

**Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) concerning the "Collection of names and certain other relevant data of returnees for joint return operations (JRO)"**

Brussels, 26 April 2010 (Case 2009-0281)

## **1. Proceedings**

On 17 April 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer of FRONTEX (or "the Agency") a Notification for prior checking concerning the "Collection of names and certain other relevant data of returnees for joint return operations (JRO)".

On 24 April, 6 July, 17 July, 10 August 2009 and 19 March 2010 the EDPS requested additional information from FRONTEX. The responses were received on 8 June, 16 July, 29 July, 20 January 2009 and 29 March 2010, respectively. The EDPS received also partial answers in the meantime. The deadline has been extended on 2 February 2010 for 2 months, due to the complexity of the case (Article 27(4) of the Regulation). The EDPS sent the draft opinion to the Data Protection Officer for comments on 9 April 2010 which were received on 26 May 2010.

## **2. Facts**

- Purpose of processing

The purpose of the processing is the preparation and realization of JROs assisted by FRONTEX under the FRONTEX Regulation<sup>1</sup> in order to:

- have exact knowledge of number and identification of returnees taking part in the JRO;
- provide airlines with a passengers list;
- know the risks linked to the returnees and for the security of the JRO;
- know the health state of returnees in order to secure appropriate medical assistance during the JRO;
- know if any minors take part in the JRO.

FRONTEX has informed the EDPS that personal data have not been processed for operational activities so far, but this processing activity is necessary in the near future: 1) to better fulfil

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<sup>1</sup> 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 349/1, 25.11.2004.

and further develop the task according to Article 9 of the FRONTEX Regulation; 2) to assist an organizing MS/SAC (Member State/Schengen Associated Country) in compiling the aforementioned lists and updating them during the course of the JRO's preparation on the basis of information received from participating States; 3) to have a constant overview of which participating MS/SAC have (or have not) provided the required data to the organizing State which anyway regularly asks FRONTEX ROS (Return Operations Sector) to contact that State and to provide the data in due time; 4) to increase the effectiveness and efficiency of FRONTEX assistance in organizing JRO of MS/SAC.

- Brief description of the procedure for organizing and conducting a JRO and processing of personal data

#### a) Initiative

The initiative to conduct a JRO comes from one or several MS. The initiative may also come from FRONTEX. The basic platform for the identification of MS' needs and possibilities for JRO are regular meetings with MS. No personal data is processed at this stage.

#### b) Preparatory work

The preparatory work can be summarised in the following points:

- Definition of list of returnees (done by each MS) based on the national law for expulsion / removal (administrative or judicial order).
- Definition of escorts, observers, other officials, medical staff, possible interpreter (done by each MS)
- FRONTEX does not receive police/judicial records.
- Participating MS (PMS) fill in a form ("Participation in an Offered Return Flight-Information Sheet") and send it to FRONTEX and to the Organising MS (OMS).
- The participating MS/SAC provide general information about each individual returnee whether (s)he is healthy or not.<sup>2</sup> If a returnee is not completely healthy, (s)he can be still returned, if stated by PMS' medical staff that (s)he is fit for flying. In such a case the relevant PMS' authority responsible for returnees should collect medical information about the health case. It is to be used only by the OMS' medical staff present during the JRO, if necessary, in order to provide the right medical treatment. The medical staff present during the JRO is usually arranged by the OMS, but a PMS can also provide its own medical staff, if needed. Medical records or medical arrangements are not disclosed to FRONTEX. Medical staff are not FRONTEX staff and do not report to FRONTEX staff. FRONTEX would process only a yes/no answer to the question "is this passenger healthy?"
- The PMS provide a general risk assessment for all individual returnees (whether they present any risks of violence and/or suicidal behaviour), which is used solely to ensure the safety of involved MS/SAC' officials, other returnees and the security of the whole return operation. This information is sent to FRONTEX and to the OMS.
- FRONTEX drafts a consolidated list of returnees. Participating MS transmit to FRONTEX and to the OMS certain personal data related to the passengers. (FRONTEX will receive the form "Participation in an Offered Return Flight-Information Sheet" and its "Annex", which includes some personal data about returnees).

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<sup>2</sup> Regarding JRO by air, it is according to the Council Decision of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders (2004/573/EC), Annex - Common Guidelines on Security Provisions for Joint Removals by Air, No. 1.1.2.

- Definition of transit countries, determination of a route, stopovers, flight schedule.
- Contact with authorities of destination countries (third-countries, hereafter TC).
- Visit of advance parties made by MS officials / FRONTEX to these destination countries.
- OMS transmits the names of returnees to authorities of third countries to check right of entry of the returnee in this country<sup>3</sup>.
- FRONTEX or the OMS transmit the passengers list to airline companies prior to the JRO.

#### c) Assembling

- Definition of point of assembling of returnees (airport).
- Travel of returnees from their respective MS to the point of assembling (FRONTEX is not involved).
- No further data is collected at this stage. Some data may be updated to ensure completeness and accuracy (e.g. in case of decreased numbers of returnees).
- FRONTEX does not send any data to Airport authorities.

#### d) Execution of the JRO

- Flight to destination.
- Ex-post evaluation.
- No further data is collected at this stage.

- Data subjects

The data subjects concerned are the returnees<sup>4</sup> announced by MS/SAC to take part in a joint return operation.

- Categories of data

The categories of personal data are the following:

\* Data related to returnees:

- surname, given name
- date of birth<sup>5</sup>
- nationality
- gender
- type and validity of travel document
- security risk assessment, made by a competent authority of the MS/SAC (not violent, violent, extremely violent, suicidal). The determination of risk is made by the competent authority of the MS/SAC.

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<sup>3</sup> Lack of documentation renders impossible the effective return of illegal migrants.

<sup>4</sup> All returnees are subject of individual removal orders issued by relevant competent national law enforcement authorities or courts of law. Such orders are justified by national security / public security reasons and based on national law (criminal, administrative or similar). FRONTEX does not know the reasons or procedures behind the national decisions. FRONTEX only knows that the individual concerned does not comply with national law of the MS regarding legal stay, without having access to further details.

<sup>5</sup> With regard to minors, their return to the country of origin depends on bilateral agreements between the MS and the relevant third countries. The condition to their return is the existence of a family in the country of origin who will take care of the minor. No unaccompanied minors are being transferred during JROs.

- medical assessment, made by a competent authority of the MS/SAC (whether a person is healthy or not; in the latter case a participating MS/SAC should provide the organising MS/SAC with medical records ; they are not delivered to FRONTEX).
- returning MS/SAC

- Information to the data subjects

FRONTEX informed the EDPS that the data subjects are informed by the MS/SAC in the light of their national data protection law. FRONTEX has not foreseen so far the provision of the information stipulated by Articles 11 and/or 12 of Regulation (EC) 45/2001 to the data subjects.

- Procedures to grant rights of data subjects

These rights are granted by the MS/SAC in the light of their national data protection law. FRONTEX has not foreseen so far specific procedures to grant data subjects rights (Articles 13 to 17 of Regulation (EC) 45/2001).

- Type of processing (automated and/or manual)

The processing activity conducted is automated.

- Storage media

The storage media is digital. The data might be exceptionally received on paper (e.g. by fax) but will then be transformed into a digital version (scanned) and the paper versions would be destroyed.

- Recipient(s) of the Processing

Compiled data and possible updates are sent only to the OMS of the JRO. The data is received from the individual participating MS/SAC, but not disseminated to them mutually. There is no need to enable access to the totality of available data to all participating MS/SAC.

Furthermore, FRONTEX would transfer data to airlines companies<sup>6</sup> (the passenger list).

- Retention policy

The data is stored for the following purposes:

- organisation of JRO
- evaluation of JRO (internal within Frontex Return Operations Sector and then also together with MS/SAC)
- internal and external controls, audits.

The length of retention is uniform: the data will be deleted within 10 working days after the execution of the operation.

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<sup>6</sup> The airline company will be chosen after an EU tender procedure.

However, when FRONTEX starts chartering aircrafts,<sup>7</sup> the passenger list will be kept only for auditing purposes, and it will be archived for 5 years in a secure area. The passenger list does not include the risk assessment or the medical assessment.

- Time limit to block/erase data on justified legitimate request from the data subjects

FRONTEX is of the view that after an operation it does not need to keep the data except in exceptional circumstances, thus, in their opinion, this renders such a request without object.

- Security and organisational measures

(...)

### **3. Legal aspects**

#### **3.1. Prior checking**

***Applicability of Regulation (EC) 45/2001:*** The collection of names and certain other relevant data of returnees for joint return operations (JRO) constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a former "Community body" in the exercise of activities which fall within the scope of former "Community law" (Article 3 (1) of the Regulation).<sup>8</sup> The processing of the data is done electronically. Therefore, Regulation (EC) 45/2001 is applicable.

***Grounds for prior checking:*** According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27 (2) (a): "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*". The processing in question includes data relating to health. Even if no medical records or medical arrangements are transmitted to FRONTEX they are informed about the state of health of the individuals. Furthermore, in some countries, the individual removal orders are based on criminal law or linked to a criminal law procedure; therefore, the processing may regularly imply data related to offences or criminal convictions.

In this case, the processing activity has to be considered also in the light of Article 27(1), due to the fact that it is connected to a sensitive field which has clear implications for human rights.

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<sup>7</sup> The EDPS has been informed by FRONTEX DPO that in the conclusions of FRONTEX' Management Board Working Group Meeting held in Warsaw on 30 September 2008, it was stated that:

- FRONTEX can co-finance, finance or even charter aircrafts, used within JRO of the MS, as part of the assistance;
- MS support a scenario according to which FRONTEX carries out - in the organization of the operation - some practical arrangements, including chartering an aircraft.

In 2009, further to a tender procedure, an independent company has been selected in order to draft the terms of reference for chartering aircrafts; this company has now started its work.

<sup>8</sup> The concepts of "Community institutions and bodies" and "Community law" were abolished by the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in the light of the Lisbon Treaty.

**Deadlines:** The notification of the DPO was received on 17 April 2009. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 255 days in order to require additional information and to allow for comments from the data controller. Consequently, the present opinion must be delivered no later than on 28 April 2010.

### 3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5 (a) is that the *"processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institutions or body"*.

Article 9 of Regulation (EC) No 2007/2004 stipulates that *"1. Subject to the Community return policy, the Agency shall provide the necessary assistance for organising joint return operations of Member States. The Agency may use Community financial means available in the field of return. (...)"*. FRONTEX is involved in "operational cooperation" with the MS and is responsible for its own role in that context. The Agency has stated that personal data have not been processed for operational activities so far, but argues that in order to cooperate in the JRO in an efficient manner, processing of personal data of the returnees who participate in the operation has to be conducted in the near future.

The EDPS understands that some processing of personal data as described in the facts of this case may be necessary for a proper execution of the Agency's task in the context of the JRO, in which case the Agency should be seen as a controller, but considers a more specific legal base than Article 9 of Regulation (EC) No 2007/2004 as preferable, if not required, due to the sensitivity of the data and the activities concerned with regard to a vulnerable population, so as to provide clearer limits to the processing and ensure appropriate guarantees for data subjects, as required by Article 8 of the European Convention on Human Rights and the EU Charter of Fundamental Rights.

The EDPS considers that Article 9 of Regulation 2007/2004 and Article 5(a) of Regulation 45/2001 could thus, under the specific circumstances of this case, only serve as a provisional legal base for the envisaged processing activity, subject to a careful review of the need for a more specific legal basis, in the context of the ongoing revision of Regulation 2007/2004.<sup>9</sup>

### 3.3. Data Quality

**Adequacy, relevance and proportionality:** According to Article 4 (1) (c) of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*. The information presented to the EDPS on the data processed appears to meet those requirements.

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<sup>9</sup> COM(2010) 61 final, Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX). This ongoing revision gives the possibility to the legislator to have a closer look at the legal base, in view of the changing situation.

**Accuracy:** Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and that *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*.

FRONTEX has informed the EDPS that the Agency has not foreseen specific procedures to grant data subjects rights so far, as data are typically provided by national law enforcement authorities and the likelihood that these data are incorrect is very low. However, it has to be noted that such procedures are required regardless of the likelihood of mistakes (see also point 3.6) and are an essential aspect to ensure respect for the data quality principle. Therefore, the EDPS urges FRONTEX to adopt appropriate mechanisms for this purpose before starting to process personal data and to ensure the respect of data subject rights.

**Fairness and lawfulness:** Article 4 (1) (a) of the Regulation also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.7)

### **3.4. Data retention**

Article 4 (1)(e) of the Regulation states that personal data must be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed"*.

The data will be kept during 10 days after the end of the JRO. In the case of chartering aircrafts, the passenger list will be kept for auditing purposes during 5 years on the basis of the Financial Regulation. These periods are in line with Article 4(1)(e).

### **3.5. Transfer of data**

In line with Article 8 of the Regulation, personal data shall be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC *"(a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or (b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced"*.

In the present case the data received by FRONTEX from the PMS will be transferred to the OMS. The OMS needs these data in order to exercise its public authority for the conduction of the JRO (Article 8(a)).

Apart from that, FRONTEX would transfer data to airline companies (the passenger list). Processing of certain passenger data is mandatory under Aviation law. In this case, the transfer of these data will also be necessary for the fulfilment of FRONTEX' role as a coordinator of the JRO (Article 8(b), first requirement). For this reason the necessity of the transfer is established by the sender instead of the recipient.

As to the protection of the data subject's legitimate interests, a differentiation has to be made depending on whether the airline company is subject to the national law transposing Directive 95/46/EC or not. In the first case, there would be in principle no reason to assume that the data subject's legitimate interests might be prejudiced because the airline company would respect the same principles (basis for lawfulness, data quality, obligations and rights, etc.) as those established in the Regulation (Article 8(b), second requirement).

In the second case, account should be taken of Article 9 of the Regulation. Article 9.1 of the Regulation stipulates that "[p]ersonal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out". The EDPS recommends a thorough examination of this Article before a transfer of this kind takes place, in order to comply with its requisites. In such a case, the EDPS requires FRONTEX to notify the EDPS a methodology for compliance with this Article before the transfer be made.

### **3.6. Right of access, rectification and blocking**

The following provisions are applicable in the present case:

(i) Article 13 of the Regulation that provides a right of access to personal data being processed; (ii) Article 14 of the Regulation that provides a right to rectification without delay of inaccurate or incomplete data; (iii) Article 15 of the regulation that provides that the data subject shall have the right to obtain from the controller the blocking of data where, among other circumstances, their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy, including the completeness of the data.

Article 20 of the Regulation provides for certain exceptions under strict conditions, but these exceptions only apply where necessary and on a case-by-case basis, and could therefore not lead to a general waiver of data subject's rights.

As described under point 2 above, FRONTEX has so far not foreseen specific procedures to grant data subjects rights (Articles 13 to 17 of Regulation (EC) 45/2001). The EDPS therefore recommends FRONTEX to implement the necessary procedures to guarantee the rights of the data subjects, to the extent required by the Regulation.

### **3.7. Information to the person concerned**

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed unless the data subject already has this information. Individuals are further entitled to be informed of, inter alia, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to. Article 12 is applicable in those cases where the data have not been obtained from the data subject, as in the case at hand. This rule states that "*1. Where the data have not been obtained from the data subject, the controller shall at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed, provide the data subject with the following information, except where he or she already has it: (...)*".

In the present case, FRONTEX has so far not foreseen to provide the data subjects with the information stipulated by Article 12 of Regulation (EC) 45/2001. Therefore, the EDPS recommends FRONTEX to implement this obligation before the processing activity takes place, except if the Member States participating in the JROs provide the information to the data subjects concerning the processing of personal data by FRONTEX in the light of Article 12 of the Regulation (*id est* including all the requisites mentioned therein).

Moreover, considering the specific characteristics of the data subjects (in most of the cases their mother tongue will not be an official EU language, the data subjects might be in a

situation of particular distress, etc.), the EDPS is of the view that the information has to be provided in a form that allows the data subject to understand it. This would imply, for instance, that it has to be given in a language that the returnee is reasonably supposed to understand and in an age appropriate manner. Moreover, it has to be ensured that illiterate persons are properly informed (e.g. an official should ensure that information is read to the returnee). Information texts should be drafted in a clear, simple and understandable language, taking account of the level of education of the data subjects and, therefore, avoiding legal terminology which they might not be familiar with.<sup>10</sup> The EDPS requests FRONTEX to inform the EDPS about the particular implementation measures taken in this regard.

### **3.8. Security measures**

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected"*. These security measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

The EDPS has no reason to believe that the adopted measures are not adequate in light of Article 22 of the Regulation.

### **4. Conclusion:**

There is - subject to one important comment - no reason to believe that there will be a breach of the provisions of Regulation 45/2001, provided the above considerations are fully taken into account. This means, first of all, that the need for a more specific legal base for the processing activity should be carefully reviewed in the context of the ongoing revision of Regulation (EC) No 2007/2004.

Moreover, FRONTEX should:

- examine Article 9 before a transfer under its scope takes place, in order to comply with its requisites. In such a case, the EDPS requires FRONTEX to notify the EDPS a methodology for compliance with this Article before the transfer;
- implement the necessary procedures to guarantee the rights of the data subjects;
- implement the obligation to inform before the processing activity takes place, except if the Member States provide the information to the data subjects in the light of Article 12 of the Regulation. Furthermore, the EDPS requests FRONTEX to inform the EDPS about the particular implementation measures taken in this regard.

Done at Brussels, 26 April 2010

(signed)

Peter HUSTINX  
European Data Protection Supervisor

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<sup>10</sup> The same line is followed in the context of Eurodac. See *Second Inspection Report on information to data subjects and assessment of the age of young asylum seekers*, Eurodac Supervision Coordination Group, Brussels, 24 June 2009.