

From: [REDACTED]
To: [REDACTED]
CC: [REDACTED]
Sent at: 16/12/09 17:27:38
Subject: RE: Frontex, prior check on Joint Return Operations, 2009-0281

Dear [REDACTED],

We are still working with our experts to give comprehensive and updated answers to your questions, with new internal meetings scheduled this week.

In case we do not have the opportunity to exchange further with you before Christmas, I take this opportunity to wish you a joyous festive season.

Best regards

[REDACTED]
Legal Adviser

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From: [REDACTED]
Sent: 11 December 2009 18:05
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: Frontex, prior check on Joint Return Operations, 2009-0281

Dear [REDACTED],

Thank you for your call and your emails ; I am working on these issues together with our experts on joint return operations and I will come back to you as soon as possible.

Kind regards

[REDACTED]
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From: [REDACTED]
Sent: 11 December 2009 17:13
To: Herve Yves Caniard
Subject: RE: Frontex, prior check on Joint Return Operations, 2009-0281

Dear [REDACTED],

there are other pending questions, as follows:

1) Which data is kept for auditing purposes?

2) What is the time limit for blocking or erasure on justified legitimate request from data subjects?

Thank you very much,

[REDACTED]

Legal adviser

European Data Protection Supervisor
Contrôle Européen de la Protection des Données

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Office: [REDACTED]

From: [REDACTED]
Sent: 12 October 2009 11:11
To: [REDACTED]
Cc: legal
Subject: RE: Frontex, prior check on Joint Return Operations, 2009-0281

Dear [REDACTED]

After discussion with our expert on joint return operations, we have been able to develop further the note "process of a JRO - further questions" which was attached to the mail below.

The substance is unchanged but you will find attached a new version of this document with some additional details (version 3, dated 12/10/09).
The previous version (so-called 'final v.') is obsolete.

Kind regards

[REDACTED]
On behalf [REDACTED]

[REDACTED]
Legal Adviser

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From: [REDACTED]
Sent: 07 October 2009 18:07
To: [REDACTED]
Cc: legal
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,

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,

[REDACTED]
Legal adviser

European Data Protection Supervisor
Contrôleur Européen de la Protection des Données

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