EUROPEAN DATA PROTECTION SUPERVISOR

EDPS OPINION ON INTERNATIONAL DATA TRANSFERS BY FRONTEX IN THE CONTEXT OF RETURN OPERATIONS

(Case 2021-0856)

1. INTRODUCTION

- This Opinion relates to the international data transfers carried out by Frontex in the context of return operations.

- The EDPS issues this Opinion in accordance with Article 58(3)(c) of Regulation (EU) 2018/1725[1], ('EUDPR').

2. BACKGROUND INFORMATION

2.1. Frontex' request

On 17 September 2021 the Data Protection Officer ('DPO') of the European Border and Coast Guard Agency ('EBCG' - commonly referred to as Frontex) submitted an informal consultation request regarding the permissible use of derogations (Article 50 EUDPR) for transfers of personal data in the context of return operations organised by the Agency.

[1] Regulation (EU) 2018/1725 of the European Parliament and 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, OJ, L 295, 21.11.2018, pp. 39-98.

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The DPO is consulting informally the EDPS as to whether the derogation of 'important reasons of public interest' could be used for the transfer of personal data to Third Countries ('TCs') for the organisation of flights (charter/scheduled) in the context of return operations organised by Frontex. Furthermore, the DPO is seeking the EDPS' informal advice as to whether carrying out Transfer Impact Assessments ('TIAs') would be sufficient to document the necessity and proportionality of the envisaged transfers in view of the accountability principle. Due to the sensitivity of the topic, the EDPS has decided to requalify this request to a formal consultation. Annexed to the consultation request there is a table offering an overview of return operations and destinations supported by Frontex in 2020 and 2021. The data shared include the number of return operations conducted and the number of third country nationals affected. The data is broken down per TC of destination.

2.2. Frontex as new 'EU return Agency'

The consultation is made in view of the growing role of Frontex in the context of return operations. One of the tasks of Frontex is assisting Member States ('MSs') when returning migrants who do not fulfil the conditions for staying in the EU back to their home TCs. Two consecutive legislative reforms, completed in 2016 and 2019, have progressively expanded the mandate and responsibilities of Frontex in the field of returns. Regulation (EU) 2019/1896 ('EBCG Regulation')[2], in particular, has granted the Agency the power to coordinate and organise return operations on its own initiative under Article 50 (1) of EBCG Regulation [3] with its own pool of forced return escorts and return monitors. Furthermore, Frontex has acquired an enhanced role in assisting Member States in a number of pre-return and return-related activities, including identifying irregularly staying third-country nationals, assisting in obtaining travel documents and preparing return decisions (Article 48 of EBCG Regulation). When providing its assistance to the Member States the Agency does so without entering into the merits of return decisions, which remain the sole responsibility of the Member States (Article 48 (1), 50(1) of EBCG Regulation). Nevertheless, this assistance should be provided in accordance with the fundamental rights, the general principles of

[2] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ L 295, 14.11.2019, p. 1–131.

[3] '*1. Without entering into the merits of return decisions, which remain the sole responsibility of the Member States, the Agency shall provide Member States with technical and operational assistance and shall ensure the coordination or the organisation of return operations, including through the chartering of aircraft for the purpose of such operations and organising returns on scheduled flights or by other means of transport. The Agency may, on its own initiative and with the agreement of the Member State concerned, coordinate or organise return operations*'.

Union and international law, including international protection, the respect for the principle of non-refoulement and children's rights (Article 48 (1) of EBCG Regulation).

The enhanced role of Frontex in the field of return operations reflects the political will to convert the Agency into an 'EU Return Agency' in order to implement the European agenda on migration [4], which as from the outset focuses on reducing the incentives for irregular migration and effectively returning migrants with no right to stay in the EU.[5] Frontex' leading role in the field of returns is described in the European Commission's Strategy on voluntary returns and reintegration presented in April this year.[6] According to the Strategy, Frontex will take over the activities of the European Return and Reintegration Network[7] in mid-2022. This will ensure that the benefits of the Network are extended equally to all Member States and that Frontex can fulfil its mandate in the area of returns in a fully effective manner, providing seamless support in organising tailored return and reintegration assistance to returnees. The role of Frontex as the operational arm of the common EU system of returns is considered by the European Commission as key to improving the overall effectiveness of the system and to support the practical use of a consolidated EU framework on voluntary return and reintegration. [8]

According to the Agency, to this aim three different return operations are planned in order to collect operational feedback aimed at improving the organization and implementation of return operations, as in the future these will be regularly carried out by the Agency. [redacted]

2.3. Personal data processing involved in return operations

Carrying out return operations entails a series of processing operations and international data transfers. One example of these processing operations is the acquisition of diplomatic overfly and landing clearance from the TCs concerned. The granting of such permissions

[4] A European Agenda on Migration, 13 May 2015.
[5] CEPS, The European Commission's legislative proposals in the New Pact on Migration and Asylum, p. 29.
[6] The EU strategy on voluntary return and reintegration
[7] This is an EU-funded network of several Member States and Schengen Associated countries that facilitates cooperation between migration authorities. The Network has become a key stakeholder in the assisted voluntary return and reintegration process.
[8] The EU strategy on voluntary return and reintegration, p. 3 and 9.

implies that the list of the passengers, including the personal data of the returnees, forced return escorts, fundamental rights monitors, security and possibly medical personnel has to be transmitted to the TCs authorities in the country of return.

With regard to the personal data of returnees, Article 86(3) of the EBCG Regulation provides for the transfer of the personal data referred to in Article 49 (biographic data or passenger lists) to a TC in accordance with Chapter V of EUDPR insofar as such transfer is necessary for the performance of the Agency's tasks. This article also provides for a series of additional safeguards that should be implemented by Frontex in relation to the transfer.

According to the clarifications provided so far by Frontex (European Centre for Returns - ECRET) the exact data transferred each time depend on (i) the specific country of return; (ii) the bilateral cooperation established between a concrete MS and the addressed TC of return. In their experience, the main requested data is as follows: (i) name and surname; (ii) type of travel document and its number; (iii) date of birth; (iv) family links within the territory of the MSs; (v) nationality. Frontex also provided some concrete examples of the data required by /transferred to some specific TCs. [redacted] In any case, Frontex further notes that the following personal data are included in the Frontex application for returns ('FAR') and can be shared with TCs by the organiser of return operations depending on the legal framework of the TC in question: (i) departure place; (ii) destination; (iii) name and surname; (iv) date of birth; (v) family link with other passengers, specifically with minors; (vi) nationality; (vii) sex; (viii) document; (viii) security risk and (ix) voluntary/enforced return.

As regards the recipients of the data, these vary depending on the TC in question. It could be the Ministry of Interior, the Ministry of Foreign Affairs or Border and Airport authorities.

3. LEGAL ANALYSIS AND RECOMMENDATIONS

3.1. Lawfulness of the transfers

EUDPR does permit transfers of personal data to TCs subject to a two-step test: first, the processing must be lawful and second, there must be a suitable transfer tool in place. This

means that when Frontex transfers personal data to TCs, in addition to complying with the provisions of Chapter V EUDPR, it should also meet the conditions of the substantive provisions of the EUDPR applicable to any processing. In particular, each processing activity must comply with the data protection principles enshrined in Article 4 EUDPR, be lawful in accordance with Article 5 EUDPR and comply with Article 10 EUDPR in case of special categories of personal data. Chapter V provides for specific mechanisms and conditions to allow transfers of personal data by EU institutions and bodies, to a TC or an international organisation. These mechanisms and conditions aim to ensure that the level of protection of natural persons guaranteed by the EU data protection legislation is not undermined.

In accordance with Article 5(1)(a) EUDPR, Frontex satisfies itself that transferring (i.e. processing) personal data is necessary for the performance of a task it carries out in the public interest or in the exercise of official authority vested in Frontex under EU law. Indeed, Article 50(1) of the EBCG Regulation provides that Frontex is competent to coordinate or organise return operations on its own initiative, which entails a series of international data transfers.

Article 86(3) and (4) of the EBCG Regulation however subject the transfers of the personal data referred to in Article 49 ((biographic data or passenger lists) to four cumulative conditions:
(1) the transfer is necessary for the performance of the Agency's tasks,
(2) the transfer complies with the additional safeguards defined by Chapter V of EUDPR,
(3) the transfer complies with the specific data protection safeguards introduced by the article, namely:

> (i) the Agency should ensure that those data are only processed by the TC or the international organisation for the purpose for which they were provided;
> (ii) The Agency shall indicate, at the moment of transferring personal data, or where the need for such restrictions becomes apparent to a third country or to an international organisation, any restrictions on access to or use of those data, in general or specific terms, including as regards transfer, erasure or destruction, and
> (iii) The Agency shall ensure that the third country or international organisation concerned complies with such restrictions.

(4) the transfer shall not prejudice the rights of applicants for international protection and of beneficiaries of international protection, in particular as regards *non-refoulement* and the prohibition against disclosing or obtaining information set out in Article 30 of Directive 2013/32/EU regarding the common procedures for granting and withdrawing international protection. In that regard, as the return decision is under the sole responsibility of the

Member State (Art. 50(1) of the ECBG Regulation), the EDPS understands that this obligation applies to Member States when transferring the data of the returnees to Frontex in the context of the organisation and coordination of the return operation. Frontex should however make sure that Member States are aware of this obligation, by for instance, asking Member States to certify that the personal data to be transferred comply with this provision (for example by ticking a box in the return application).

3.2. Transfers under appropriate safeguards

The European Data Protection Board ('EDPB') [9], its predecessor ('WP 29') as well as the EDPS have long interpreted the regime of transfers as providing for a layered approach towards transfers' mechanisms. In this regard, the controller (data exporter) should first consider whether the TC provides an adequate level of protection, in the form of an adequacy decision issued by the European Commission, and ensure that the exported data in the context of a specific processing operation will be safeguarded in the TC.

In case there is no adequacy decision in the third country where the data is transferred, the data exporter should consider providing appropriate safeguards, inquiring possibilities to frame the transfer with one of the mechanisms provided in Article 48 EUDPR: legally binding and enforceable instruments between public authorities, standard data protection clauses adopted by the European Commission or the EDPS, binding corporate rules, codes of conduct, certification mechanisms, and subject to the authorisation of the EDPS ad-hoc data protection clauses and administrative arrangements.

Only in the absence of such appropriate safeguards, and as last resort, the data exporter could assess the possibility to use one of the derogations provided in Article 50 EUDPR.

The effort to frame transfers of personal data with appropriate safeguards and not to rely on derogations is of particular importance in the context of return operations taking into account the vulnerability of the data subjects whose personal data is transferred to TCs and the impact the transfer may have to their fundamental rights and freedoms.[10] This is recognised by the EU legislator who puts particular focus on the respect of fundamental rights in the context of return operations and in Article 48 of the EBCG Regulation provides that Frontex should provide its assistance to the Member States only in accordance with the

[9] Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679.

[10] On the rule of law and fundamental rights challenges arising from the Return Directive 2008/115/EC refer to K. Eisele, et al, The Return Directive 2008/115/EC, European Implementation Assessment.

fundamental rights, the general principles of Union and international law, including international protection, the respect for the principle of non-refoulement and children's rights.

In the case under consideration, Frontex puts forward that none of the countries of return has an adequacy decision in place. As it is the sole competence of the Commission to issue adequacy decisions, Frontex cannot rely on this option to base the transfer.

The EU has a series of readmission agreements in place (Hong Kong; Macao; Sri Lanka; Albania; Russia; Ukraine; North Macedonia; Bosnia & Herzegovina; Montenegro; Serbia; Moldova; Pakistan; Georgia; Armenia; Azerbaijan; Turkey; Cape Verde and Belarus) on which Frontex could rely under Article 48(2)(a) EUDPR. However, even though these readmission agreements contain a data protection clause, the DPO is of the opinion that the text of the clauses does not qualify as appropriate safeguards provided in Article 48 EUDPR. No additional information is provided in that regard. The review of the data protection clause included in the readmission agreements with Albania[11] and Georgia[12], confirms the conclusion of the DPO. The minimum safeguards that have to be included in a legally binding instrument concluded between public authorities, as these were identified by the EDPB when interpreting the relevant provisions of the GDPR[13], are missing from the abovementioned data protection clauses. For instance and without being exhaustive, there are no provisions regarding the transparency obligations of the parties, the data subjects' rights any redress and supervision mechanism.

Finally, the EU has as well a number of non-binding readmission arrangements (Afghanistan; Guinea; Bangladesh; Ethiopia; Gambia; Ivory Coast) on which Frontex could rely to carry out these data transfers under Article 48(3)(b) EUDPR with the prior authorisation of the EDPS. The DPO is also of the opinion that the text of the clauses does not qualify as appropriate safeguards provided in Article 48 EUDPR. In the same line, civil society organisations and the European Parliament have criticised these arrangements for their lack of transparency

[11] Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation - Declarations.

[12] Agreement between the European Union and Georgia on the readmission of persons residing without authorisation.

[13] EDPB Guidelines 2/2020 on articles 46 (2) (a) and 46 (3) (b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies.

and the potential impact on returnees' human rights as in principle they do not include any references to international protection of refugees and human rights. [14]

In light of the above, it appears that Frontex could, in many cases, use (binding or, alternatively, non-binding) re-admission agreements/arrangements, should these agreements/arrangements provided for appropriate data protection safeguards. The EDPS is of the opinion that such re-admission agreements/arrangements should be, as a rule, the preferred instrument to base the transfers of personal data of returnees to their countries of origin.

However, the EDPS understands from the information provided, that such instruments do not currently provide for such appropriate safeguards and cannot, in the present circumstances, be used as instruments to frame the transfers.[15]

3.3. Use of the derogation of public interest

As analysed above, in the absence of transfer mechanisms adducing appropriate safeguards, and as last resort, the data exporter could assess the possibility to use one of the derogations provided in Article 50 EUDPR. Therefore and in order for Frontex to be in place to perform its tasks and execute its legal mandate, the agency must assess whether it can base these transfers on Article 50 (1)(d) EUDPR. The latter provision allows a transfer or a set of transfers of personal data to a third country wherever such transfer is necessary for important reasons of public interest.

3.3.1. Important reasons of public interest

The EDPS considers, as is also recalled by the EDPB in the guidance with regard to derogations under Article 49 GDPR[16], that according to Article 50(3) EUDPR, only public

[14] The European Court of Auditors' special report: EU readmission cooperation with third countries, para. 34 - 38.

[15] The DPO stresses that due to the sensitivity and reluctance of TCs to sign readmission agreements, it appears to be very difficult to negotiate appropriate safeguards. The European Court of Auditors' special report: EU readmission cooperation with third countries, para. 26 -38, also notes that during the 2015-2020 period, the EU achieved limited progress in concluding negotiations of EU readmission agreements. However, the Commission has been more successful in negotiating legally non-binding readmission arrangements, the contents of which are more flexible.

[16] Refer to footnote 9.

interests recognized in Union law can lead to the application of this derogation. In more detail, for the application of this derogation, it is not sufficient that the data transfer is taking place in order to serve a public interest of a TC which, in an abstract sense, also exists in EU law. It is rather that the derogation only applies when it can also be deduced from EU law that such data transfers are allowed for purposes of important public interest, including in the spirit of reciprocity for international cooperation.

The European Agenda on Migration[17] puts particular focus on the effective return policy of irregular migrants considering it as an integral part of a comprehensive migration and asylum policy. Ensuring the return of irregular migrants is essential to enhance the credibility of policies in the field of international protection and legal migration. Hence, the EU has long sought to harmonise and support national efforts to manage returns based on the Return Directive (2008/115/EC), which lays down common standards and procedures for the return of non-EU nationals who are staying in the EU irregularly. Initiatives adopted by the Commission in the field of returns under the Agenda have included the provision of recommendations and guidance to Member States on how to conduct more effective return procedures[18] proving that tackling illegal migration through an effective return policy is an important issue of public interest of the European Union.

The expanded mandate and responsibilities of Frontex in the field of returns under the EBCG Regulation is also part of the EU return policy and complements the common rules existing in Member States on returns. In particular with regard to returns of irregular migrants, recital 79 of the EBCG Regulation states that '*The return of third-country nationals who do not fulfil or who no longer fulfil the conditions for entry, stay or residence in the Member States, in accordance with Directive 2008/115/EC of the European Parliament and of the Council, is an essential component of the comprehensive efforts to tackle illegal immigration and represents an important issue of substantial public interest*'.

Therefore, in the case under consideration, organising return operations in order to tackle illegal migration should be considered as an important issue of public interest recognised in Union law as required by Article 50(3) EUDPR.

[17] A European Agenda on Migration, 13 May 2015. European Agenda on Migration - Legislative Documents
[18] CEPS, The European Commission's legislative proposals in the New Pact on Migration and Asylum, p. 29.

3.3.2. A restrictive approach to the use of derogations

With regard to the derogation of '*important reasons of public interest*' recital 68 EUDPR indicates that the derogation is not limited to data transfers that are '*occasional*' as is the case when the transfer is necessary in relation to a contract or a legal claim. Yet, according to the EDPB guidance issued in the context of the GDPR, this does not mean that data transfers on the basis of the important public interest can take place on a large scale and in a systematic manner. Rather, the EDPB recalls the general principle according to which the derogations shall not become '*the rule*' in practice, but need to be restricted to specific situations and each data exporter needs to ensure that the transfer meets the strict necessity test, in the sense that the transfer of the specific data is necessary in order to address the public interest pursued.

Hence, the EDPB strongly encourages all data exporters (and in particular public bodies) to frame these transfers by putting in place appropriate safeguards rather than relying on derogations in cases where transfers are made in the usual course of business or practice. The EDPS also consistently advises EUIs to adopt appropriate safeguards in case of structural transfers.[19]

This approach is based on the fact that derogations do not by themselves provide protection for data transfers, since they are meant to cover situations in which there is no adequate protection in the country to which the data is to be transferred. Therefore, derogations under Article 50 are exemptions from the general principle that personal data may only be transferred to TC if an adequate level of protection is provided for in the TC or if appropriate safeguards have been adduced and the data subjects enjoy enforceable and effective rights in order to continue to benefit from their fundamental rights and safeguards. Due to this fact and in accordance with the principles inherent in European law, the derogations must be interpreted restrictively so that the exception does not become the rule.

The EDPB's predecessor (WP 29) has also identified that the very concept of derogations (called exceptions at the time) is based on the fact that '*the risks to the data subject are*

[19] 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), p. 3-4, EDPS formal comments on the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and the Implementing Protocol thereto and on the Proposal for a Council Decision on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and of the Implementing Protocol thereto, p.4-6, Formal comments of the EDPS on the Proposal for a Council Decision on the accession of the European Union to the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, p. 4-6.

relatively small' or '*other interests (public interests or those of the data subject himself) override the data subject's right to privacy*'.[20] Thus, the derogations in effect allow data transfers when there is an overriding societal interest that they take place, either because the risks are small or because they are overridden by other important rights and interests, implying that a balancing exercise has to be carried out.

With regard to the balancing exercise that should take place in the context of data protection, it is well established case-law of the Court of Justice of the European Union that limitations to the right to the protection of personal data are allowed if (in between other conditions) they are proportionate (in the sense of being appropriate and necessary) to the legitimate aim pursued, which should be a general interest recognised by EU law.[21] The balancing exercise requested by the Court should take into account whether there were other measures than the ones provided, which would interfere less with the rights concerned.[22] The Court has also held that in accordance with the principle of proportionality, '*serious interference*' to the fundamental right to the protection of personal data can be justified, in case the aim pursued is also important, while '*less serious*' interference can be justified for less important aims.[23]

In our view, it is in this sense that the EDPB requires that data transfers on the basis of the public interest derogation cannot take place on a large scale and in a systematic manner as they would entail a '*serious interference*' to the fundamental right to the protection of personal data. In the case at stake, as mentioned above, the decision to return individuals to their countries of origin, which implies for Frontex the need to transfer data about these individuals to TCs which do not provide for an adequate level of protection, is a serious interference into their fundamental rights. Frontex should thus establish that the public interest at stake overrides the data subjects' rights to privacy and data protection.

To that end, Frontex should carry out an assessment in order to reach a decision as to whether the application of the public interest derogation is lawful. The assessment should be conducted on the basis of the criteria identified below.

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[20] See WP 29, Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive. Adopted on 24 July 1998 and available under https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/1998/wp12_en.pdf, p. 24.

[21] See indicatively, CJEU Judgement in Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR (C-92/09), Hartmut Eifert (C-93/09) v Land Hessen, recitals 65, 72 and 74, CJEU Judgement in joint Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd, Seitlinger and Others, recitals 38-44.

[22] See indicatively, CJEU Judgement in Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR (C-92/09), Hartmut Eifert (C-93/09) v Land Hessen, recitals 65, 72 and 74.

[23] See CJEU Judgement in Case C-207/16, Ministerio Fiscal, recitals 51-58.

3.3.3. Criteria for carrying out the assessment on whether the application of the public interest derogation is permissible

Taking into account the vulnerability of the returnees whose personal data is transferred to their countries of origin and the '*serious*' impact the transfer may have to their fundamental rights and freedoms and as it appears hazardous to define fixed thresholds, the EDPS recommends that Frontex takes into account the following factors in order to make the assessment:

(i) the type of data transferred to the TC (e.g. biometric data), in the meaning that the more sensitive the data transferred is the more '*serious*' the interference will be; and the type of the data subjects affected (e.g. minors).

(ii) the volume of the data transferred (mentioned in detail under 2.3) and of the data subjects affected in order to avoid large scale transfers that would entail a '*serious*' interference to the right of data protection. The EUDPR does not define what constitutes large-scale processing. The WP 29 in the Guidelines on Data Protection Impact Assessments (endorsed by the EDPB during its first plenary meeting) [24] interpreting the relevant provisions of the GDPR recommended that the following factors, in particular, should be considered when determining whether the processing is carried out on a large scale:

- the number of data subjects concerned, either as a specific number or as a proportion of the relevant population;
- the volume of data and/or the range of different data items being processed;
- the duration, or permanence, of the data processing activity;
- the geographical extent of the processing activity;

Regarding the case under consideration and in line with the above guidance, it should be considered whether the needs of the MS for certain countries can be anticipated (e.g. in case there is a pattern in returns flights, then Frontex can anticipate which are the needs of the MS by analysing prior requests). In such cases, the volume of the data transferred and of the data subjects affected should be assessed in view of the periodicity of the transfer as well.

(iii) the systematic or not character of the transfer. As to the interpretation of the term '*systematic transfer*', the EDPB has held that as such should be considered a data transfer that occurs regularly within a stable relationship between the data exporter and a certain data importer. Such transfers cannot be considered '*occasional*' as the latter term indicates that transfers may happen more than once, but not regularly, and would occur outside the

[24] Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, p. 10.

regular course of actions, for example, under random, unknown circumstances and within arbitrary time intervals. [25]

Frontex argues that, if it were to organize its own return operations, the transfers involved therein would not be systematic, since they entirely depend on the availability of returnees, the cooperation of the TC authorities, the need of MSs for support and on variations in destinations.

In order to assess the systematic character of transfers, the role of Frontex in the context of return operations should also be considered. In more detail, as long as return operations on its own initiative constitute a marginal activity for Frontex it is easier to argue that transfers are '*not systematic*'. On the other hand, as the political will to convert the Agency into an 'EU Return Agency' will materialise in the coming years leading Frontex to organise on its own initiative the majority of the return operations, recourse to a stable transfer mechanism (i.e. legal binding agreements or administrative arrangements) would be the appropriate answer to the more systematic transfer of personal data to TCs.

(iv) the existence of a data protection regime in the TC that would limit risks of the transfer for the data subjects. This is of particular importance for countries that have concluded an association agreement with EU and its Member States (e.g. Albania, Georgia), which include articles providing for cooperation in order to ensure a high level of data protection based on European and international standards.

4. CONCLUSION

The above analysis has established the following:

- The decision to return individuals to their countries of origin remain the sole responsibility of Member States but imply for Frontex the need to transfer data about individuals to TCs which do not provide for an adequate level of protection. The transfer of personal data constitute a serious interference to the fundamental rights of vulnerable data subjects, i.e. of the returnees. Taking into account the serious impact of the transfer on this vulnerable category of data subjects, the legislator provided that Frontex should fulfil its extended mandate with regard to return operations in accordance with the fundamental rights, the general principles of Union and international law, including international protection, the respect for the principle of non-refoulement and the children's rights (Article 48 (1) of EBCG Regulation).

[25] Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, p. 4.

- Frontex should strive to base personal data transfers on re-admission agreements/arrangements providing appropriate safeguards as a rule. This becomes more critical as Frontex slowly turns into the 'EU Return Agency', i.e. develops its own capacity to organise its own initiative return operations in accordance with Article 50 EBCG Regulation. In that sense, Frontex should encourage the European Commission to negotiate/renegotiate and include in the readmission agreements/arrangements concluded with TCs appropriate data protection safeguards in line with Article 48 EUDPR. In the meantime, Frontex is also encouraged to negotiate administrative arrangements with TCs to which the transfer of data becomes regular or even structural. This seems particularly important in order to ensure compliance with the specific data protection safeguards listed in Article 86(3) of the ECBG Regulation;
- The use of the derogation of '*important reasons of public interest*' for the transfer of personal data to TCs in the context of return operations should remain a last resort solution and it cannot amount to a blanket authorization of transfers to any TC;
- Organising return operations in order to tackle illegal migration has been recognized as an important issue of public interest in Union law, as required in Article 50(3) EUDPR;
- In order to assess whether the transfer to a TC meets the strict conditions of Article 50(1)(d) EUDPR an assessment should be carried out taking into account the criteria described under point 3.3.3;
- The assessment should be documented and updated every time there is a substantial change in one of the factors taken into account for the assessment.

Done at Brussels on 20 December 2021

(e-signed)
Wojciech Rafał WIEWIÓROWSKI