

From: [REDACTED]
To: [REDACTED]
CC: legal <legal@frontex.europa.eu>
Sent at: 07/10/09 18:06:57
Subject: Frontex, prior check on Joint Return Operations, 2009-0281

Dear [REDACTED]

Thanks again for your great efforts to facilitate my work as Frontex DPO and, in particular, on the prior notification on JRO.

As we discussed in Brussels last week please find attached the documents I gave you.

As I said;

- Our original notification included also MS/SAC official ("escorts"), but as I explained our intention was not to notify those, since they do not contain sensitive information or do not present specific risks. This data does not fall under Article 27 of Regulation 45/2001 and, therefore, should not be considered as part of our notification. I am sorry for this mistake from my side.
- Our notification was made because of two categories of data that Frontex intends to process; i.e. the assessment of violence and the health data. This data we consider falling under the definition of such sensitive data for which Article 27 applies.
- In processing descriptions I gave you there are two points where our procedures are still under development; i.e. (i) whether Frontex receives the whole medical data or only the final assessment of the health condition requiring special needs during the return flight. Maybe that the health data is given directly only to the medical personnel participating at the flight; and (ii) whether Frontex or the relevant Member State will transfer the data to the third country concerned, and if yes for Frontex what data (however, it should be clear that Frontex does not transfer sensitive data to the third country, i.e. the violence assessment or the health assessment. The data to be transferred is related to the name and travel document only)
- This processing presents a particular challenge, since it is dealing with processing that the Member States have done for years in the third pillar (or totally under their own competence) and only now it might be moved to the first pillar.

Best regards from Warsaw,
[REDACTED]

From: [REDACTED]
Sent: 18 September 2009 15:49
To: [REDACTED]
Subject: prior check 2009-0281

Dear [REDACTED]

Thank you very much for the discussion we had on the phone today.

Further to my e-mail of 10 August 2009, please let me summarize some further

questions that also take into account the discussion of today:

1) **Legal basis.** The notification form declares that the legal basis for the processing activity is Article 9 of Regulation 2007/2004: "*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. (...)*". So far, FRONTEX has assisted and participated in 47 joint return operations, which were based in Article 9. So far, FRONTEX has not received personal data in this context. Could you justify the "necessity" for FRONTEX to start processing personal data in the context of JRO? Is there a more precise legal basis authorising/requesting such processing activity?

Please note that 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*". Therefore, in this case, the processing activity can only take place if it is foreseen in the Treaties or other legal instruments, and the processing is necessary to achieve the task described in the legislation.

2) **Role of FRONTEX** and the Member States. controller/processor/co-controller. It is necessary to identify who determines the purposes and means of the processing (see the definitions of Articles 2(d) and 2(e) of Regulation 45/2001) Is FRONTEX alone that determines the purposes and means of processing? Is the member States that decide that? Are both of them? To what extent FRONTEX has autonomy in deciding, for instance, the categories of data to be processed, the retention period, etc.? In case the conclusion is that FRONTEX is controller or co-controller, FRONTEX will have to respect Article 11 and/or 12, and 13 to 17 of Regulation 45/2001.

3) **Recipients. Transfers of Data. (Articles 8 and 9 of Regulation 45/2001)**

3.1. Procedure. It is necessary to clarify exactly the envisaged procedure. Please specify, step by step, who would send data to whom (for instance: participating states would send data to FRONTEX, FRONTEX would send these data to the organising member State), as well as which data would be processed (sent) in each step. Please remember that the notification form says that there will be an "Organising Member State", so FRONTEX is not identified as "organising" but "assisting the organiser".

3.2. Airlines: Would FRONTEX transfer personal data to airline companies? If yes, which data? If yes, to which companies? Companies established in the EU or also companies established in a third country?

3.3. Third countries: Who would transfer the personal data of returnees to third countries, FRONTEX or the organising Member State? Please consider Article 9 of Regulation 45/2001. Then, it has to be assessed whether such transfers would be "necessary to allow tasks covered by the competence of the controller" (in case FRONTEX is considered the controller and in case FRONTEX would make the transfers).

4) Retention policy (Article 4.1(e) of Regulation 45/2001).

Please specify the envisaged retention policy.

5) The **security measures** point of the notification form mentions that "It is planned to install high security measures requiring iris scan in front of the area of the ROS offices."

Please inform the EDPS of the status of this plan. (Please note that it would involve the processing of biometric data and therefore Regulation 45/2001 has to be respected).

As also mentioned on the phone, it might be necessary to discuss other aspects of the prior check. You said that you are coming to Brussels for the DPO meeting, so, it would be possible to fix a meeting for that opportunity, depending on the state of the discussions.

Please note that the procedure is still suspended (Article 27.4 of Regulation 45/2001).

Best regards,

████████████████████
Legal adviser

European Data Protection Supervisor
Contrôleur Européen de la Protection des Données

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Without comments

LEGAL BASIS FOR PROCESSING

European Data Protection Supervisor:

Could you justify the "necessity" for FRONTEX to start processing personal data in the context of JRO¹? Is there a more precise legal basis authorising/requesting such processing activity?

Article 5 of Regulation 45/2001² provides criteria:

THE PROCESSING ACTIVITY IS NECESSARY FOR PERFORMANCE OF A TASK CARRIED OUT IN THE PUBLIC INTEREST ON THE BASIS OF THE TREATIES OR OTHER LEGAL INSTRUMENTS:

THE PROCESSING ACTIVITY IS NECESSARY FOR PERFORMANCE OF A TASK CARRIED OUT IN THE LEGITIMATE EXERCISE OF OFFICIAL AUTHORITY VESTED IN THE COMMUNITY BODY:

TREATIES

Within Title IV of the TEC, which governs visas, asylum, immigration and other policies related to free movement of persons, two legal bases are relevant for Frontex:

1) Article 62(2)(a):

The Council (...) shall (...) adopt (...) measures on the crossing of the external borders of the Member States which shall establish: (a) standards and procedures to be followed by Member States in carrying out **checks on persons**³ at such borders;

2) Article 66:

The Council, acting in accordance with the procedure referred to in Article 67, shall take measures **to ensure cooperation between the relevant departments of the administrations of the Member States** in the areas covered by this title, as well as between those departments and the Commission.

In addition, the legal basis for measures on immigration policy adopted by the Council, in the area of repatriation of illegal residents is Article 63(3)(b)⁴ of the TEC.

¹ Joint Return Operation.

² Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, 12.1.2001, OJEU, L 8/1.

³ Insofar checks on persons are mentioned, one might draw the conclusion that processing of certain personal data of these persons are likely to happen.

⁴ The Council (...) shall (...) adopt (...) measures on immigration policy within the following areas: (...) (b) illegal immigration and illegal residence, including repatriation of illegal residents.

Without comments

FRONTEX REGULATION⁵:

Art. 2 (f):

Main tasks:

[The Agency shall (...)] provide Member States with the necessary support in organizing joint return operations.

Art. 9:

Return cooperation:

1. Subject to the Community return policy, the Agency shall provide the necessary assistance for organizing joint return operations of Member States. The Agency may use Community financial means available in the field of return.

2. The Agency shall identify best practices on the acquisition of travel documents and the removal of illegally present third country nationals.

Other provisions of Frontex regulation are of interest:

Recital 4:

(...) The Agency should facilitate the application of **existing and future Community measures** relating to the management of external borders **by ensuring the coordination of Member States' actions** (...)

Recital 11:

In most Member States, the operational aspects of return of third-country nationals illegally present in the Member States fall within the competencies of the authorities responsible for controlling external borders. As **there is a clear added value in performing these tasks at European level**, the Agency should, subject to the Community return policy, accordingly provide (...)⁶.

Art. 1.2:

Establishment of the Agency:

(...) the Agency shall facilitate and **render more effective the application of existing and future Community measures** relating to the management of external borders. It shall do so by **ensuring the coordination of Member States' actions** in the implementation of those measures.

Art. 11:

Information exchange systems:

The Agency may take all necessary measures to **facilitate the exchange of information** relevant for its tasks with the Commission and the Member States.

Art. 14:

Facilitation of operational cooperation with third countries and cooperation with competent authorities of third countries:

In matters covered by its activities and to the extent required for the fulfillment of its tasks, the Agency shall facilitate the operational cooperation between Member States and third countries, in the framework of the European Union external relations policy.

⁵ Council Regulation (EC) 2007/2004 of 26 October 2004, OJ L 349, 25.11.2004, as last amended.

⁶ See provisions referred to in Art. 9

Without comments

The Agency may cooperate with the authorities of third countries competent in matters covered by this Regulation in the framework of working arrangements concluded with these authorities, in accordance with the relevant provisions of the Treaty.

FRONTEX – MINUTES OF THE MANAGEMENT BOARD (MB)

Minutes of the 14th MB session (22 November 2007)

CION explained to the Management Board its interpretation about Article 9 on Frontex Regulation which provides the legal framework to the Agency for assisting the MS in the field of returns. **CION underlined that this Article can be interpreted in a broader way**, as regards the operational coordination of the activities in return related matters. Accordingly CION does not see any obstacles for Frontex in leasing the aircrafts, even though the practical arrangements have to be worked out. CION also remarked that they will cover the issue of returns in the current Evaluation of Frontex and highlighted that they fully support the Council Conclusions of June 2007 as regards the enhancing of this issue.

BE expressed that the information provided by CION regarding the interpretation of Article 9 was very interesting and BE is in favor of this broad reading. BE referred to the steps taken by the former German EU Presidency in the field of the coordination of returns through Member States' international airports, and more in particular regarding the assistance in case of transit for the purpose of removals by air. (...) the return process requires a transit through other member States' airports. These operations involve a lot of manpower and coordination measures. Taking into consideration the broad interpretation of Article 9, **BE invites Frontex to reflect on how the Agency could contribute in this matter.**

DE (...) fully supports this broader interpretation of Article 9.

SL thanked (...) CION for its opinion and flexible interpretation as regards Article 9 on Frontex Regulation.

FR remarked that they were delighted by the broad interpretation of Article 9 made by CION and mentioned that as some countries of origin remain quite hostile to these operations, **Frontex might negotiate with them to smooth the whole process.**

Minutes – 15th MB Session (14 February 2008)

Concerning the return operations, FR considered that organizing 8-10 joint operations is clearly not enough.

Minutes – 16th MB Session (27 March 2008)

FR believes that joint return flights should be more prioritized.

SL fully supported FR in implementing article 9 of the Regulation.

Concerning the return operations, BE can support what has been said by FR, more in particular they believe Frontex should make more efforts in this field.

LU supported FR, BE and SL as regards the joint return flights.

Without comments

OTHER TEXTS

Council, Presidency Note, Proposal for a Return Action Programme, 25 November 2002⁷

IV. h) Joint Return Operations: (...)“An exchange of information on the request and capacities of Member States with regard to joint operations should immediately start taking place on an ad hoc basis”.

Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air⁸

An annex to this Directive defines “general information about the third-country national whom the transit request concerns”.

Council Decision 2004/573/EC 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 orders⁹

This decision sets out a legal basis for organisation of joint return flights.

Justice and Home Affairs Council of 27 and 28 April 2006, Council conclusions on improved operational cooperation on joint return operations by air

The Council, underlining that joint return operations constitute an important tool for the efficient implementation of the return policy of the Union, considers that: (...)

- FRONTEX, subject to a precise definition of the scope of its responsibilities in this area, **should play a coordinating role in the organisation** of joint charter flights and provide the necessary assistance. (...)

- [ICONet¹⁰: Information and Co-ordination Network for Member States' Migration Management Services]: FRONTEX should be given access¹¹ to ICONet in order to perform its tasks and should use this system **as a platform for its communication with the Member States**; (...)

⁷ Ref. 14673/02.

⁸ 6.12.2003, OJEU, L 321/6.

⁹ 6.08.2004, OJEU L 261/28.

¹⁰ The Council adopted Council Decision 2005/267/EC of 16 March 2005 establishing a secure web-based Information and Coordination Network (hereinafter ICONet) for Member States' Migration Management Services (1.4.2005, OJEU L 83/48). Subsequently on 15 December 2005, the Commission adopted a Decision (C(2005) 5159 final du 15/XII/2005) laying down detailed rules for the implementation of the Council Decision.

The purpose of the Commission's managed ICONet is to provide for a platform for the exchange of strategical, tactical and operational information concerning illegal migratory movements and on the fight against such phenomena, and the return of illegal residents, including JRO.

¹¹ Frontex has access to ICONet: see « Décision de la Commission concernant l'adoption du protocole d'accord relatif au développement de l'ICONet entre la Commission européenne et FRONTEX » and the « protocole d'accord » attached to this Decision. See also COM (2006) 733, infra.

Without comments

The Council, in particular, invites:

- Member States which organise joint charter flights or which plan to organise them **to involve FRONTEX**, in accordance with the FRONTEX Regulation;
- Member States and FRONTEX **to define practical arrangements** for their cooperation in the **organisation and implementation** of joint charter flights (...)

Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, COM/2006/0402 final, 19/07/2006

Policy priorities: (...) g) Return policy: (...) FRONTEX will provide the necessary assistance for **organising and coordinating** the joint return operations of Member States.

Communication from the Commission to the Council, COM (2006) 733, Reinforcing the management of the European Union's Southern Maritime Borders, 30/11/2006

To facilitate the exchange of information between all relevant actors, the Commission has also concluded a Memorandum of Understanding with FRONTEX in order to grant it access to ICONet, thus enabling the Agency to supply to, and gather information from, the secure web-based Information and Co-ordination Network for Member States' Migration Management Services.

Justice and Home Affairs Council of 12-13 June 2007 - Council Conclusions on the improvement of cooperation between Member States, the Commission and FRONTEX in the field of return

3. It is also important to ensure stronger cooperation and interaction between the Council and Commission bodies which deal with return issues and FRONTEX and its structures¹².

5. **The Council calls on FRONTEX** to assist Member States' competent authorities with return by land, sea and air, by the following means: (...)

- **identifying any need for joint return operations;**
- providing the **appropriate coordination and assistance** to joint return operations carried out by Member States;
- **taking part in advance missions** (together with the organising and participating Member States) in countries of destination, **to prepare for joint return operations** and assist with the necessary work at the destination; (...)
- **promoting and constantly updating the ICONet** platform as an information network for the Member States; (...)

In order for FRONTEX to perform these tasks to the extent necessary, it should be provided with sufficient staffing and funding. **The Council calls on FRONTEX to play an active part in cooperation between Member States under points 1 and 2¹³.**

¹² In 2007, the Council went as far as considering establishing “a body dealing with joint return operations issues in the framework of the FRONTEX structures, in full respect of its prerogatives and competence in this area”. Currently, the work in this area is carried out by a specific Section (ROS) of the Operation Unit, within the Operation Division of Frontex.

¹³ Point 1: The Council calls on Member States to step up their practical cooperation and collaboration between the relevant authorities with regard to return. There is a need for Member States' experts,

Without comments

Justice and Home Affairs Council of 18 September 2007: Council conclusions on further reinforcing the EU's Southern Maritime Borders

The Council: (...)

10. Calls for work to be taken forward urgently on the implementation of the Council Conclusions of 12-13 June 2007 **on the improvement of the cooperation between Member States, the Commission and FRONTEX in the field of return.**

Commission staff working document - Accompanying document to the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions report on the evaluation and future development of the Frontex agency - impact assessment, SEC(2008) 148, 13/02/2008

2.8 Management of the ICONet [with regard to return]: The ICONet may also help Member States in their efforts to increase co-operation and co-ordination in the field of return by exchanging information on relevant Community and national laws in force; best practices in establishing the identity of third country nationals and obtaining travel documents in order to facilitate their return; planned or scheduled joint return flights; requests/notifications of planned or scheduled transit removal operations. The FRONTEX Agency has been connected to ICONet in 2007 and **uses it for exchanging information with Member States regarding risk analysis, preparation of joint operations and return.**

2.12. Return: (...) Return, in full respect of fundamental rights, remains a cornerstone of EU migration policy. One of the tasks of FRONTEX is to provide the necessary assistance for organising joint return operations of Member States. [Statistics on JRO] : these low figures illustrate that **there is a lack of return operations involving the Agency** and that most of the return operations are organised by Member States on a bilateral basis with third countries, or a in a joint effort undertaken by a group of Member States. In those cases FRONTEX has not been involved.

3.2. Specific policy objectives: The specific policy objectives can be defined as the enumeration of tasks in the current mandate of the Agency; see Article 2(a-g) of the Frontex Regulation:

(...)

Provide Member States with the **necessary support in organising joint return operations** (...)

Returns form an important part of the integrated border management system.

(...)

To the specific objectives (...) should also be added the **facilitation of operational cooperation between the Agency and third countries** (...). **Such cooperation may cover exchange of information** and common risk analyses, training, and joint operational activities.

permanently or as required, to:

- **assess the data available** on voluntary and forced return; (...)

Point 2: In order to allow for extensive, efficient sharing of information and experience as well as agreements on practical measures between Member States' experts, in accordance with point 1, sufficient discussion time should be set aside in existing Council bodies established to consider return issues and in expert groups set up by the Commission (...).

Without comments

Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals¹⁴ (Return Directive)

Recital (7):

The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return¹⁵.

Art. 8(5): In carrying out removals by air, MS shall take into account the *Common Guidelines on security provisions for joint removal by air* annexed to Decision 2004/573/EC¹⁶.

Communication from the Commission to the European Parliament, the Council, An area of freedom, security and justice serving the citizen, 10 June 2009

Annex "Priority issues": (...) Promoting a more integrated society: (...) The EU must combat illegal employment and **pursue an effective policy on removal and return, making full use of existing instruments.**

Conclusions of the Meeting of the ad hoc Management Board Working Group¹⁷, 04/09/2009

Frontex involvement in negotiations with third countries:

- MS are encouraged to invite Frontex to participate in Advance Parties
- Frontex will accompany and support MS in talks with third countries.

French delegation – Note to the Council – Migration situation in the Mediterranean, 11/09/2009

[Comprehensive return policy]

In order to avoid a situation whereby each Member State has to negotiate the organisation of return flights on its own, the EU must give this policy greater consideration. **FRONTEX should systematically charter "return" flights from the Mediterranean Member States.**

Annex: Mediterranean plan of action

Enhancing controls at the EU's external maritime borders: (...) systematic organisation of return flights by FRONTEX.

French initiative – Note to the Council, 18/09/2009

Action plan: regular chartering by FRONTEX of group flights for common return operations at European level.

CONCLUSION

¹⁴ 24.12.2008, OJEU, L 348/98.

¹⁵ It is worth drawing a comparison with the wording of Art. 14 of Frontex regulation, supra.

¹⁶ See supra.

¹⁷ Set up by Frontex Management Board in order to further develop the joint return operations, as expressed by the Member States.

Without comments

- Several legal bases allow Frontex to process data under both primary law and secondary law. Frontex needs to process certain personal data in order to fulfil the tasks to be carried out pursuant to his official mandate.
- By essence, Frontex is very much involved in “operational cooperation” which implies coming across data, some of which may be personal data. “Support” and “assistance” from Frontex to the Member States in the field of JRO go beyond the task of acting merely as a mailbox between Member States, without processing data.
- This is all the more true due to the very wide definition of the term “processing” under Regulation 45/2001/EC.
- Although there has been 47 JRO which involved no processing of personal data by Frontex, it does not mean this is an ideal situation; new ways of carrying out tasks related to JRO are needed: it has to be recalled that Frontex is a newly created agency and that its procedures are still evolving.
- Frontex has not used yet all the possibilities opened to the Agency under the existing wording of Art. 9 of Frontex regulation.
- Furthermore, there is a consensus on the necessity to have a broad interpretation of Art. 9 of Frontex regulation.
- Frontex has been asked to organise JRO and to start, inter alia, leasing aircrafts. This means processing data related to, e.g.: passenger list, tickets, seating order, safety measures, medical care, organisation of advance parties.
- The processing of certain personal data such as the passengers list is mandatory under Aviation law.
- A number of pressing statements have been made by Member States to urge Frontex to reinforce its direct involvement with regards JRO.
- Frontex might facilitate the relations with third-countries in this field, which the Agency has not done significantly so far.
- Frontex is also invited to strengthen its efforts to facilitate the exchange of information among stakeholders.

JRO organized by MS with support of Frontex¹ as an assistant

This reflects the 47 JRO already carried out

2.1 Is it FRONTEX alone that determines the purposes and means of processing? Is the member States that decide that? both of them? Articles 2(d) and 2(e) of Regulation 45/2001).

The initiative to organise JRO comes from the MS.

Solely the MS determine the purpose and means of the processing.

2.2 To what extent FRONTEX has autonomy in deciding, for instance, the categories of data to be processed, the retention period, etc.?

- Frontex has no autonomy to decide about the nature of data.

- Frontex has no autonomy to decide the retention period.

3.1 Recipients and transfers of data (Articles 8 and 9 of Regulation 45/2001) : describe the procedure step by step. Who would send data to whom as well as which data would be processed (sent) in each step ?

a) Initiative

Initiative comes from one or several MS. After consultation with other MS, the initiative is confirmed (preparatory meetings between MS). A MS acts as an organizer; Frontex requests officially the MS to organize the JRO if it is financed by Frontex.

Data: no personal data

b) Preparatory work

- Definition of list of returnees (done by each MS) based on the national law for expulsion / removal (administrative decision, Courts order).

- Frontex does not receive police/judicial records or medical files.

- Participating MS fill in a form (“Participation in an Offered Return Flight-Information Sheet”); the annex to this form containing PD is sent only to the organizer by the participants MS, not to Frontex.

- The participating MS/SAC provide general information about each individual returnee whether he/she is healthy or not (fit for flight). If the returnee is not healthy, the participating MS/SAC should provide the organising MS/SAC, not Frontex, with more detailed medical information that are to be used by the medical staff only.

- The organizing MS draft a consolidated list and does not disclose the PD of this list to Frontex

- Definition of transit countries

- Contact with authorities of destination countries (third-countries, hereafter TC)

- Visit of advance parties made by MS officials / Fx to these destination countries

Data:

- Participating MS transmits to the Organizing MS certain personal data related to the passengers (form “Participation in an Offered Return Flight-Information Sheet”)

- Participating MS / Organizing MS transmits to Frontex solely non-personal data

¹ Although Frontex has sometimes been called “co-organizer” in the past, this wording may be misleading as to the extent of the role of Frontex since even as a so-called “co-organizer” Frontex did not have access to many data, most of it being accessible solely to the organizing MS. We have chosen a new wording: in the past operations, Frontex is described as assistant. For future operations, Frontex would be called organizer or co-organizer.

- Organizing MS transmits the names of returnees to authorities of TC (country of origin) to confirm right of entry in this country²
- Organizing MS transmits the passengers list to airlines companies prior to the transportation

c) Assembling

- Definition of point of assembling of returnees (airport)
- Travel of returnees from their respective MS to the point of assembling (Frontex not involved)

Data: no further data. Some data may be updated to ensure completeness and accuracy.

d) Execution of the JRO

- Flight to destination
- Ex-post evaluation

Data: no further data.

3.2 Airlines: Would FRONTEX transfer personal data to airline companies? If yes, which data?

If yes, to which companies? Companies established in the EU or also companies established in a third country?

- Frontex does not transfer data to airlines companies
- Type of data: the passenger list: this is mandatory as a carrier cannot transport an undocumented passenger. It is sent by the organising MS.
- Which companies: the airlines companies are chosen by the MS.

3.3 Third countries: Who would transfer the personal data of returnees to third countries, FRONTEX or the organising Member State?

Only the organising MS transfer the data.

4 Retention policy (Article 4.1(e) of Regulation 45/2001).

Frontex does not retain any personal data related to a JRO, not even the passengers' list.

CONCLUSION: summary

Who decides of the needs / purpose of the JRO = the MS

Who collects the data = the MS

Who sends the data = the MS

To whom = to other MS, to airlines companies, to TC, to Frontex

Who organizes = a MS

² Lack of documentation renders impossible the effective return of illegal migrants.

JRO organized by FRONTEX (Frontex acting as organizer or co-organizer)

This scenario will apply to future JRO conducted by Frontex

2.1 Is it FRONTEX alone that determines the purposes and means of processing? Is the member States that decide that? both of them? Articles 2(d) and 2(e) of Regulation 45/2001).

Purpose and means are decided by both the MS and Frontex.

In case the conclusion is that FRONTEX is controller or co-controller, FRONTEX will have to respect Article 11 and/or 12, and 13 to 17 of Regulation 45/2001.

Our answer is provided in the document “Opinion on a notification for Prior checking (...)” (information to data subjects; procedures to grant rights to data subjects).

2.2 To what extent FRONTEX has autonomy in deciding, for instance, the categories of data to be processed, the retention period, etc.?

Frontex has very little autonomy to decide the categories of data to be processed as these data are the one without which a JRO becomes unworkable.

Frontex has autonomy to decide the length of retention period.

3.1 Recipients and transfers of data (Articles 8 and 9 of Regulation 45/2001) : describe the procedure step by step. Who would send data to whom as well as which data would be processed (sent) in each step ?

a) Initiative

Initiative comes from one or several MS. Initiative may also comes from Fx.

Data: no personal data

b) Preparatory work

- Definition of list of returnees (done by each MS) based on the national law for expulsion / removal (administrative decision, Courts order).

- Frontex does not receive police/judicial records.

- Participating MS fill in a form (“Participation in an Offered Return Flight-Information Sheet”) and send it to Frontex

- The participating MS/SAC provide general information about each individual returnee whether he/she is healthy or not (fit for flight). If the returnee is not healthy, the participating MS/SAC should provide Frontex, with more detailed medical information that are to be used by the medical staff only.

- Frontex draft a consolidated list

- Definition of transit countries

- Contact with authorities of destination countries (third-countries, hereafter TC)

- Visit of advance parties made by MS officials / Fx to these destination countries

Data:

- **Participating MS transmits to Frontex certain personal data related to the passengers.**

(form “Participation in an Offered Return Flight-Information Sheet”; Frontex would receive the full one, including the annex with PD about returnees)

- **Frontex transmits the names of returnees to authorities of TC (country of origin) to confirm right of entry in this country³**

- **Frontex transmits the passengers list to airlines companies prior to the transportation**

c) Assembling

- Definition of point of assembling of returnees (airport)

- Travel of returnees from their respective MS to the point of assembling (Frontex not involved)

³ Lack of documentation renders impossible the effective return of illegal migrants.

Data: no further data. Some data may be updated to ensure completeness and accuracy. Frontex does not send any data to Airport authorities.

d) Execution of the JRO

- Flight to destination
- Ex-post evaluation

Data: no further data.

3.2 Airlines: Would FRONTEX transfer personal data to airline companies? If yes, which data?

If yes, to which companies? Companies established in the EU or also companies established in a third country?

- Yes Frontex would transfer data to airlines companies
- Type of data: the passenger list; this is mandatory as a carrier cannot transport an undocumented passenger.
- Which companies: we do not know. The airline company will be chosen after an EU tender procedure.

3.3 Third countries: Who would transfer the personal data of returnees to third countries, FRONTEX or the organising Member State?

Both would.

Please consider Article 9 of Regulation 45/2001. Then, it has to be assessed whether such transfers would be "necessary to allow tasks covered by the competence of the controller" (in case FRONTEX is considered the controller and in case FRONTEX would make the transfers).

Adequate level of protection in the destination country and necessity of the transfer:

- Dataprotection awareness:

The standards vary depending on the destination country.

- Necessity of the transfer:

1) Right of entry in the TC:

Without providing the TC with some personal data related to the returnee, the TC will not, for obvious reasons, let him in.

2) Limited availability:

It has to be reminded that Frontex / the MS disclose solely the data needed for entry on the territory of the TC.

3) Legal basis for transferring:

The data are transferred solely to allow tasks covered by the competence of the controller to be carried out (see the document "legal basis for the processing").

4) Will of the MS:

See the expectations and wishes expressed by the MS and EU institutions, in the above-mentioned document, urging Frontex to be more involved in the relations with TC.

If, in spite of everything that has been mentioned above, it appears necessary to rely on derogation, Art. 9(6) (d) of Reg. 45/2001 would be the relevant basis :

"The transfer is necessary or legally required on important public interest grounds"

4 Retention policy (Article 4.1(e) of Regulation 45/2001).

Most of the data are deleted immediately after the execution of the JRO, without prejudice to the right to conserve some of it for audit purposes.

The length of retention is uniform: from the moment of receiving first data related to a concrete JRO to their destruction, the duration will be a few weeks after the operations have effectively ended, depending on the complexity and scale of the JRO.

Exceptions: the passenger lists and the data kept for auditing purposes, which will be stored for 5 years.

Summary

Who decides of the needs / purpose of the JRO = the MS and Frontex

Who collects the data = the MS

Who sends the data = the MS and Frontex

To whom = to other MS, to TC, to Frontex, to airlines companies

Who organizes = Frontex and the MS