



WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Mr Fabrice LEGGERI
Executive Director
Frontex
Plac Europejski 6
00-844 Warsaw
POLAND

Brussels, 24 November 2016
WW/OL/sn/D(2016)2535 C 2015-0346
Your reference: CGO/FCS/JOMA/20668/2016
Please always copy edps@edps.europa.eu

Subject: Update of PeDRA prior checking notification

Dear Mr Leggeri,

On 18 October 2016, Frontex' DPO, Mr Andrzej Graś, provided an updated notification for prior checking under Article 27 of Regulation (EC) 45/2001 (the Regulation)¹ concerning the way your Agency handles Personal Data in Risk Analyses (PeDRA).²

As the update only informs the EDPS about a small number of changes to PeDRA, it is not appropriate to issue a full new opinion. The present opinion will only address the changes notified and should be read in conjunction with the initial opinion of 3 July 2015.³

The Facts

The changes notified relate to the changes brought by Regulation (EU) 2016/1624 (the new Frontex Regulation)⁴, replacing the old Frontex Regulation⁵. Remaining references to the old Frontex Regulation in the notification are to be read in accordance with the correlation table annexed to the new Frontex Regulation.

To summarise, the changes to the notification are the following:

1. Under Article 47(1) of the new Frontex Regulation, the Agency plans to deploy also members of its own staff in order to assist host Member States in the collection of personal data during debriefing activities. Such personal data will be still be collected

¹ OJ L 8/1, 12/01/2001

² The notification was received on 18 October 2016; pursuant to Article 27(4) of the Regulation, the EDPS shall render an opinion within two months of receipt of the notification.

³ our reference D(2015)1121 C 2015-0346

⁴ OJ L 251/1, 16/09/2016

⁵ OJ L 199/30, 31/07/2007, as last amended before repeal

following the national law of the host Member State and will be transferred to Frontex by the host Member State's Intelligence Officer (the liaison point between the Member States and Frontex).

2. Personal data received from source Member States will not only be forwarded to Europol in personal data packages, but also sent back to the source Member State (Article 47(2)(b) of the new Frontex Regulation) in a pre-process and structured form. In the longer term, Frontex may start forwarding the personal data package to other Member States concerned (e.g. when nationals of Member State B are suspected of criminal activity based on a debriefing carried out in Member State A).
3. The scope of criminal activity covered by PeDRA will also explicitly include terrorism; a new data item "type of crime" is added in the list of possible data categories in the notification.

Legal Analysis

Using the same numbering as above, the EDPS has the following comments to make:

1. The EDPS' understanding is the same as that of Frontex: Agency staff deployed in a host Member State will be acting under the authority of the host Member State (Articles 21 and 40 new Frontex Regulation). Therefore, as - in data protection terms - the host Member State will be the controller of the debriefing operations, personal data collected will thus be considered as coming from that Member State.
2. Article 47(2)(b) of the new Frontex Regulation allows transferring such personal data "to the authorities of the relevant Member States which are responsible for border control, migration, asylum or law enforcement [where this] is necessary for use in accordance with national legislation and Union and national data protection rules". This provision appears to cover the use cases described by Frontex.
3. The scope of crimes covered by PeDRA now explicitly covers "cross-border crime, such as migrant smuggling, trafficking in human beings or terrorism" (Article 47(1) of the new Frontex Regulation). Article 11c of the old Frontex Regulations referred to "cross-border criminal activities, in facilitating illegal migration activities or in human trafficking activities" instead. The new legal basis explicitly covers terrorism.⁶

Additionally, item (q) in the list of possible data fields in the updated notification reads "sexual orientation" (same as in the original notification). As per recommendation 4 of the PeDRA prior check opinion, Frontex should not process such data in PeDRA. Frontex implemented this recommendation with the specific Implementing Rules for PeDRA adopted on 18 December 2015, whose Article 9(1) explicitly bans processing of such data. On 9 November 2016, Frontex confirmed that the Agency indeed does not process such personal data in PeDRA.

Conclusion

The EDPS has no further recommendations to make concerning the notified changes to PeDRA.

However, I would like to take this opportunity to draw your attention to the sole remaining recommendation from the original PeDRA prior check, relating to conservation periods in the system.⁷ **Provided that Frontex implements that recommendation, the EDPS has no reason to believe that there is a breach of the Regulation.**

For that recommendation, please report back by 16 December 2016, as requested in our earlier letter of 30 September 2016.

⁶ The old legal basis implicitly covered it as well: terrorism counts as "criminal activity" and given the nature of PeDRA, information relating criminal activity in its scope was very likely to have a cross-border element.

⁷ See our letter of 30/09/2016, our reference D(2016)2062 C 2015-0346.

Finally, I would like to thank your staff, especially Messrs Graś and Wilkin, for the excellent cooperation throughout this case.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI

Cc: Mr Andrzej Graś, DPO, Frontex
Mr Antonio SACCONI, Head of Risk Analysis Unit, Frontex
Mr Teddy WILKIN, Project Manager PeDRA, Risk Analysis Unit, Frontex