

## MINUTES OF THE FRONTEX 87<sup>th</sup> MANAGEMENT BOARD MEETING 17-18 November 2021, hybrid meeting

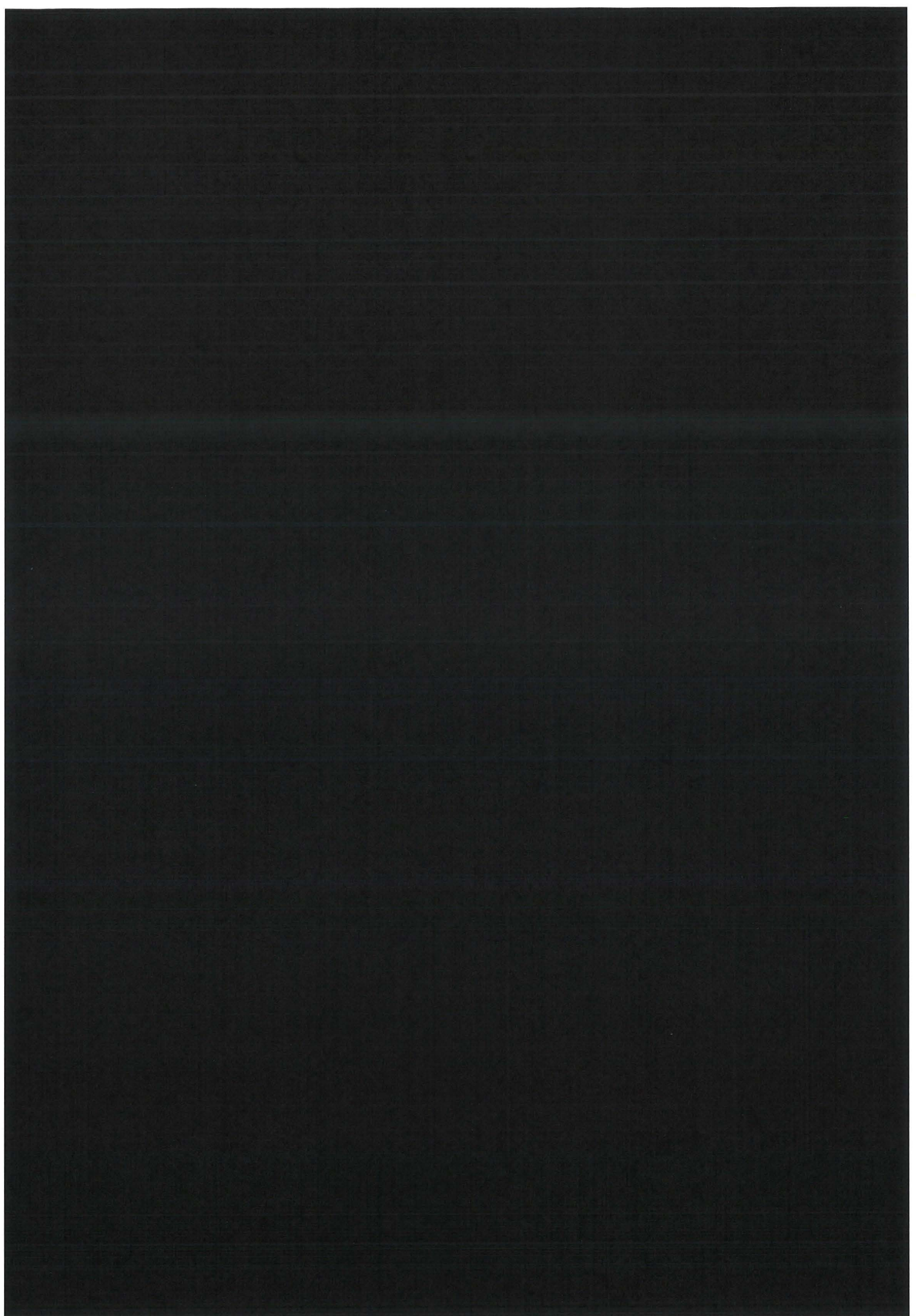
### Table of Contents

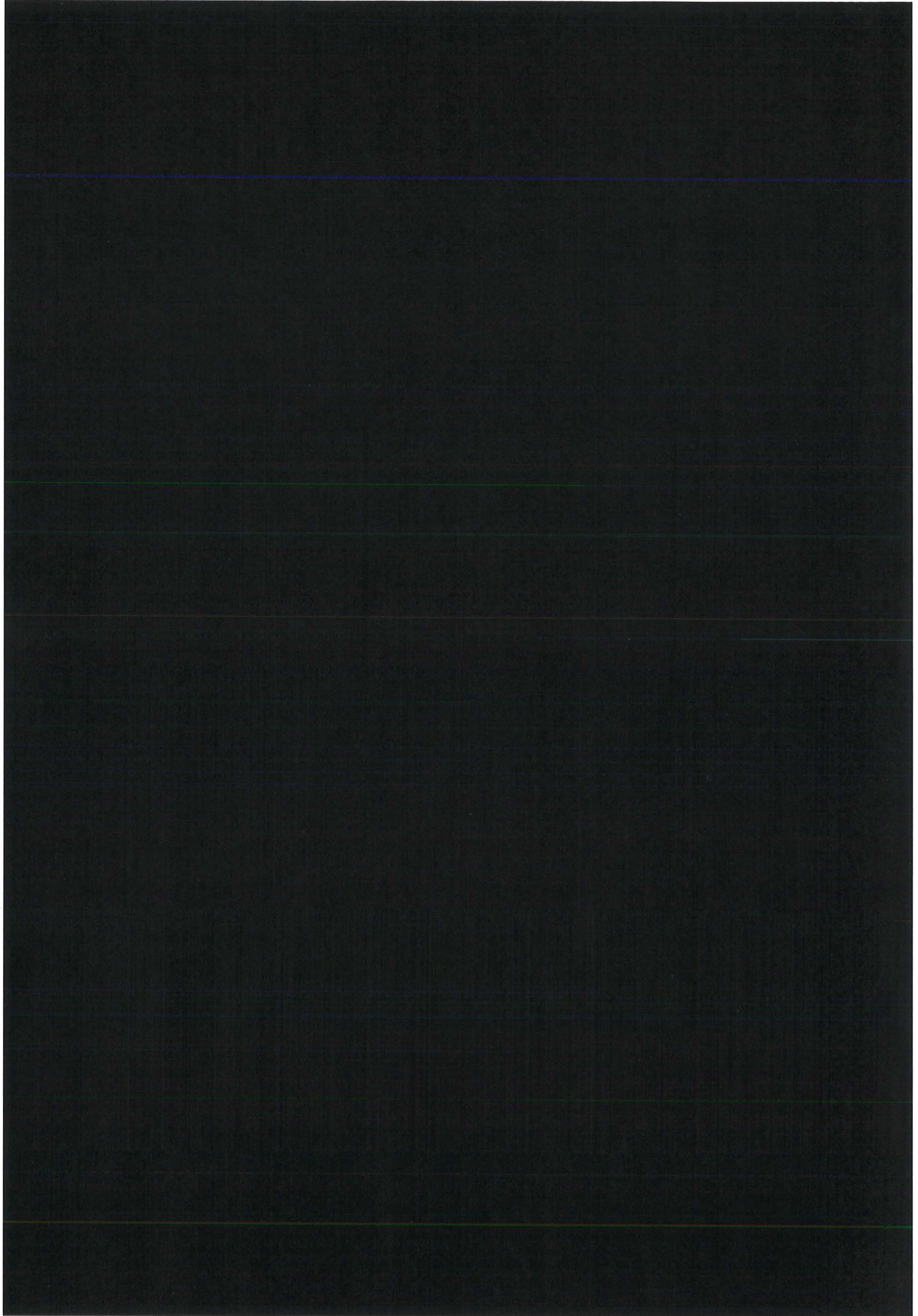
[Redacted content]

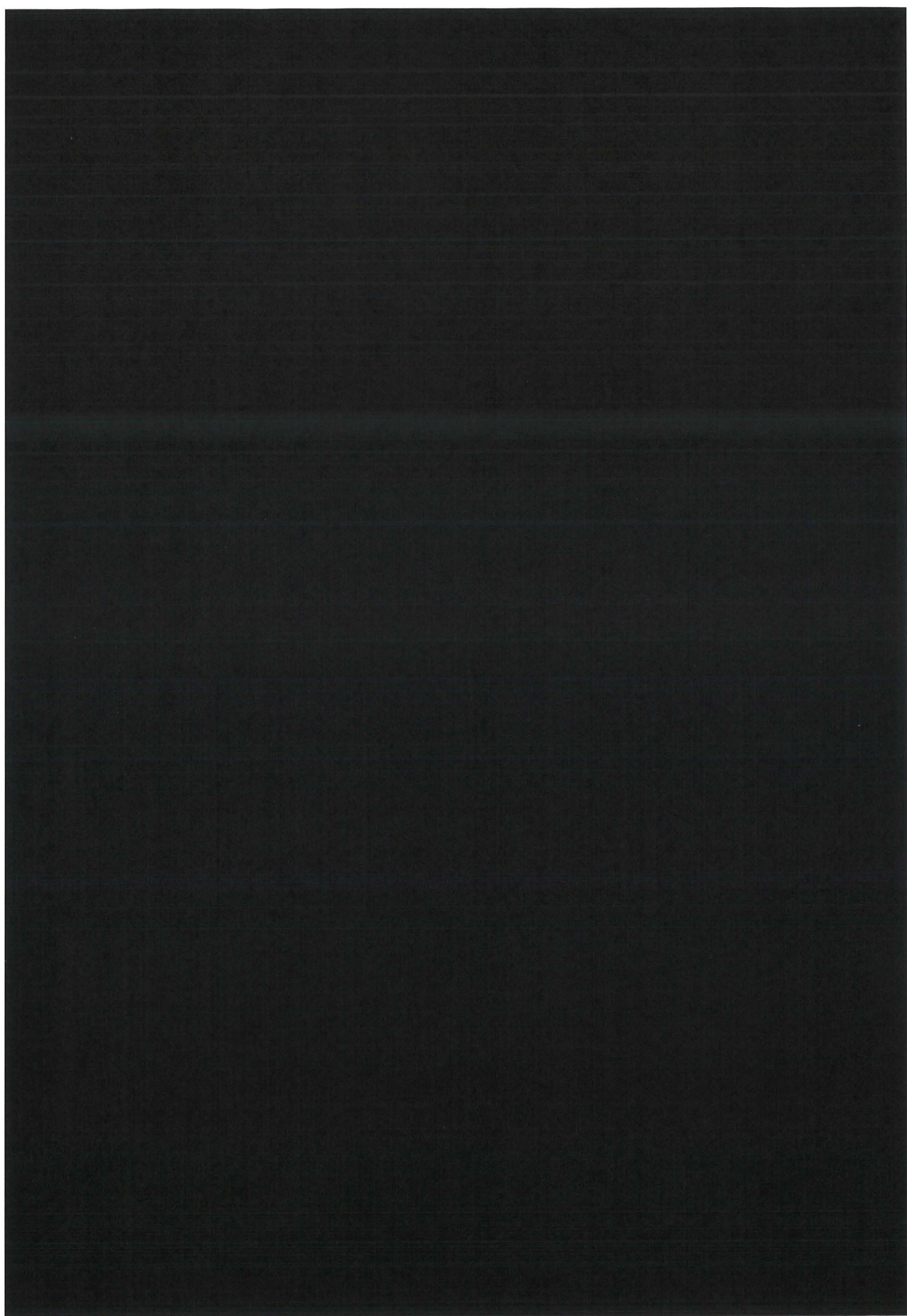
8.	Data Protection issues - presentation	11
8.1	Implementing rules for processing Operational Personal Data	11
8.2	Implementing rules for processing non-Operational Personal Data	12

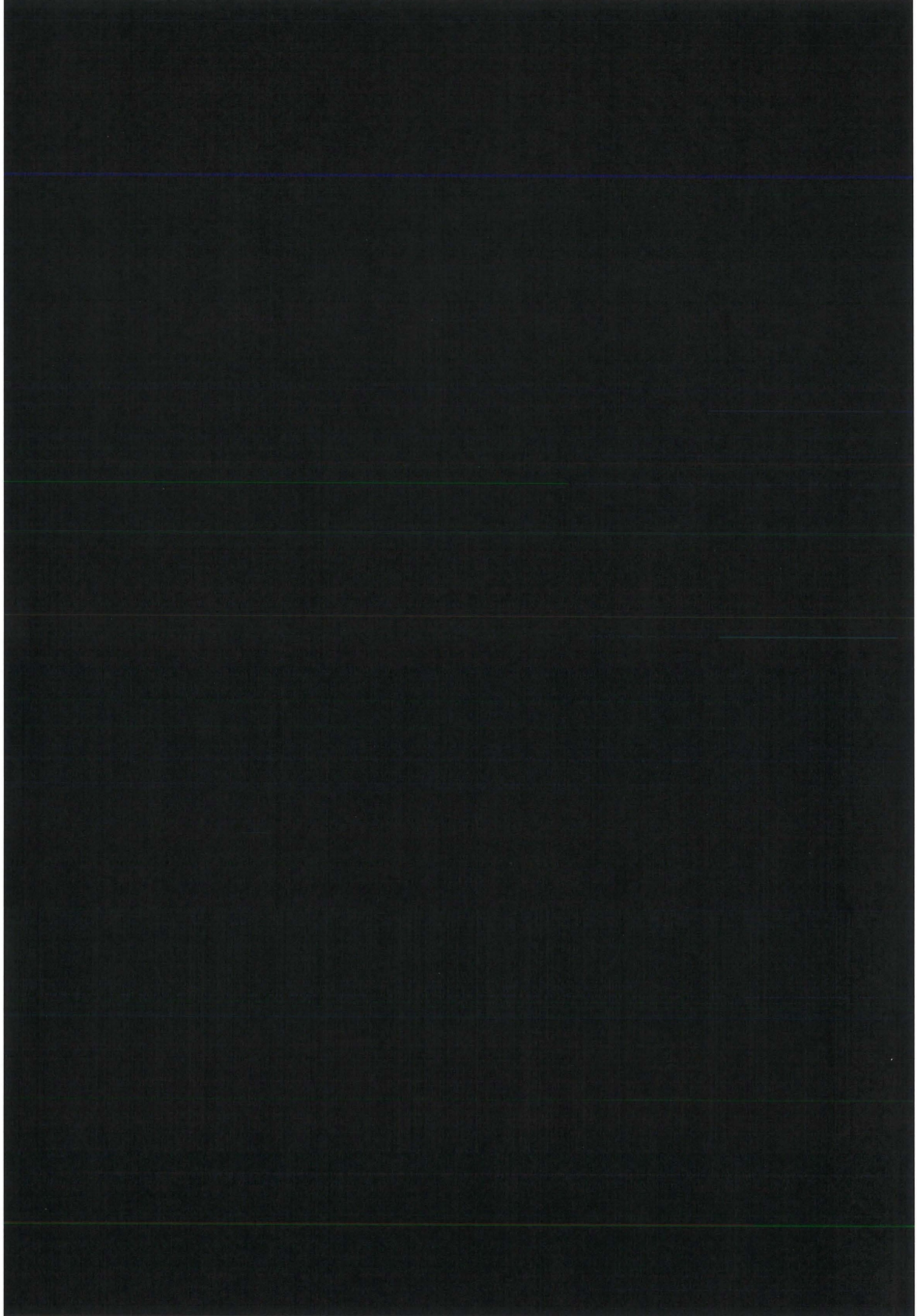
[Redacted content]

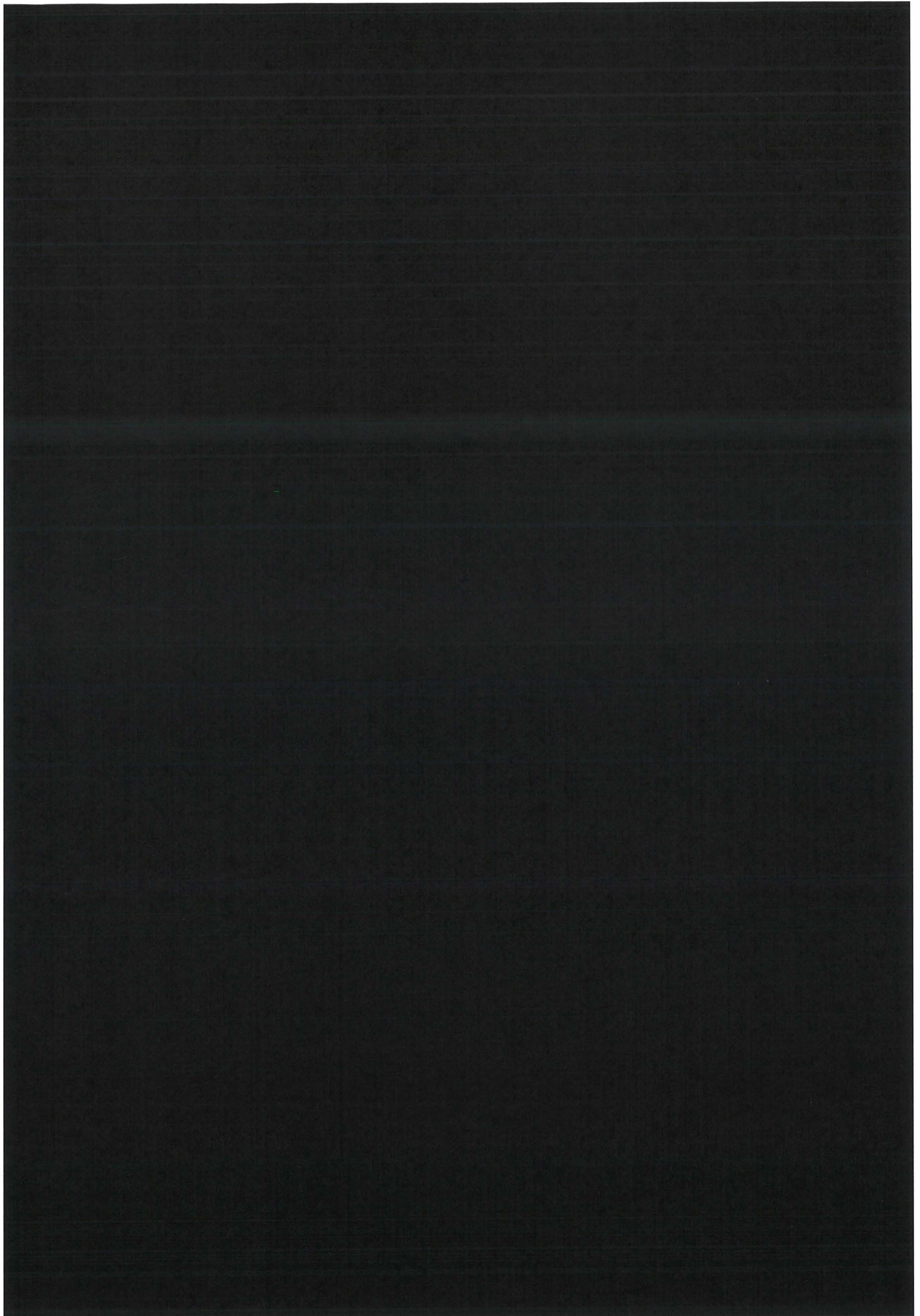
[REDACTED]

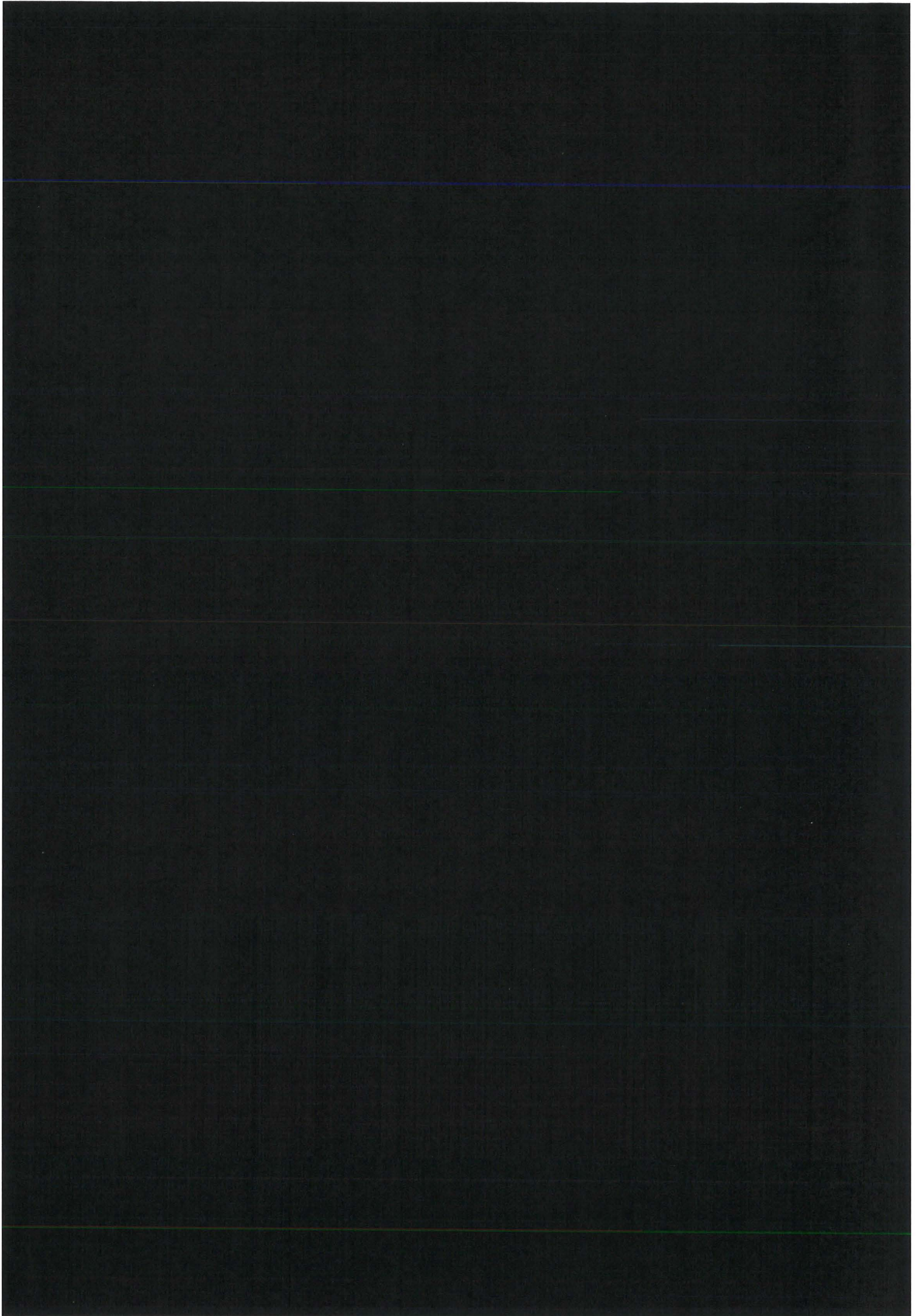




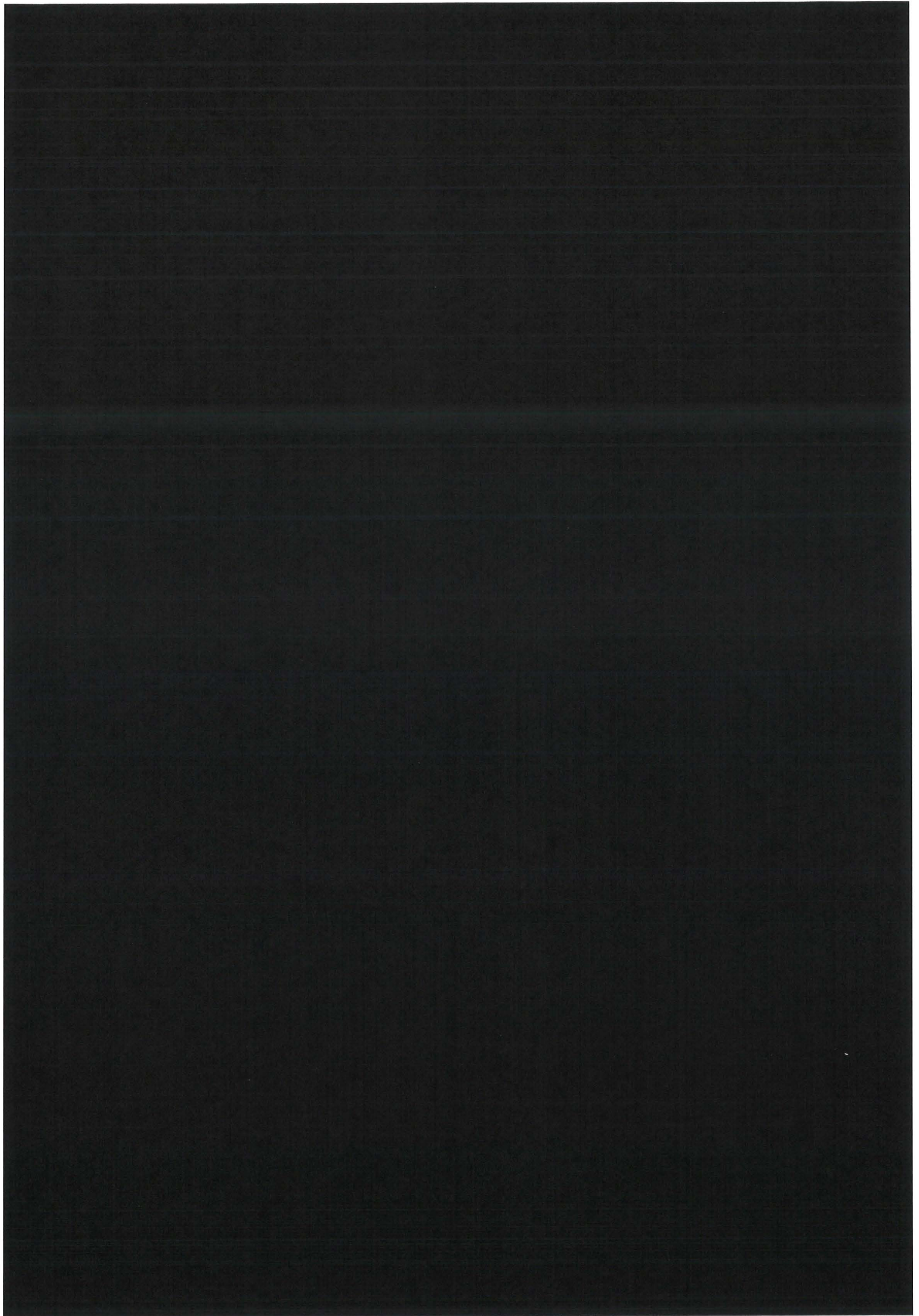


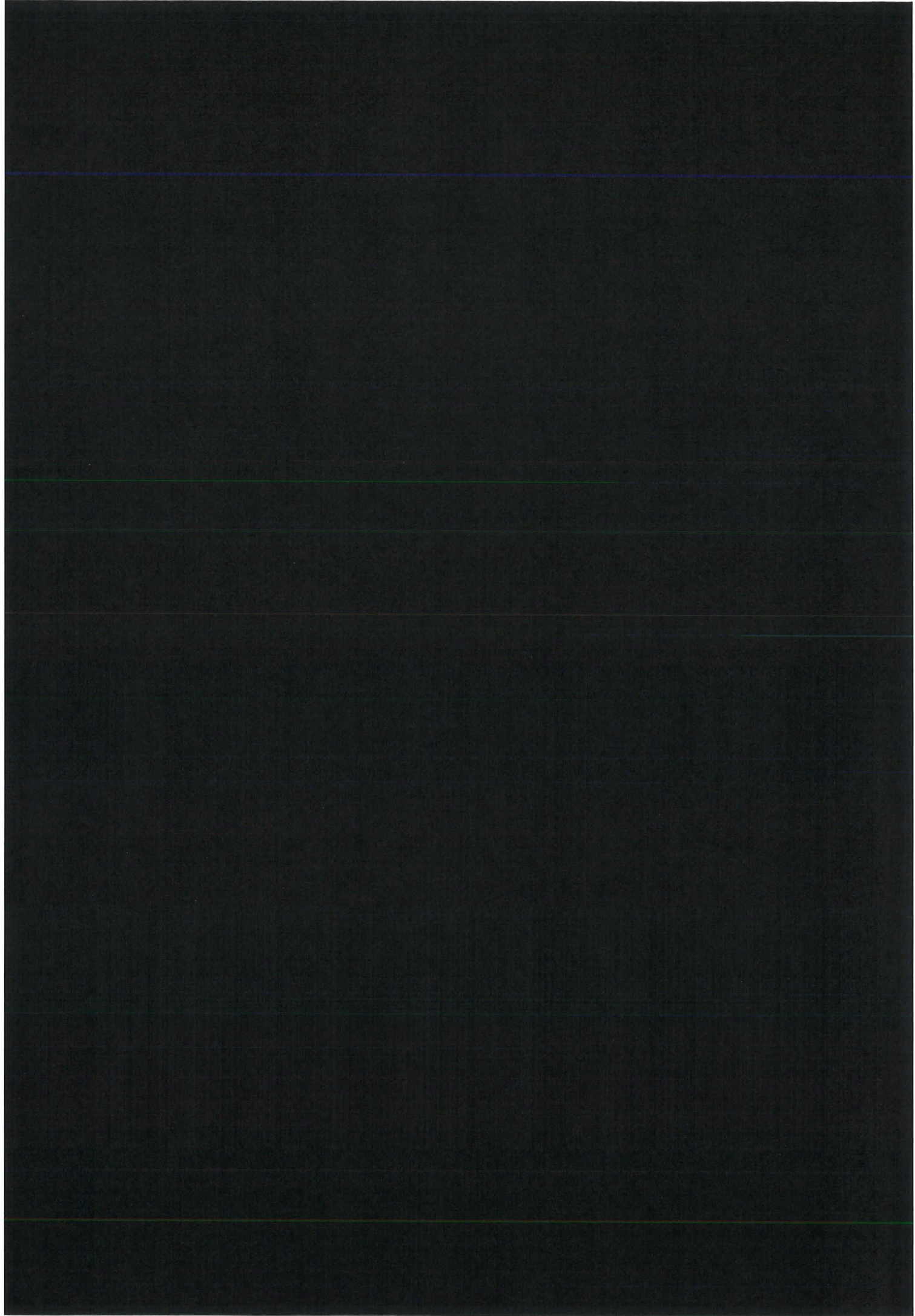












## 8. Data Protection issues - presentation

Chair reminded the delay in the adoption of the pending data protection decisions and informed that a workshop with MSs and COM had taken place at the end of October 2021. The draft documents were uploaded into FOSS ahead of the meeting.

ED took the view that it is essential to have a robust data protection framework because of the many interactions in operational matters with MSs. The objective is to comply with the EU General Data Protection Regulation (GDPR) and with the Regulation and to ensure that Frontex delivers on its operational mandate, while having an accountability framework for the implementation of data protection. In this context, ED will ensure that those with responsibilities to implement data protection rules, namely heads of units or directors of divisions, will do so effectively. ED reiterated the Agency's intention to present the 3 draft Decisions to the MB before year end. Concerning the draft Decision on Implementing rules on restrictions of data subject rights, ED reported he had notified it to the European Data Protection Supervisor the day prior to the MB meeting.

### 8.1 Implementing rules for processing Operational Personal Data

[REDACTED], Director of Governance Support Centre ad interim a.i. (DGSC a.i.), informed that the Implementing rules for processing Operational Personal Data (OPD) are a novelty stemming from the Regulation, which untaps an unrealized potential since implementing rules for the full operationalization of the Article 90 are not in place yet. This area of Frontex's activities is about police and criminal justice cooperation. It connects the Agency with Europol and Eurojust and is about providing support to MSs' authorities at the external border in the fight against cross-border crime and terrorism. The purpose is to allow Frontex to process OPD and enable it to exchange OPD with Europol and Eurojust, and with MSs law enforcement authorities for the purposes of preventing, detecting and investigating cross-border crime. The sources for collection of data are risk analysis, monitoring of migratory flows and collection during operations. Data subjects are suspects, as well as victims and witnesses of cross-border crime. For security reasons, this MB decision may not be made public or at least not in its entirety. Since September 2021, with the help of DPO, MSs and COM, the Agency has developed provisions related to special categories of personal data, such as a restriction to limit the processing of personal data of minors; control ownership and joint control ownership; verification and acceptance processes when OPD are exchanged with MSs, and data retention timelines were agreed upon. DPO was consulted twice with a very short notice. Her opinion was issued the day before the meeting so that there was no possibility to take stock of it. DGSC expressed confidence that the Agency will be able to present the draft decision for MB adoption in WP in the coming days or weeks.

██████████, **Data Protection Officer (DPO)**, clarified that respect of data protection and privacy means compliance with a fundamental right. She underlined that consulting the EDPS before adoption of the decision is important also for this set of rules, so as to avoid amendments of the decision at a later stage. In respect to the Implementing rules for processing OPD, DPO provided advice on numerous occasions and 2 opinions. The first of them contained several recommendations that were not followed. This still creates some concern on the current text, particularly in relation to control ownership and to the different types of purposes that are covering Eurosur. Purpose and purpose limitation of this set of rules are already defined by law. As regards the function group, the Agency can process this type of personal data only for one reason: the identification of suspects. For activities beyond it, such as investigation or prosecution of criminal offenses, the Agency has no mandate and the remit of the implementing rules on OPD is extremely limited. Specific risks associated to this are possible violations of fundamental rights and the endangerment of criminal investigations performed by MSs. Should Frontex process personal data for a purpose that goes beyond its mandate or that it has obtained outside its mandate, investigations and trials may be vitiated. DPO's advice with regards to Implementing rules for processing OPD was to further work on the current draft to eliminate inconsistencies and to consult the EDPS prior to the adoption.

DK mentioned that the national expert attending the workshop deemed discussions in that venue quite fruitful. However, DK considered the timeline for adoption of the MB Decision very ambitious, also considering that the consultation with the EDPS is not yet finalized and that the DPO opinion was not yet included in the draft decision. As mentioned by the DPO, the MB should learn from past experiences and do its utmost to avoid a situation where it is necessary to amend rules just adopted because an EDPS' conflicting opinion is issued. Considering the complexity of the subject, DK suggested discussing it further at expert level or granting MSs, both at the expert and MB level, appropriate time to scrutinize the documents before adoption by the MB.

NL supported the call from DK to spend some more time on the issue and raised some national concerns on the use of analyzed and normalized data for local prosecution, which will be discussed bilaterally with DPO.

COM recalled that the adoption of the Implementing rules for processing OPD was already delayed and that the Agency accelerated the work for the preparation of these rules, following the advice of the MB. According to the reports from the workshops, COM considered the text more than mature for adoption and in accordance with similar texts from other agencies. Furthermore, the consultation of the EDPS is not mandatory.

## 8.2 Implementing rules for processing non-Operational Personal Data

DGSC a.i. informed the MB that the Implementing rules for processing non-Operational Personal Data (NOPD) relate to the personal data processed in the context of professional activities outside the special framework of OPD. They will replace a MB decision adopted in 2015 and fall under the general scope of the GDPR. This second set of implementing rules addresses Frontex's core business, namely joint operation, pilot projects, rapid border interventions, return operations, management support team, risk analysis etc. The category of personal data to be processed relates to data of persons illegally crossing the external borders to enable the Agency to confirm identity and nationality of 3rd country nationals especially for return activities. Frontex can process such data for purposes of border and migration management, asylum and return activities, and for risk analysis. Personal data will be transmitted to MSs, but also, exceptionally, to 3rd countries and international organizations. Data collectors may be MSs officials, members of Frontex teams and other staff in Frontex, as well as EUROSUR staff. This set of rules is the least advanced as the Agency is still struggling with some difficulties.

DPO underlined that the Agency tends to call these rules NOPD, although they cover everything the Agency has been tasked with by Article 10 of the Regulation, except Article 10(q). All the other activities are supposed to be covered by these rules: not only personal data in joint operations, but also the personal data of the 10,000 SCs included in certain databases, data on the usage of outsourcing companies, data related to social media monitoring etc. Therefore, DPO recommended to clearly define the scope of the new rules. Although there is no obligation, DPO advised to consult the EDPS, particularly on EUROSUR, where controllership can be extremely tricky, and on the extension of Frontex's mandate when it comes to processing personal data on MSs behalf.

EE put an emphasis on the need to define what should be considered NOPD, which encompasses a variety of possibilities. This fine-tuning exercise would not prevent the swift adoption of these rules, rather this suggestion to the Agency may involve further work on a later stage consisting in guidelines for operational people or analysis of case studies, in order to facilitate the understanding of the rules for people working in the field.

Chair agreed on EE suggestion.



