioned in Article 9(2)(h). When using other systems for EUROSUR purposes, the principle of purpose limitation always needs to be taken into account in case personal data are affected. Any personal data originally collected for a specific

purpose cannot be accessed or further used for another purpose without a specific assessment of compatibility between both purposes.¹

- The EDPS recommends clarifying and giving examples of which kinds of information are supposed to be collected from the sources mentioned in Articles 9(2), especially as regards points (j) and (k) of this Article.
- In Article 17(5), it should be clarified to which extent the cooperation with those entities may include personal data.

IV. Third country transfers

- The EDPS takes note of the addition of paragraph 5 in Article 18 and welcomes that it clarifies the applicability of the data protection framework to exchanges of information derived from the common application of surveillance tools. However, some of the other provisions in this Article could benefit from further clarification.
- In Article 18(1) it could be clarified which regional networks with neighbouring third countries are meant. Supposedly the networks are the same as mentioned in Article 9 (2) (h); a cross-reference could help clarifying this.
- Article 18(3) gives the impression that Article 9(2)(h) is in itself a legal basis for sending data to third countries. This is not the case since Article 9(2)(h) only states that information received via these networks may be used only for EUROSUR. The wording in Article 18(4) is better in this regard; the EDPS recommends adapting it for use in Article 18(3).

V. Other issues

- Article 10(6)(c) mentions that the intelligence sub-layer of the European Situational Picture shall contain information on "*migrant profiles*". Here, it should be clarified that no personal data shall be included in these profiles.
- Article 19 foresees the establishment of a EUROSUR Handbook containing among others technical guidelines, recommendations and best practices. To the extent this handbook will touch upon matters related to data protection, especially the possible limited processing of personal data, the EDPS would like to be consulted on it.

Brussels, 8 February 2012

¹ See also EDPS Opinion of 7 October 2009 on the amended proposal for a Regulation concerning the establishment of 'Eurodac' [...], 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, OJ C 92, 10.4.2010, p.1, especially pts. 44-45.