



## **"Frontex Application for Return (FAR)"**

### **Prior Checking Opinion**

Case 2017-0874

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The present processing operation relates to a platform of exchange of information on return operations and returnees coordinated by the Agency Frontex. The EDPS is of the view that the data protection notice should be re-drafted to reflect only processing of personal data relating to returnees. Any restriction of the right of access and rectification should be done on a case-by case basis, based on a risk assessment, and should be properly documented.

## 1. Background- Description of the processing operation

FAR is a web-based platform enabling the exchange of information between Frontex ('the Agency') and the Member States (and Schengen association countries)<sup>1</sup> on returnees within the framework of return operations.

Returnees are defined as 'an illegally staying third-country national who is the subject of a return decision issued by a Member State'.<sup>2</sup> The return decision may be administrative or judicial. It declares that the stay of the third country national is illegal and imposes an obligation to return to his/her country of origin. Return operations thus mean sending returnees to their country of origin and involve technical and operational support which is granted and/or coordinated by the Agency.

Return operations can be initiated and conducted either by single Member States, or jointly with others; they can also be initiated by the Agency.

Return operations can be conducted within the framework of voluntary departures or forced return. The first occurs when there is an intention to comply with the obligation to return within a time-limit fixed for that purpose in the return decision.<sup>3</sup> The second is when, on the contrary, the returnee has no intention to comply with the decision.<sup>4</sup>

Member States, through FAR, will inform the Agency of their planning of return operations, number of returnees and places of return. They will also inform the Agency of their need for assistance.

When the need for a return operation is identified by a Member State, the Agency is thus first informed through the FAR platform. A Rolling Operational Plan<sup>5</sup> ('ROP') is set up, which consists of a table where the needs of Member States can be consulted within FAR. All the

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<sup>1</sup> In this Opinion, 'Member State' should be understood as encompassing Schengen associated countries as well. Denmark and the UK have participated (or may participate) also in return operations.

<sup>2</sup> See Article 2 (13) of the Frontex Regulation. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC (OJ L 251/1 of 16.09.2016).

<sup>3</sup> Article 3 (8) of 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, OJ L 348/98 of 24.12.2008.

<sup>4</sup> Another category of return is the 'voluntary return', which occurs when the legally-staying third country national decides to voluntarily return to his/her country of origin. However, this does not fall within the competence of Frontex. See point 1.7 of the 'Return Handbook', Annex to the Commission recommendation establishing a common 'Return Handbook' to be used by Member States 'competent authorities when carrying out return related tasks, Brussels 27.09.2017 C (2017) 6505, p.12.

<sup>5</sup> As defined in art. 28 (2) of Reg. (EU) 2016/1624 mentioned in footnote 2. This provision states that 'the Agency shall draw up a rolling operational plan to provide the requiring Member States with the necessary operational reinforcement's including through technical equipment. The Agency may [...] include in the rolling operational plan the dataset and destinations of return operations it considers necessary based on needs assessment.'

information provided by the organising Member State will then be visible to other Member States that could join the operation. The Agency may then accept the proposal and offer concrete (material) support.<sup>6</sup> Once accepted, the Member State will send practical information about the return operation.

### **The purpose of the processing operation**

The purpose of the processing of personal data is to allow the Agency to coordinate and organise return operations within the framework of its mandate. The return operation may involve the chartering of a plane or the booking of tickets on a scheduled commercial flight and the provision of human resources stemming from Frontex pools upon request of Member States<sup>7</sup>

### **Data subjects**

The data subjects concerned may be of at least four categories.

*First*, the returnees, this being the third country nationals who are subject to an individual return decision issued by a Member State and who have to be removed from the territory of the European Union.

*Second*, the operational staff who assists in the return operation (escorts, monitors, interpreters, medical staff, observers etc.). This staff is present during the operation.

*Third*, the technical personnel involved in the preparation of the return operation but not physically present during the transportation.

*Fourth*, the FAR users (the officials from Member States and Frontex with access to FAR).

As will be explained later on, for the purpose of the present opinion, only the **returnees** as data subjects are concerned.

### **Data categories**

Regarding the returnees, the following data categories are processed within FAR prior to the return operation:

- name and surname;
- travelling from....to ....
- date of birth;
- nationality;
- gender;
- country of origin;
- type of document;

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<sup>6</sup> The Agency does not enter into the merits of an administrative or judicial decision; it only helps in the implementation of the return decision.

<sup>7</sup> So far there have been no returns by sea although they may be envisaged in the near future.

- validity of the travel document;
- security risk assessment [...]
- healthy or not (positive or negative).<sup>8</sup>
- voluntary/enforced return.

The Agency does not receive the full text of the return decision taken by Member State authorities. Instead, it only receives the above listed data items. Further, in the charter flights module, Frontex receives the confirmation from the Member States that all returnees have been addressed by individual return decisions, and that according to all relevant national and international laws all those decisions can be legally enforced (no suspension effects and/or pending administrative and/or judicial procedures on return and/or asylum).

In addition to the data collected prior to the operation, the following data on returnees is processed within FAR:

- The passenger name record (PNR) and ticket numbers related to the returnee;
- Whether the returnee is a family member of another returnee in a return operation (the specific relations between the passengers is not indicated; only that they are family members).

### **Data retention period**

A return operation is closed on the date when the airplane comes back to the European Union from the third country without the returnee. Article 48 (3) of the Frontex Regulation provides that data is to be deleted 30 days after the end of the operation.

After that period FAR deletes the name, surname and validity of the returnee's travel document, and turns the date of birth into age. Apart from the age, FAR keeps the following information for statistical purposes: country to which the returnee is attached, third country of origin to which the returnee is travelling, nationality, gender, type of travel document, security risk assessment, health status and type of return.

Booking and ticket numbers are retained for the purpose of financial verification of the invoices.

The travel agency sends the invoice to the Agency on the first day of each month. The Agency ensures that fifteen (15) days are needed by its financial sector to verify the invoices. Consequently, booking and ticket numbers are retained for sixty (60) days after the completion of the return operation.

At present, the booking and ticket number are deleted manually.<sup>9</sup>

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<sup>8</sup> No other medical information is inserted in FAR. However, if a returnee is reported as being 'not healthy', the Member State has to provide a fit-to-travel form to be presented to the airline before boarding. Nevertheless, this will be done bilaterally between the Member State and the medical officers and would not be processed by the Agency.

<sup>9</sup> The Agency has informed us that they are working on automating this deletion.

### **Information to data subjects**

The notification contains a data protection notice to be given to the returnees. This data protection notice refers to the following categories of personal data: operational personnel, technical personnel, third country official, Member States contact persons and returnees. According to the information provided by the Agency, data subjects have not yet received the notice.<sup>10</sup> The Agency has affirmed that they intend to upload it to the Agency's webpage. The data protection notice contains the following information relating to the processing operation: its purpose, the categories of personal data, the recipients of data, the rights of access and rectification (including the restrictions), the legal basis, the retention period, information on the controller and the fact that both Member States and Frontex may insert data on the platform.

### **Data subject's rights of access and rectification**

The notification provides that the Agency would like to restrict, as a matter of principle, the application of Articles 13 to 17 on the basis of Article 20 of the Regulation. On the other hand, the data protection notice provides that the right of access will be guaranteed but that the right of rectification can be restricted on the basis of public security.

### **Data transfers**

Data of returnees is first transferred from Member States to Frontex and secondly from Frontex to the authorities of the third countries where the return will take place always via a Member State. No international data transfer takes place via FAR. Data is also transferred to air carriers involved in the return operations.<sup>11</sup>

### **IT system architecture and security**

[...]

## **2. Legal analysis**

This prior checking Opinion<sup>12</sup> under Article 27 of Regulation 45/2001 (hereinafter 'the Regulation')<sup>13</sup> will focus on those aspects which raise issues of compliance with the Regulation

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<sup>10</sup> Information provided during the meeting that took place at EDPS premises on 12 January 2018.

<sup>11</sup> A contract has been concluded between Frontex and a travel agency. The travel agency has signed agreements with the concerned carriers, specifying the conditions related to the Frontex Pilot Project in order to conduct the return operations.

<sup>12</sup> As this is an *ex-post* case, the deadline of two months for the EDPS to issue his Opinion does not apply. The notification was received on 11 October 2017. This case has been dealt with on a best-effort basis. A first set of questions was put by email of 13 November 2017 and the Agency answered also by email of 18 December 2017. At the request of the Agency and given the complexity of the file a meeting was organised in the EDPS premises on 12 January 2018 to clarify both technical and legal aspects of the notification. More questions were put by email of 30 January 2018 and answers were received on 9 February 2018. By email of 20 February 2018 the EDPS sent additional questions and the Agency responded by email of 9 April 2018.

<sup>13</sup> OJ L 8, 12.1.2001, p. 1.

or otherwise merit further analysis. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

## **2.1. Scope of this Opinion**

It should be clarified from the outset that, within the processing operation entitled FAR, two main categories of data subjects may be identified. On the one hand, there is the collection and processing of data relating to operational and support personnel which is necessary for the setting up of return operations. On the other hand, there is the collection and processing of data of returnees, which includes sensitive data such as the security risk assessment and/or the health status. This opinion will only focus on the second category of data subjects.

It does not seem likely that FAR may represent specific risks for the rights and freedoms of operational and support personnel and thus it would not fall within the scope of Article 27 (2) of the Regulation. By contrast, processing of personal data of returnees within FAR, directly falls under the scope of:

- Article 27 (2) (a), i.e. data relating to health, offences, criminal convictions and security measures and
- Article 27 (2) (b), i.e. processing operations intended to evaluate personal aspects of the data subject.

## **2.2. Lawfulness of the processing operation**

The legal basis for the processing of data of returnees is to be found in Articles 27 and 28 of the Frontex Regulation.<sup>14</sup> The first one, on return, states that the Agency shall coordinate at a technical and operational level return-related activities of the Member States and provide for assistance.<sup>15</sup> Article 28 of the same Regulation states that the Agency shall provide necessary assistance including chartering of aircrafts. It also states that the Member States shall inform the Agency of their indicative planning of number of returnees and their needs for assistance and coordination by the Agency.<sup>16</sup> This is complemented by Article 48 stating that in performing this task the Agency may process personal data of returnees.

Concerning the setting up of FAR, decision 37/2016 of the Management Board of Frontex<sup>17</sup> provides for the establishment of a user-friendly web based application for cooperation between the Agency and the Member States and also provides for the coordination of the return operations and other return-related activities. This Management Board decision sets up FAR

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<sup>14</sup> Regulation (EU) 2016/1624, see footnote 2.

<sup>15</sup> See in particular Article 27 (1) (a) and (b).

<sup>16</sup> See in particular Article 28 (1) and (2) of the Regulation.

<sup>17</sup> This internal decision was adopted on 23 November 2016 (reg n. 21952).

so that the Member States can inform the Agency of their indicative planning of the number of returnees and the third countries of return and their needs for assistance or coordination by the Agency.<sup>18</sup>

For the abovementioned reasons, the processing operation is lawful under Article 5(a) of the Regulation, according to which personal data may be processed ‘if processing is necessary for the 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 institution or body or in a third party to whom the data are disclosed.’”

### **2.3. Information to be given to data subjects**

When data have not been obtained directly from the data subject, the requirements of Article 12 should be provided in the form of a data protection notice.<sup>19</sup> The EDPS notes that the notification is accompanied by a data protection notice entitled ‘processing personal data for return operations in Frontex Application for Return (FAR)’. This data protection notice is addressed to the following categories of data subjects: operational personnel, technical personnel, third country officials, Member States contact persons and returnees.

For the sake of clarity, the EDPS is of the view that a separate data protection notice for returnees should be drafted; it should contain all the requirements stated in Article 12 of the Regulation.

The EDPS **recommends** that the Agency draft a separate data protection notice for returnees containing the requirements stated in Article 12 of the Regulation.

The EDPS has to clarify that the Agency has agreed to draft a data protection notice for returnees and is working on the text. In addition, the Agency has also agreed to publish it on the internet to enhance transparency. The EDPS welcomes this initiative and recommends publishing a data protection notice for returnees in a visible place on the Agency’s website. The EDPS also welcomes that the Agency is working on the text of a new data protection notice.

The EDPS **recommends** that the Agency publish a data protection notice for returnees on the internet.

Furthermore, in order to comply with the requirements of Article 12 of the Regulation, data subjects have to be individually and actively informed about the features of the processing

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<sup>18</sup> See in particular point 2 of the Annex to the Management Board Decision.

<sup>19</sup> This data protection notice should contain at least the following requirements: identity of the controller, purpose of the processing operations, categories of data concerned, recipients or categories of recipients, existence of the right to access and the right to rectify and any further information such as the legal basis for the processing, time-limits for storing data and the right to have recourse at any time to the EDPS as well as information on the origin of data.

operation.<sup>20</sup> The EDPS has further stated that ‘(...) simple publication is not necessarily enough to comply with Article 12 [of the Regulation], as this Article requires actively informing the data subject. Only when individual information is impossible or would require a disproportionate effort, the mere publication can be considered.’<sup>21</sup>

Such additional requirement of handling in a data protection notice to each returnee can be done through a paper copy<sup>22</sup>, by reading the data protection notice to them or by providing the link where it can be found. It is important returnees are informed as quickly as feasible once the Agency starts processing their data,<sup>23</sup> so that they can exercise their rights of access and rectification. Otherwise, the Agency may ensure that Member States provide the returnees, at the moment the return decision is communicated to them, with a data protection notice relating to the processing operation to be carried out by the Agency. For this purpose, a joint procedure should be set up between the Agency and the Member States. At any rate, the EDPS recommends the Agency to ensure that returnees are individually (and actively) informed of the processing operation through a data protection notice, which should be complementary to its publication on the internet. This data protection notice should be provided some time *before* the returnees enter into the return flight.

The EDPS **recommends** that the Agency ensure that returnees are individually (and actively) informed on the processing operation through the handling of a data protection notice.

The EDPS also notes that the existing data protection notice does not include the contact details of the controller. This should be added for data subjects to make their rights effective. The Agency may also want to specify that the data protection notice implements a legal obligation under European data protection law, i.e. to inform returnees how their data is processed by the Agency. For the sake of clarity, the data protection notice could also refer to the fact that the Agency cannot assess the merits of return decisions, which are adopted by the Member States.

The EDPS **recommends** that the Agency include the details of the controller in the data protection notices and consider indicating that the Agency cannot assess the merit of return decisions.

As a final point, the data protection notice should contain more specific information about the purpose of the processing operation and its legal basis. In particular, it should refer to the decision of the Management Board setting up FAR and the provision of the Frontex Regulation that governs return operations.

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<sup>20</sup> In a previous case the EDPS stated: ‘in this case, the ECB has a duty to inform them [data subjects] about the informal contacts prior to the [...]. Exceptions are possible if this is impossible or requires a disproportionate effort. This does not seem to be the case here [...]’ See case C 2014-0888 of 22 February 2017.

<sup>21</sup> Case 2016-0674 of 7 December 2016.

<sup>22</sup> For example by using a type of paper that might not be used by returnees to cause themselves any self-harm.

<sup>23</sup> See Article 16(3) of the politically agreed compromise text for the “new Regulation 45/2001” (Council Document 9296/18), stipulating that in such situations, data subjects have to be informed at the latest when their personal data are disclosed to another recipient (for example, to the airline), and in any case within one month from starting the processing. The Agency could bring its procedures in line with these forthcoming requirements.



The EDPS **recommends** that the data protection notice contain a clear reference to the legal basis setting up FAR and governing return operations.

## 2.4. Rights of access and rectification

Under Article 13 of the Regulation, data subjects have the right of access to their own personal data, including ‘communication in an intelligible form of the data [...] and of any available information as to their source.’ Under Article 14 of the Regulation, data subjects have the right ‘obtain from the controller the rectification without delay of inaccurate or incomplete personal data.’ Restrictions are possible on a case-by-case basis under Article 20, e.g. where these are necessary for safeguarding public security.

The data protection notice states that returnees have the right to access their personal data but that rectification can be restricted on grounds of public security under Article 20 (1) (d) of the Regulation. The notification provides that the Agency may restrict the application of Articles 13 to 17 to safeguard the different rights and interests established under Article 20.

### 2.4.1. Right of access

The EDPS is of the opinion that, if returnees make a request for access to their data, the Agency should guarantee this right in application of the abovementioned Article 13 of the Regulation. In this regard, the Agency has rightly pointed out in the data protection notice that returnees will have in principle the right of access to their personal data.<sup>24</sup>

The EDPS is aware that there may be cases in which a restriction of the access to certain category of data will have to be made in accordance with Article 20(1)(d) of the Regulation, this is, for reasons of national security, public security or defence of the Member States. Nevertheless, these cases have to be documented and subject to a risk analysis stating why the provision applies.

The Agency should properly document each analysis and provide for enhanced security measures for the storage.<sup>25</sup>

The EDPS **recommends** that the Agency perform and document a case-by-case analysis to examine whether access to certain categories of data (such as the security risk assessment) need to be restricted or deferred on the basis of Article 20 of the Regulation.

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<sup>24</sup> Although this is in contradiction with the information stated in the notification, which provides for the Agency to systematically restrict the right of access and rectification on grounds of national security as far as returnees are concerned.

<sup>25</sup> This is the kind of documentation the EDPS may request in case of complaints.

## 2.4.2. Right of rectification

The EDPS wants to highlight that, as a matter of principle, the right of rectification cannot be systematically restricted. Article 20 of the Regulation is entitled ‘exemptions and restrictions’ and by definition has to be interpreted narrowly.<sup>26</sup> Any restriction to the right of rectification would require a case-by-case analysis, which again has to be properly documented. The EDPS Guidelines on the rights of individuals with regard to the processing of personal data state that the right of rectification only applies to objective and factual data and not to subjective statements.<sup>27</sup>

This means that if data subjects want to contest factual data, they should be able to provide a piece of evidence of the same (legal) value than the one contested.

Furthermore, since return decisions are taken by the Member States and the Agency merely provides assistance,<sup>28</sup> the data protection notice could specify that the exercise of the right of rectification cannot be used to put into question a decision of return.

The EDPS **suggests** that the Agency include in the data protection notice that the right of rectification cannot be used to put into question a decision of return which is taken by a judicial or administrative authority of a Member State.

In cases where it is difficult to determine whether the data are inaccurate or not, such as cases relating to the conduct of the person or even cases relating to health, the EDPS has stated that data subjects could be permitted to complement existing data with a second opinion or counter expertise.<sup>29</sup>

As a final point, the data protection notice could specify that given the short retention periods, data subjects should exercise their right of access and/or rectification relatively quickly, as after 30 days from the end of the return operation, the data is deleted.

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<sup>26</sup> See the EDPS Guidelines on the Rights of Individuals with Regard to the Processing of Personal Data at: [https://edps.europa.eu/sites/edp/files/publication/14-02-25\\_gl\\_ds\\_rights\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-02-25_gl_ds_rights_en.pdf). In particular ‘under article 20 (section 6) of the Regulation (entitled ‘exemptions and restrictions’) data subject’s rights can be restricted but they cannot be denied. This limitation can take place in specific cases, for a determined period of time and only if necessary to safeguard [...]’. p.7

<sup>27</sup> Ibid., p. 18 point 2 a) of the document mentioned in footnote 28.

<sup>28</sup> Article 28 (1) of the Frontex Regulation provides that ‘without entering into the merits of return decisions and in accordance with Directive 2008/115/EC’[...].’

<sup>29</sup> For example, Frontex may receive information from the Member State that issues the return decision which states that the person is not healthy; the data subject, however, could provide another medical document stating the contrary.

The EDPS **suggests** that the Agency include in the data protection notice that, given the short retention periods, data subjects should exercise their rights before their data are anonymised, this being 30 days after the completion of the return operation.

## 2.5. Data retention and anonymisation

There are two concerns regarding the compliance with the data retention period.

Firstly, booking and ticket numbers of the trip are kept for two months after the completion of the return operation which is beyond the 30 (thirty) days period stated in Article 48(3) of the Frontex Regulation.

The EDPS understands that under the Financial Regulations, the Agency might have documentation obligations that make it necessary to keep supporting data for a period longer than 30 days.

In that case, the EDPS **recommends** that the data relevant for the financial checks be retained for as short as possible, used only for verification purposes and accessible only to users on a need to know basis.

Secondly, the anonymisation procedure applied to the personal data to provide statistics on operations managed by the Agency does not prevent potential re-identification of data subjects.

To provide statistics while complying with the data retention period, the Agency does not completely delete the personal data but applies a procedure aimed to render them anonymous.

As stated in the Opinion 05/2014 on Anonymisation Techniques of the Article 29 Data Protection Working Party, '[A]n effective anonymisation solution prevents all parties from singling out an individual in a dataset, from linking two records within a dataset (or between two separate datasets) and from inferring any information in such dataset. Generally speaking, therefore, **removing directly identifying elements in itself is not enough to ensure that identification of the data subject is no longer possible.** It will often be necessary to take additional measures to prevent identification, once again depending on the context and purposes of the processing for which the anonymised data are intended.' (emphasis added).

Keeping the age of returnees is an example of a re-identification risk with regards to the approach taken by the Agency to anonymise FAR data. This could in fact allow for re-identification of very young or older returnees. The possibility of singling out returnees using a subset of the retained data such as age, health condition and destination country is even higher.

The anonymisation procedure adopted by the Agency should also prevent the re-identification risk that could arise from the cross-checking of retained FAR data with other databases.

The EDPS **recommends** that the Agency re-design the anonymisation procedure to ensure that re-identification is impossible.

In the redesign of the process, the Agency should assess, and apply as needed, randomisation and generalisation anonymisation techniques<sup>30</sup> to address the existing re-identification risks. Unless such measures are taken and a thorough assessment proves that the re-identification risk is mitigated, the data continues to be personal data and has to be processed in accordance with the Regulation.

## 2.6. Security of the processing and risk assessment

[...]

## 2.7. Vulnerability assessment

[...]

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## 3. Recommendations and suggestions for improvement

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that both major and minor recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

For the following **major recommendations**, the EDPS expects **implementation and documentary evidence** thereof within **three months** of the date of this Opinion:

- The EDPS **recommends** that the Agency draft a separate data protection notice for returnees containing all the requirements stated in Article 12 of the Regulation.
- The EDPS **recommends** that the Agency publish a data protection notice for returnees on the internet.
- The EDPS **recommends** that the Agency ensure that returnees are individually (and actively) informed on the processing operation through the handling of a data protection notice.
- The EDPS **recommends** that the Agency include the details of the controller in the data protection notices and consider indicating that the Agency cannot assess the merit of return decisions.
- The EDPS **recommends** that the data protection notice contain reference to the legal basis setting up FAR and governing return operations.
- The EDPS **recommends** that the Agency perform and document a case-by-case analysis to examine whether access to certain categories of data (such as the security risk assessment) need to be restricted or deferred on the basis of Article 20 of the Regulation;

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<sup>30</sup> As those described in Opinion 05/2014 of the 29 WP, pages 11-19.

- The EDPS **recommends** that the data relevant for the financial checks is retained for as short as possible, used only for verification purposes and accessible only to users on a need to know basis.

- The EDPS **recommends** that the Agency re-design the anonymisation procedure to ensure that re-identification is impossible.

For the following **minor recommendations**, the EDPS expects **implementation**, but does not require documentary evidence:

-The EDPS **suggests** that the Agency include in the data protection notice that the right of rectification cannot be used to put into question a decision of return which is taken by a judicial or administrative authority of a Member State;

- The EDPS **suggests** that the Agency include in the data protection notice that, given the short retention periods, data subjects should exercise their rights before their data are anonymised, 30 days after the completion of the return operation.

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Done at Brussels, 26 September 2018

Wojciech WIEWIOROWSKI