

**EDPS's comments on Amendment 59 in the Draft report on the proposal for a regulation of the European Parliament and of 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) (COM(2010)0061 - C7-0045/2010 -2010/0039(COD))**

### **Paragraph 1 of Article 11 aa**

*"In performing its tasks, the Agency may process personal data in order to contribute to the security of the external borders of the Member States of the European Union."*

#### **Comment:**

We believe that the purpose for which personal data would be processed by FRONTEX should be more clearly defined in the provision and restricted to what is necessary for FRONTEX to fulfil its tasks.

To this end, we suggest that the proposed wording: *"to contribute to the security of the external borders of the Member States of the European Union"* is redrafted to reflect the mandate of FRONTEX as envisaged in the proposal. Moreover, we consider it opportune to specify the scope of activities giving rise to the processing of personal data. The words *"where strictly necessary"* should also be added in the beginning of the paragraph 1.

We also suggest that a second paragraph is added to Article 11 (a) of the Commission's proposal which would explicitly stipulate that *"Regulation 45/2001 apply to the processing of personal data by the Agency"*. This clarification would avoid any possible doubts and interpretations about the scope of application of Regulation 45/2001 in the context of FRONTEX's tasks and would also clarify the tasks of the EDPS as supervisor of the data processing operations by EU institutions, bodies and agencies. We furthermore suggest that the second paragraph of Article 11 (a) as proposed by the Commission is re-introduced reading as follows: *"The Management Board shall establish measures for the application of the Regulation by the Agency, including those concerning the Data Protection Officer of the Agency and data subject rights, with due regard to Article 11aa.."*. The EDPS should be consulted on these measures before their adoption, as follows from Article 28 (1) of Regulation 45/2001. It would be useful to mention this explicitly in Article 11 (a).

### **Paragraph 2 of Article 11 aa**

*"The processing of personal data shall respect the principles of necessity and proportionality."*

**Comment:**

We support this paragraph which is in line with the comments made in the EDPS Opinion on the Commission's proposal, although strictly speaking not necessary since these basic requirements are already laid down in Regulation 45/2001.

**Paragraph 3 of Article 11 aa**

*"The processing of personal data by the Agency shall be limited to personal data obtained during joint operations or pilot projects or rapid border intervention missions regarding persons who are suspected on reasonable grounds of involvement in cross-border criminal activities, in illegal migration activities or in human trafficking activities as defined in Article 1 (1) (a) and (b) of Council Directive 2002/90/EC<sup>1</sup>, persons who are victims of such activities and whose data may lead to the perpetrators of such illegal activities as well as persons who are subject to return operations in which the Agency is involved."*

**Comment:** It is important to ensure sufficient clarity and consistency between paragraph 1 and paragraph 3 of Article 11 (aa). To this end, the purpose of processing operations by the Agency should be clearly determined in paragraph 1 (see our comment above) and it should also be checked if the activities mentioned under paragraph 3 are the ones for which data processing is really necessary and proportionate compared to the purposes. The types of personal data (names, dates of birth, etc.) which would be processed by the Agency should also be defined to the extent possible.

**Paragraph 4 of Article 11 aa**

*"The personal data shall be deleted as soon as the purpose for which they have been collected has been achieved. The term of storage shall in any event not exceed three months after the date of the collection of those data."*

**Comment:** This paragraph is welcomed as it constitutes the required specification of Article 4 (1) (e) of Regulation 45/2001. It would be useful to justify the criteria used to determine the period of 3 months.

**Paragraph 5 of Article 11aa**

*"Personal data processed by the Agency for the purpose specified in this Article shall, subject to Article 13 of this Regulation, be transmitted to Europol."*

**Comment:**

This paragraph refers to Article 13 (Amendment 60) which stipulates that *"The Agency shall cooperate with Europol, the European Asylum Support Office, the Fundamental Rights Agency, other European Union agencies and bodies, and international organisations competent in matters covered by this regulation in the framework of working arrangements concluded with those bodies, in accordance with the relevant provisions of the treaty and the provisions on the competence of those bodies"*.

Consequently, Article 13, as amended by the draft report, obliges FRONTEX to cooperate with Europol in matters covered by the FRONTEX Regulation in the framework of a working arrangement.

We welcome the link between Article 11 (aa) and Article 13 in the draft report as needed clarification.

Nevertheless, we draw attention to the fact that paragraph 5 of Article 11 (aa) - if adopted as proposed in the Amendment 59 - would oblige FRONTEX to regularly and systematically transmit to Europol all personal data processed by FRONTEX in the context of its activities. This approach is not in line with Regulation 45/2001, and in particular with proportionality and

necessity principles which require a case-by-case assessment of the need to transfer data under Article 7 Regulation 45/2001.

Therefore, we suggest that a limitation to case-by-case transmissions of data by Frontex to Europol is included in the legal basis; this could be further specified in the working arrangement under Article 13. This should ensure that FRONTEX exchanges with Europol only the data which are strictly necessary for the fulfilment of tasks of both agencies.

#### **Paragraph 6 of Article 11 aa**

*"Onward transmission or other communication of personal data processed by the Agency to other European Union agencies or bodies shall be subject to specific working agreements regarding the exchange of personal data and subject to the prior approval of the European Data Protection Supervisor."*

#### **Comment :**

The remarks on the need for regular and case-by-case assessment of the need for data transfers between Frontex and Europol, mentioned under the comments on paragraph 5 of the proposed Article 11 (aa), also apply, in more general terms, to paragraph 6.

As stressed in the EDPS Opinion, it is very important to ensure that cooperation and synergies between FRONTEX and other bodies and agencies of the European Union, in particular Europol, are sufficiently clarified in the legal basis to avoid any duplication of work and provide for positive synergies.

This should be done with due regard to Article 7 of Regulation 45/2001 and the powers of the EDPS.

Given that, as mentioned earlier, Regulation 45/2001 applies to the processing of personal data by FRONTEX, this including the competences and tasks of the EDPS, we suggest that the words *"and subject to the prior approval of the European Data Protection Supervisor"* are deleted to avoid any possible discrepancy with the interpretation of Regulation 45/2001. It should be noted in this context that certain processing operations are already subject to prior checking and systematic follow up by the EDPS under Article 27 of Regulation 45/2001, as also mentioned in the EDPS Opinion on the Commission's proposal.

#### **Paragraph 7 of Article 11 aa**

*"Onward transmission or other communication of personal data processed by the Agency to Member States or third countries or other third parties shall be prohibited."*

#### **Comment:**

Regarding the specification that personal data processed by the Agency should not be transmitted by FRONTEX to third countries or third parties, we note that such a specification is in line with the EDPS Opinion on the Commission proposal in which we referred to Article 14 of the Commission proposal, and mentioned that this provision did not specify whether, and if so to which extent and under which circumstances, the "working arrangements" envisaged in this provision would include personal data. Given that Article 14 was silent about processing of personal data, the EDPS understood that this provision would not involve the processing of personal data.

### **Additional comments**

In addition to the above-mentioned comments related to the amendment 59, we also suggests an addition to Article 11 b Par. 2 of the proposal as presented by the Commission, so that this provision will read as follows:

*"2. The Agency shall apply the security principles relating to the processing of non-classified sensitive information as adopted and implemented by the European Commission and develop accordingly its own and detailed security policy."*

Brussels, 3 December 2010