



## **Formal comments of the EDPS on the Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast)**

### **1. Introduction and background**

- These formal comments are in reply to a consultation of the EDPS by the European Parliament on 13 December 2018, following a request from the Chair of the Committee on Civil Liberties, Justice and Home Affairs, in accordance with Article 57(1)(g) of Regulation (EU) 2018/1725<sup>1</sup>, on the proposal for the recast of Directive 2008/115 (EC) adopted by the Commission on 12 September 2018<sup>2</sup> (hereinafter, ‘the Proposal’)<sup>3</sup>.

- We welcome this consultation by the European Parliament on the data protection implications of the Proposal. At the same time, we recall that the EDPS was consulted by the European Parliament and issued formal comments on 3 December 2018 on the Proposal for Regulation on the European Border and Coast Guard (hereinafter, ‘the EBCG’ and ‘the new EBCG Regulation’)<sup>4</sup>. We regret the fact that, similarly to this previous proposal, the Proposal is not accompanied by an Impact Assessment and the EDPS has not been consulted by the Commission, either formally nor informally.

- The lack of impact assessment, notably having regard to the possible effects of the Proposal on fundamental rights<sup>5</sup>, including on the rights to privacy and to the protection of personal data, of the persons concerned (notably, the returnees) is striking, given the already *prima facie* evident impact of the Proposal on those fundamental rights.

- The Proposal aims in particular at:

- establishing a procedure for the rapid return of applicants for international protection whose application was rejected;
- providing more effective rules on the issuing of return decisions;
- providing a clear framework of cooperation between irregular migrants and competent national authorities;

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<sup>1</sup> Regulation (EU) 2018/1725 of the European Parliament and of 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, L295, 21.11.2018.

<sup>2</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, L348, 24.12.2008.

<sup>3</sup> Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018)634 final.

<sup>4</sup> Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the European Parliament and of the Council, COM(2018) 631 final.

<sup>5</sup> For instance, on the right to effective remedy; to liberty and security; to asylum and protection in the event of removal or expulsion.

- streamlining the rules on the granting of a period for voluntary departure and establishing a framework for the granting of financial, material and in-kind assistance to irregular migrants willing to return voluntarily;
- establishing more efficient instruments to manage the administrative processing of returns, the exchange of information among competent authorities and the execution of return in order to dissuade illegal migration;
- ensuring coherence and synergies with asylum procedures; ensuring a more effective use of detention to support the enforcement of returns<sup>6</sup>.

• Given the short deadline imposed by the European Parliament, and in line with the consultation request, the present comments focus on only the most apparent and significant data protection issues raised by the Proposal. They are without prejudice to any future comments or opinion of the EDPS on this or related file(s).

## **2. Comments**

### **2.1. Preliminary remark on the applicable data protection laws**

• As preliminary remark, we note that the Proposal makes reference to data protection law, notably Regulation (EU) 2016/679 (hereinafter, ‘the GDPR’)<sup>7</sup> and Directive (EU) 2016/680 (hereinafter, ‘the Law Enforcement Directive’)<sup>8</sup> in Recital 47, on the transfers of personal data from Member States’ return authorities to (the authorities of) the third countries of return.

• Concerning all personal data processing entailed by the provisions of the Proposal, a separate standalone Recital should clearly state that “the Proposal does not in any way affect the applicable rules on the processing of personal data, notably the GDPR and Regulation (EU) 2018/1725.”

• Furthermore, Recital 47 does not refer to Regulation (EU) 2018/1725. This Regulation is applicable to the processing of personal data by the EBCG provided for by the Proposal. Consequently, we recommend including a reference in a dedicated recital to the applicability of the Regulation (EU) 2018/1725.

• Furthermore, the Law Enforcement Directive is not applicable, because the data processing activities regulated under the Proposal (based on Article 79(2)(c) TFEU, which empowers the Union to adopt measures in the field of illegal immigration and unauthorized residence), as laid down under Article 1 (Subject matter), namely “common standards and procedures to be applied in Member States for returning illegally staying third-country nationals”, due to their ‘administrative nature’, do not fall under the scope of this Directive.<sup>9</sup> The reference to the

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<sup>6</sup> See at page 2 of the Explanatory Memorandum.

<sup>7</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119, 4.5.2016.

<sup>8</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, L119, 4.5.2016.

<sup>9</sup> For instance, also in case of Member States deciding to apply the Proposal -pursuant to its Article 2(3)(a)- to third country nationals “subject to return as criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures”, we consider that the ‘return

Law Enforcement Directive should therefore be deleted, unless the Commission can point to specific examples that would fall within its scope, to be explained in recitals.

## **2.2. Specific remarks**

### **2.2.1. On the obligation of third country nationals to cooperate with Member States competent authorities**

- The (new) Article 7, as specified under Recital 12, establishes the obligation for third country nationals “to cooperate with the authorities at all stages of the return procedure, including by providing the information and elements that are necessary in order to assess their individual situation.”
- In this regard, the EDPS recommends clarifying - in the aforementioned Recital 12 - that the provided information must be “*proportionate*” as well as “*necessary*”, in order to ensure that a *fair balance* is reached by the competent authorities of the Member States collecting and processing personal data relating to returnees between the aim of ensuring the smooth and rapid performance of the return obligation and the interference on the rights to privacy and to the protection of personal data<sup>10</sup>.

### **2.2.2. On the transfer of personal data from the authorities of the Member States to the authorities of third countries**

- According to the new Recital 47, “Readmission agreements, concluded or being negotiated by the Union or the Member States and providing for appropriate safeguards for the transfer of data to third countries pursuant to Article 46 of Regulation (EU) 2016/679 or pursuant to the national provisions transposing Article 36 of Directive (EU) 2016/680, cover a limited number of such third countries. In the situation where such agreements do not exist, personal data should be transferred by Member States' competent authorities for the purposes of implementing the return operations of the Union, in line with the conditions laid down in Article 49(1)(d) of Regulation (EU) 2016/679 or in the national provisions transposing Article 38 of Directive (EU) 2016/680.”
- Concerning the applicability of the Law Enforcement Directive, we reiterate the remarks expressed under Section 2.1. of these formal comments. We also observe that the purpose of the transfer, namely, as stated in the aforementioned recital, “to ensure the proper implementation of return procedures and the successful enforcement of return decisions”, does not concern activities falling under the Law Enforcement Directive. For this reason, the EDPS recommends deleting the reference to the Law Enforcement Directive from this recital.
- Secondly, the EDPS recalls that Article 49(1)(d) of the GDPR, namely, ‘*transfer is necessary for important reasons of public interest*’ is, as clearly specified in the heading of Article 49 of the GDPR, a “derogation for specific situations”. Hence, we consider that Member States’ return authorities can rely on the ‘public interest ground’ as legal ground for

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procedure’ would still have an administrative law nature and thus be subject to the provisions of the GDPR (as opposed to procedures relating to the ‘prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties’, falling under the scope of the Law Enforcement Directive).

<sup>10</sup> As example of application of the principle of proportionality having regard to the fundamental rights to privacy and the protection of personal data in the field of border control, asylum and migration, see CJEU, C-473/16, *Bevándorlási és Állampolgársági Hivatal*.

such transfers of personal data only exceptionally (as ‘last resort’), in the absence of the safeguards (notably, the agreement with the third country’s competent authority including appropriate data protection clauses), and for ‘non-structural’ transfers. In other words, the Proposal can allow transfers of personal data based on Article 49(1)(d) of the GDPR only as a derogation (as an exception to the requirement for an adequacy decision or appropriate safeguards), on a case-by-case basis (in individual cases), and provided that the necessity and proportionality for each transfer is demonstrated by the competent authority performing it<sup>11</sup>.

In the context of the Proposal, the appropriate legal basis for transfers of personal data to non-adequate Countries, in case of structural, recurrent transfers would be Article 46 of the GDPR, laying down the appropriate safeguards under Article 46(2) letters (a)-(f), and Article 46(3) letters (a) and (b).

Consequently, Recital 49 should read: “In the absence of the safeguards referred to in Article 46 of Regulation (EU) 2016/679, and, in particular, of administrative arrangements including provisions on enforceable and effective data subject rights, personal data may exceptionally be transferred by Member States' competent authorities to the competent authorities of the third country of return, pursuant to Article 49(1)(d) of Regulation (EU) 2016/679, only in individual cases and insofar as necessary and proportionate to the purpose of the implementation of the return of the third country national who do not fulfil or no longer fulfil the conditions for entry, stay or residence in the Member States in accordance with this Directive.”

### **2.2.3. On the national return management system, to be “linked to” the central system established by the EBCG**

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<sup>11</sup> In this regard, on transfers to third country based on the ‘public interest’ ground as exceptional, non-structural, and subject to case-by-case assessment, see Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, L312 of 7.12.2018:

Article 15: “(...) Application of Regulation (EU) 2016/679, including with regard to the transfer of personal data to third countries pursuant to this Article, and in particular the use, proportionality and necessity of transfers based on point (d) of Article 49(1) of that Regulation, shall be subject to monitoring by the independent supervisory authorities referred to in Article 51(1) of that Regulation.”

Recital 18 specifies that: “(18) Personal data obtained by a Member State pursuant to this Regulation should not be transferred or made available to any third country. As a derogation to that rule, it should be possible to transfer such personal data to a third country where the transfer is subject to strict conditions and is necessary in individual cases in order to assist with the identification of a third-country national for the purposes of his or her return. The transfer of any personal data to third countries should be carried out in accordance with Regulation (EU) 2016/679 of the European Parliament and of the Council (1) and be conducted with the agreement of the issuing Member State. It should be noted however, that third countries of return are often not subject to adequacy decisions adopted by the Commission under Article 45 of Regulation (EU) 2016/679. Furthermore, the extensive efforts of the Union in cooperating with the main countries of origin of illegally-staying third-country nationals subject to an obligation to return has not been able to ensure the systematic fulfilment by such third countries of the obligation established by international law to readmit their own nationals. Readmission agreements that have been concluded or are being negotiated by the Union or the Member States and which provide for appropriate safeguards for the transfer of data to third countries pursuant to Article 46 of Regulation (EU) 2016/679 cover a limited number of such third countries. Conclusion of any new agreement remains uncertain. In those circumstances, and as an exception to the requirement for an adequacy decision or appropriate safeguards, transfer of personal data to third-country authorities pursuant to this Regulation should be allowed for the purposes of implementing the return policy of the Union. It should be possible to use the derogation provided for in Article 49 of Regulation (EU) 2016/679, subject to the conditions set out in that Article. Under Article 57 of that Regulation, implementation of that Regulation, including with regard to transfers of personal data to third countries pursuant to this Regulation, should be subject to monitoring by independent supervisory authorities.”

- According to Article 14(1), “Each Member State shall set up, operate, maintain and further develop a national return management system, which shall process all the necessary information for implementing this Directive, in particular as regards the management of individual cases as well as of any return-related procedure.”
- From the reference to “individual” cases, made in the aforesaid provision, we preliminarily note that the collection and processing of information entails the processing of personal data, i.e. data relating to identified or identifiable persons.
- Article 14(2) provides that: “The national system shall be set up in a way which ensures technical compatibility allowing for communication with the central system established in accordance with Article 50 of Regulation (EU) .../... [*EBCG Regulation*].”
- Recital 38 further specifies that: "Establishing return management systems in Member States contributes to the efficiency of the return process. Each national system should provide timely information on the identity and legal situation of the third country national that are relevant for monitoring and following up on individual cases. To operate efficiently and in order to significantly reduce the administrative burden, such national return systems should be linked to the Schengen Information System to facilitate and speed up the entering of return-related information, as well as to the central system established by the European Border and Coast Guard Agency in accordance with Regulation (EU) .../... [*EBCG Regulation*].”
- The new EBCG Regulation refers to the ‘central return management system’, *inter alia* under Article 15(4): “In relation to return, the Agency shall develop and operate a central return management system for processing all information necessary for the Agency to provide operational assistance in accordance with Article 49 automatically communicated by the Member States’ national systems, including operational return data.”
- In our formal comments of 3 December 2018 to the European Parliament on the proposal for the new EBCG Regulation, regarding the central system established under Article 50<sup>12</sup>, we stressed the unclear description of the specific purpose(s) of the processing to be performed via the envisaged central system to be set up and operated by the EBCG<sup>13</sup> and of the categories of personal data to be processed for each of these purposes.
- We observe that the same issues (notably, the lack of clarity as to the categories of personal data to be processed) also concern the ‘national return management system’. Article 14(1) provides that such system “shall process all the necessary information for implementing this Directive”, whereas Recital 38 refers to “timely information on the identity and legal situation of the third country national that are relevant for monitoring and following up on individual cases.”
- The EDPS considers that, similarly to what he noted with regard to the new EBCG Regulation, the Proposal should expressly stipulate, with reference to the national systems,

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<sup>12</sup> Pursuant to Article 50 (Information exchange systems and management of return), of the new EBCG Regulation, the EBCG “(...) shall set up, operate and maintain a central system for processing all information and data, automatically communicated by the Member States’ national return management systems, necessary for the Agency to provide technical and operational assistance in accordance with Article 49”.

<sup>13</sup> In particular, we note that Article 50 of the new EBCG Regulation refers to Article 49, which lists, under Article 49(1), letters (a)-(g), in a non-exhaustive way, a range of different ‘purposes’, including: “assistance to the Member States in the identification of third-country nationals and the acquisition of travel documents, including by means of consular cooperation, without disclosing information relating to the fact that an application for international protection has been made”; “providing technical and operational assistance to Member States in the return of third country nationals, including the preparation of return decisions”.

which categories of personal data can be processed for which specific purposes (limiting the categories of personal data to what is relevant for the specified purpose). In other words, the legislation should clearly identify the information that will be collected and processed, the purpose(s) of the processing activities. In addition, it should clearly lay down the entities involved (controllers and, if any, processors, as well as the recipients or categories of recipients of the data) and outline all appropriate and relevant safeguards to ensure the protection of the right to the protection of personal data of the individuals concerned.

- The need for specification of the categories of personal data and of the purposes is increased by the fact that the new EBCG Regulation (under Article 50(2)) provides for the ‘automatic communication’ of data from the ‘national return management system’, established under Article 14(1) of the Proposal, to the ‘central system’ to be set up, operated and maintained by the EBCG, established under Article 50 of the new EBCG Regulation. The interconnection would increase the security risks and the risk of ‘function creep’ (use of the data for additional purposes, not expressly laid down in the Proposal, and different from the purpose of the first collection in the national database) for the personal data undergoing processing.
- Given the automatic data sharing and interconnection between the national and the central system, the purposes and data categories should be exactly aligned between these two systems.
- We finally point out to the importance, especially when setting up large scale information systems processing personal data, of ensuring compliance with the principles of data protection by design and by default: this is a legal obligation for both the national (in this case, the national return authorities) and the EU controller (in this case, the EBCG)<sup>14</sup>, pursuant, respectively, to Article 25 of the GDPR and Article 27 of the Regulation.

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<sup>14</sup> For specific guidance on this, see EDPS “Guidelines on the protection of personal data in IT governance and IT management of EU institutions”, March 2018, available at:

[https://edps.europa.eu/sites/edp/files/publication/it\\_governance\\_management\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/it_governance_management_en.pdf)

See also the recommendations made by the EDPS having regard to the proposed Entry Exit System (the EES) in the EDPS Opinion 06/2016 on the Second EU Smart Borders Package, available at:

[https://edps.europa.eu/sites/edp/files/publication/16-09-21\\_smart\\_borders\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/16-09-21_smart_borders_en.pdf)

In this Opinion, the EDPS, having regard to the information system under scrutiny (the EES), recommended in the conclusions in particular:

- to specify what information may be collected, stored and used by the border authorities (...);
- to provide for the strong need for coordination between [eu-LISA] and Member States with regard to ensuring security [of the EES];
- that the security responsibilities are made clear in the Proposal in case of interconnection [of national facilitation programmes from Member States to the EES];
- to include in the information to be communicated to data subjects: the retention period applying to their data, (...) and an explanation of the fact that [the EES data] will be accessed for [border management and facilitation purposes];
- to provide a clear description of safeguards that would ensure that a proper attention is given to data relating to children, the elderly and persons with a disability;
- to provide the EDPS with the appropriate information and resources so that his new responsibilities as Supervisor [of the future EES] may be carried out effectively and efficiently.

We consider that the aforesaid recommendations made with reference to the EES are also applicable, *mutatis mutandis*, to the national and to central return management system (the latter, managed by the EBCG) envisaged by the Proposal and under the new EBCG Regulation.