

EDPS Decision 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 2024-0345)

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 'EUDPR').¹

In accordance with Article 57(1)(n) and Article 58(3)(f) of the EUDPR, the EDPS authorises the use of the amended Data Protection Administrative Arrangement ('DPAA') signed on 9 October 2023 as a means for adducing appropriate safeguards under Article 48(3)(b) of the EUDPR for the transfer of personal data from SESAR to the European Organisation for the Safety of Air Navigation ('Eurocontrol').

The EDPS authorises as of 1 July 2024 the use of the amended DPAA considering in particular the new Eurocontrol Personal Data Protection Regulation ('Eurocontrol Regulation') approved by the Eurocontrol's Permanent Commission Measure No 24/288 on 20 March 2024. The EDPS considers that the appropriate safeguards included in the amended DPAA and the new Eurocontrol Regulation provide for a level of protection of personal data transferred to Eurocontrol essentially equivalent to that is guaranteed under the EUDPR.

EUROPEAN DATA PROTECTION SUPERVISOR

¹ 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. This Decision concerns the authorisation of the amended Data Protection Administrative Arrangement ('DPAA') signed on 9 October 2023 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').²
- 2. The EDPS issues this Decision in accordance with Article 57(1)(n) and Article 58(3)(f) of the EUDPR.
- 3. This Decision is addressed to SESAR.

2. BACKGROUND INFORMATION

2.1. Previous EDPS decision

- 4. On 14 December 2022, the EDPS temporarily authorised the use of the Data Protection Administrative Arrangement signed subsequently on 15 December 2022 between SESAR and Eurocontrol in the context of Eurocontrol's in-kind contributions to SESAR ('EDPS Decision of 14 December 2022').³ In that Decision, the EDPS made several recommendations and authorised the use of the administrative arrangement until 30 June 2024.⁴
- 5. The EDPS also required SESAR to introduce in the DPAA the changes suggested in points 3.7-3.10 and 3.17 of his Decision of 14 December 2022. SESAR had to request renewal of the authorisation at the latest 3 months before the expiry and to provide a report on the follow-up of the EDPS recommendations.
- 6. On 27 March 2024, SESAR submitted the following documents:
 - Report on the follow up of the EDPS recommendations Request for renewal of authorization on the use of the DPAA between SESAR and Eurocontrol under Articles 48(3)(b), 57(1)(n) and 58(3)(f) of Regulation (EU) 2018/1725;
 - Annex I Amendment no 1 to the data protection administrative arrangement between the Single European Sky ATM Research 3 Joint Undertaking and EUROCONTROL – References S3JU/LC/006-CTR and ECTL: AG-198-22-SJU-OTH-263 signed on 9 October 2023;

 ² 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.

³ EDPS Authorisation Decision of 14 December 2022 (case 2022-0933).

⁴ The conditions are listed under points 3.7-3.10 and 3.17 Section 3 of the EDPS Decision of 14 December 2022.

• Annex II - <u>Eurocontrol Personal Data Protection Regulation approved by Permanent</u> <u>Commission Measure No 24/288 dated 20 March 2024</u>.

2.2. Facts

- 7. Pursuant to Articles 144(1)(b) and 146(2) of the Single Basic Act, Eurocontrol is one of the members of SESAR.⁵ Eurocontrol's contributions to SESAR shall consist of financial contributions, in-kind contributions to operational activities, and in-kind contributions to additional activities.⁶
- 8. 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.⁷ In addition, the back office arrangement shall be provided by Eurocontrol.⁸
- 9. 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 EUDPR.
- 10. SESAR signed with Eurocontrol the DPAA on 15 December 2022 and also already signed an amendment to that DPAA on 9 October 2023, in order to address the recommendations of the EDPS Decision of 14 December 2022. On 27 March 2024, SESAR submitted to the EDPS a report on the implementation of the recommendations, and a new request for an authorisation under Article 48(3)(b) of the EUDPR together with the new Eurocontrol Regulation. The submitted DPAA is part of the broader framework agreement between SESAR and Eurocontrol under Article 157 of the Single Basic Act.
- 11.On 17 May and 31 May 2024 SESAR, based on their exchanges with Eurocontrol, provided clarifications to the EDPS on the existence or not of automated individual decision making, the list and types of personal data processed under the DPAA as well as on the actual redress mechanism applied after 1 January 2024 by Eurocontrol. SESAR informed the EDPS that any amendments to the DPAA will have to be adopted by the Permanent Commission of Eurocontrol and the SESAR Governing Board. The next meetings are scheduled in November 2024 for the Permanent Commission and in December 2024 for the Governing Board.

⁵ Article 146 in conjunction with Article 3 of the Single Basic Act.

⁶ Article 146 in conjunction with Article 11(4) of the Single Basic Act.

⁷ 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 and providing information.

⁸ Article 158 of the Single Basic Act.

3. LEGAL ANALYSIS

- 12.When submitting the request for the new authorisation, SESAR notified the EDPS of the amendment of the DPAA as signed on 9 October 2023 and of the new Eurocontrol Regulation. In addition to the DPAA, the EDPS analysed the Eurocontrol Regulation and welcomes its adoption since it modernises Eurocontrol's internal data protection framework to enhance the rights of data subjects. The EDPS notes with satisfaction the progress made to implement the recommendations in the amendment of the DPAA and the new and comprehensive data protection framework adopted by Eurocontrol that paves the way for authorizing the use of the DPAA as a means for adducing appropriate safeguards under Article 48(3)(b) of the EUDPR.
- 13. The EDPS assessed the new Eurocontrol Regulation against the criteria set out in the Article 29 Working Party Adequacy Referential⁹ under the GDPR, since this document provides guidance on the elements that have to be present in the legal framework of a third country or of an international organisation to ensure essential equivalence of the protection of personal data afforded in the EU. The appropriate safeguards provided through the amended DPAA and the new Eurocontrol Regulation therefore provide for an essentially equivalent level of protection to what is guaranteed under the EUDPR.
- 14. However, the EDPS regrets that the DPAA signed on 15 December 2022 did not implement the recommendations that were to be fulfilled but did not depend on the adoption of the new Eurocontrol data protection framework and that the EDPS was not consulted before the signature of the amendment of 9 October 2023. In all likelihood, since the DPAA was amended before the adoption of the Eurocontrol Regulation, this latter does not yet fully reflect some of the prior EDPS recommendations. This concerns shortcomings that, while not affecting the finding that the DPAA read in conjunction with the Eurocontrol Regulation ensures an essentially equivalent level of protection, would still deserve to be addressed for the sake of legal clarity and to ensure consistency with the Eurocontrol Regulation. Therefore the EDPS recommends to introduce the following changes :

3.1. Clarifications of the definitions of the key concepts

- 15.The EDPS welcomes that in Article 1 of the DPAA, the definitions of 'processor', 'recipient', 'transfer' have been clarified and aligned with the EUDPR and that the DPAA now includes definitions of a 'third party'¹⁰ and 'restriction of processing'¹¹.
- 16.The EDPS observes that a new paragraph¹² has been added to the DPAA on 'processors' setting out that the parties may engage a processor for the execution of the activities under the DPAA on their behalf. Processors must now provide sufficient guarantees to

⁹ Article 29 Working Party Adequacy Referential 18/EN WP 254 rev.01adopted on 28 November 2017 as last revised and adopted on 6 February 2018.

¹⁰ Article 3(14) of the EUDPR.

¹¹ Article 3(4) of the EUDPR.

¹² Article 2(4) of the DPAA.

implement appropriate technical and organisational measures to meet the requirements of the DPAA and ensure protection of data subjects' rights.

- 17.The EDPS notes that pursuant to Article 1 of the DPAA, the definition of onward transfers covers any transfers or sharing of personal data to an entity not party to the DPAA irrespectively from its location. Article 6 of the DPAA sets out the conditions for onward transfers in line with the requirements of the EUDPR and the recommendations in Guidelines 2/2020 of the European Data Protection Board ('EDPB').¹³ Onward transfers are subject to the principle of purpose limitation, prior and express authorisation of the transferring party and the receiving third parties need to commit to respect the same data protection principles.
- 18. The EDPS observes that Article 1 of the DPAA defines 'third party' as a natural person or an entity **other than** the data subject, controller or processor. Since Article 6(2) of the DPAA refers to transfers to a 'third party', it seems that processors would be excluded from the scope of application of Article 6(2) which would contradict the definition of onward transfers in Article 1 of the DPAA and would not be in line with the requirements described in the previous paragraph. The EDPS notes however that the Eurocontrol Regulation does not present this contradiction, because in Article 6 of its Annex III it prohibits the onward transfer of personal data to any recipient not bound by the rules it provides, with limited exceptions in line with EU data protection law. In that context, the EDPS also welcomes that Article 16 and Annex I of the Eurocontrol Regulation set clear and specific conditions for the engagement of processors reflecting the provisions of Article 29 of the EUDPR, in particular to conclude a legally binding act with specific elements to be included. It would be therefore useful to clarify the applicable provisions for processors of the parties also in the DPAA.
- 19. As a consequence of the above, for the sake of consistency and legal clarity, the EDPS **recommends** to:
 - add in the Article 2(4) that engaging a processor shall be **without prejudice to the provisions of Article 6 on onward transfers** and they may process personal data under the DPAA **only for the fulfilment of the tasks described in Annex 1**;
 - add in Article 2(4) that processors need to enter into a binding commitment ensuring the same level of protection as provided by the DPAA and that either the processor should be listed in Annex III of the DPAA as a recipient or the parties should expressly authorise their use in writing before engaging them;
 - complete Article 6(1) by adding at the end of the sentence 'and if the other requirements of the DPAA are fulfilled';
 - replace references to 'Third Party' with 'Recipients' in Article 6(2) to cover also onward transfers to processors of the parties.

¹³ Paragraphs 41-48 of the 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.

3.2. Improvements to the definitions of key data subject rights

- 20. The EDPS also takes note of the improvements made to the definition of key data subject rights, in particular including the right for data subjects to get information on recipients, the source of the personal data, and the appropriate safeguards in place relating to the transfers, pursuant to Article 48 of the EUDPR. The amended DPAA also foresees an obligation 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.
- 21. Concerning **automated individual decision-making**, the EDPS notes that Article 8(1)(1) of the amended DPAA introduces an obligation to provide information to data subjects on the existence of automated decision-making, including profiling. In this context Article 8(2) clarifies that -when exercising their right to access- data subjects are entitled to obtain information concerning the existence of automated decision making, including profiling, the logic involved as well as the significance and envisaged consequences of such processing.
 - 22. The EDPS observes that pursuant to Article 7(3) of the Eurocontrol Regulation data subjects shall have the right not to be subject to a decision based solely on automated processing, which produces legal effects or similarly significantly affects them. This provision corresponds to Article 24(1) of the EUDPR. The Eurocontrol Regulation does not provide for any exceptions corresponding to the provisions of Article 24(2) of the EUDPR. The substance of the guarantees against automated decision making under the EUDPR is therefore ensured under the Eurocontrol Regulation. Furthermore, SESAR informed the EDPS on 31 May 2024 that Eurocontrol confirmed that it does not carry out any processing involving automated decision making or profiling.
- 23. In light of the above, the amended DPAA might misleadingly suggest under Article 8(1)(1) that automated decision-making could occur.
- 24. For the sake of avoiding any ambiguity, considering the legal framework and the confirmation of Eurocontrol that no automated decision making is taking place under the Eurocontrol Regulation, the EDPS **recommends** to:
 - exclude explicitly in the DPAA the possibility for Eurocontrol to take a decision which produces legal effects concerning a data subject or similarly affects them based solely on automated individual decision making, including profiling, without human involvement; and
 - delete the text added to the amended DPAA in Article 8(1)(1): "including the existence of automated decision making, including profiling, if any,"

3.3. Independent oversight mechanism and judicial redress

25. The EDPS recalled in the Decision of 14 December 2022 that in order to guarantee enforceable data subjects rights and effective legal remedies, data subjects must continue to benefit from redress mechanisms after their data has been transferred to

Eurocontrol. In particular, the data subject must be ensured an effective way to lodge a complaint and get it handled with an **independent oversight mechanism** as well as access to effective **judicial redress**.¹⁴

- 26. SESAR was expected to ensure that 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. It was also necessary for Eurocontrol to establish a mechanism that enables a data subject free of charge 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.
- 27. In this context the EDPS welcomes the creation of the Eurocontrol Data Protection Supervisory Board in Articles 23 and 24 of the Eurocontrol Regulation and the confirmation of the availability of an alternative redress mechanism including arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ('ICC') pursuant to Article 26(2) of the Eurocontrol Regulation. The EDPS notes equally with satisfaction that the costs of the proceedings are to be borne by Eurocontrol,¹⁵ and that the decisions of the ICC are binding.¹⁶ In addition, the EDPS welcomes that under Article 27 of the Eurocontrol Regulation the right to compensation for material and non-material damages suffered as a result of an infringement is ensured for data subjects¹⁷.
- 28. The EDPS notes that the final establishment and entry into force of the above- described improvements for **oversight and judicial redress mechanisms** were still '*subject to the approval of the EUROCONTROL Permanent Commission*'¹⁸ at the time of the signature of the amendment to the DPAA. Therefore, in light of the ongoing modernisation efforts of Eurocontrol at the time of adopting the amendment, the amended DPAA still includes two sets of procedures: one binding until 31 December 2023, and another starting from 1 January 2024.¹⁹
- 29. Until 31 December 2023, which was a transition period until the new data protection framework was adopted, the function of both oversight mechanism and judicial redress was exercised by the ICC in accordance with the ICC's Arbitration Rules in effect at the time of filing the claim.²⁰

¹⁴Paragraph 50 of the 2/2020 EDPB Guidelines.

¹⁵ Article 26(2) of the Eurocontrol Regulation.

¹⁶ Article 26(2) of the Eurocontrol Regulation.

 $^{^{\}rm 17}$ Article 27 of the Eurocontrol Regulation.

¹⁸ Article 12(7) of the DPAA.

¹⁹ Article 12(4)-12(6) of the DPAA signed on 15 December 2022 and the amended DPAA signed on 9 October 2023.

²⁰ Article 12(4) of the DPAA 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

- 30. The EDPS observes that as of 1 January 2024, the text of the amended DPAA still refers to the general description of the redress mechanism included in the original DPAA²¹. Article 12(6) of the DPAA sets out that data subjects can 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 and access to such mechanism shall be free of charge for the data subject.
- 31. The same applies to the oversight mechanism: pursuant to Article 12(5) of the DPAA, after 1 January 2024 data subjects may lodge a complaint with Eurocontrol supervisory body (to be) established during the transitory period²². The text describes the oversight body as a future, independent, effective and impartial oversight supervisory body, which is functionally autonomous to issue binding instructions to Eurocontrol.
- 32. The EDPS takes note that in particular pursuant to its Articles 1, 23, 24, 25 and 26(2) the Eurocontrol Regulation provides for enforceable data subject rights and effective legal remedies for individuals whose personal data is transferred by SESAR to Eurocontrol. However, the EDPS considers that in the text of the DPAA it is not sufficient to provide for the mere availability and a general description of redress and oversight mechanisms; the concrete details should be included in the respective arrangements and the data subjects should be informed accordingly. Therefore, the EDPS **recommends** to amend the DPAA to describe in greater detail the redress and oversight mechanism actually in place since 1 May 2024 pursuant to Articles 23-27 of the Eurocontrol Regulation.

3.4. Personal data processed under the Data Protection Administrative Arrangement

- 33. The EDPS observes that Annex I on the purpose, categories of data subjects and personal data, retention period for intended transfers of personal data has been amended under points A.3, B.3 and D.3. setting out that the data processed may include simple identification data setting out a 'not exhaustive' list of personal data processed.
- 34. The EDPS recalls that transfers to a third country or to an international organisation are subject to a two-steps test: first, the processing must be lawful and second, there must be a suitable ground for transfer in place in line with Chapter V of the EUDPR.
- 35. Pursuant to Article 3(8) of the EUDPR, it is for SESAR as the controller to determine the purposes and the (essential) means of the processing. Such essential means include what

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'.

²¹ Article 12(6) of the DPAA.

²² Article 12(5) of the DPAA

personal data of which data subjects are processed by whom and for how long.²³ Essential means are closely linked to the purpose and the scope of the processing. Together with the purpose of processing, the essential means are also closely linked to the question of whether the processing is lawful, necessary and proportionate.²⁴

- 36. Pursuant to Article 4(1)(b) of the EUDPR personal data must be collected for specified and explicit purposes. 'Specified' implies that the purpose of the collection must be clearly and specifically identified: it must be detailed enough to determine what kind of processing is and is not included within the specified purpose.²⁵ The EDPS considers that determining what kind of processing falls within the purpose limitation inherently implies identifying what categories and types of personal data are to be processed. Indeed, without identifying what categories of personal data are processed for what purposes, neither the controller nor the competent supervisory authority can assess whether the processing complies with the law²⁶ and if the safeguards provided by the DPAA are appropriate under Article 48 of the EUDPR. The description of the types of personal data and purposes of the processing should be made, in the most detailed possible manner, while keeping the flexibility ensured by the fact that only 'categories' of personal data needs to be described and, in any circumstance, the types of personal data must be specified further than merely 'personal data as defined in Article 3(1) EUDPR'.²⁷ In particular the purposes must be specified at the latest at time of collection of the personal data in question,²⁸ therefore implying that the controller is able to *specify* the personal data in question at that moment, and then linking them to specific purposes.
- 37. The changes introduced in points A.3, B.3 and D.3 have been made to enable the parties transferring similar types of personal data falling in the same category of identification data (e.g. physical address instead of e-mail address). Other categories of data, in particular special categories of personal data falling under Article 10 of the EUDPR therefore cannot be processed.
- 38. In light of the above and considering the specific purposes set out in Annex I, the EDPS considers that the categories and types of personal data are sufficiently detailed in the DPAA allowing the listed purposes to be explicit and specified.

²³ See paragraphs. 112, 114, 116 to 118 of the <u>Guidelines 07/2020 of the European Data Protection Board on the concepts of controller and processor in the GDPR</u>.

²⁴ Paragraph 40 of the 07/2020 EDPB Guidelines 07/2020.

²⁵ See page 15 of the <u>Article 29 Working Party Opinion 3/2013 on purpose limitation</u> and page 35 of the 07/2020 EDPB Guidelines.

²⁶ See in this respect also Opinion of the Advocate General Pitruzzella, Case C-817/19, Ligue des droits humains, ECLI:EU:C:2022:65, paras 113, 130 and 131.

²⁷ See, by analogy, EDPB Opinion 14/2009 on the draft Standard Contractual Clauses submitted by the DK SA (Article 28(8) GDPR) adopted on 9 July 2019, para 50.

²⁸ See CJEU, C-77/21, "Digi", ECLI:EU:C:2022:805, para 27 and CJEU, C-175/20, "Valsts ieņēmumu dienests", ECLI:EU:C:2022:124, paras 64-66),

4. CONCLUSION

4.1. Authorisation

- 39.In light of the safeguards provided by the Eurocontrol Regulation entering into force on 1 May 2024 as well as the EDPS' assessment on automated decision making and the applicable oversight and redress mechanisms, the EDPS considers that the DPAA in the light of the Eurocontrol Regulation provide appropriate safeguards, including enforceable data subject rights and effective legal remedies for data subjects, for the purpose of transfer of personal data by SESAR to Eurocontrol.
- 40. Furthermore, in this Decision the EDPS identified changes to the text of the DPAA that are recommended to introduce in order to ensure consistency and legal clarity on the protection afforded by the Eurocontrol Regulation and the appropriate safeguards adduced by SESAR within the meaning of Article 48(3)(b) of the EUDPR. The requested changes should be implemented by 31 December 2024.
- 41.Therefore, considering the Eurocontrol Regulation as adopted on 20 March 2024, pursuant to Article 57(1)(n) and Article 58(3)(f) of the EUDPR, the EDPS **authorises the use of the DPAA as of 1 July 2024 as a means for providing appropriate safeguards under Article 48(3)(b) of the EUDPR**.
- 42. In addition, the EDPS recommends introducing in the DPAA the following changes at the latest by 31 December 2024, namely:
 - clarify the conditions to engage processors for the execution of the DPAA;
 - exclude explicitly the possibility for Eurocontrol to take a decision which produces legal or similar effects concerning a data subject based solely on automated individual decision making, including profiling, without human involvement;
 - describe the redress and oversight mechanism in place pursuant to Articles 23-27 of the Eurocontrol Regulation and
- 43. SESAR is requested to notify the EDPS any changes made to the Eurocontrol Regulation without undue delay.

5. JUDICIAL REMEDY

44. Pursuant to Article 64 of the EUDPR, 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, 28 June 2024