

From: [REDACTED]
To: [REDACTED]
CC: legal <legal@frontex.europa.eu>
Sent at: 12/10/09 11:10:57
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The previous version (so-called 'final v.') is obsolete.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 present 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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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, according to their needs and possibilities.
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. Frontex regularly organises meetings with MS to identify their needs and possibilities for JRO, to determine organising states and to discuss operational, practical matters of JRO. Afterwards Frontex decides on possible co-financing of JRO. If it is approved, Frontex sends a request letter to a MS to organise a concrete JRO as well as an offer of co-financing. Frontex receives an official offer of JRO from an organising MS and spreads it to all MS. A MS acts as an organiser.

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)
- Definition of escorts, observers, other officials, medical staff, possible interpreter (done by each MS)
- 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 participating MS/SAC provide a risk assessment for all individual returnees whether they present any risks of violence and/or suicidal behavior, which is used solely to ensure the safety of involved MS/SAC’ officials, other returnees and the security of the whole return operation. This information is disclosed solely to the organizer
- The organizing MS draft a consolidated list and does not disclose the PD of this list to Frontex
- Definition of transit countries, determination of a route, stopovers, flight schedule
- Contact with authorities of destination countries (third-countries, hereafter TC)
- Visit of advance parties made by MS officials / FX to these destination countries.

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: to refer to the past operations, Frontex will be described as assistant. For future operations, Frontex would be acting as an assistant or as organizer / co-organizer.

Data:

- Participating MS transmits to the Organizing MS certain personal data related to the passengers (form “Annex to Participation in an Offered Return Flight-Information Sheet”)
- Participating MS / Organizing MS transmits to Frontex solely non-personal data
- Organizing MS transmits the names of returnees to authorities of TC (country of origin) to check right of entry in this country²
- Organizing MS (OMS) 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 (e.g. in case of decreased numbers of returnees, escorts).

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 airline companies
- Type of data: the passenger list: this is mandatory as a carrier cannot transport an unknown, unregistered passenger. It is sent by the organising MS
- Which companies: the airline 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 transfers 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 personal data = the organising MS

Who sends the personal data = the participating MS send them to the organising MS

To whom = the organising MS sends them to airlines companies, to TC

Who organizes a JRO = 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 may 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 (...)” in the paragraphs “information to data subjects” and “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 come from FX. The basic platform for the identification of MS' needs and possibilities for JRO are regular meetings with MS.

In case of Frontex as an organiser it is foreseen to closely collaborate with a MS which has diplomatic contacts in a destination country, to facilitate co-operation with a relevant third country, and which can also assist in providing medical personnel, interpreter for JRO.

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)

- Definition of escorts, observers, other officials, medical staff, possible interpreter (done by each MS)

- 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 or co-organising/assisting MS with more detailed medical information that are to be used by the medical staff only

- The participating MS/SAC provide a risk assessment for all individual returnees whether they present any risks of violence and/or suicidal behavior, which is used solely to ensure the safety of involved MS/SAC' officials, other returnees and the security of the whole return operation. This information is disclosed solely to the organizer

- Frontex draft a consolidated list

- Definition of transit countries, determination of a route, stopovers, flight schedule

- 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 or co-organising/assisting MS transmits the names of returnees to authorities of TC (country of origin) to check right of entry in this country³

- Frontex or co-organising/assisting 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 (e.g. in case of decreased numbers of returnees, escorts).

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 unknown, unregistered passenger.

- Which companies: 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 could, depending on practical arrangements between organising MS and Frontex and whether Frontex would be co-organiser or organiser. But the data would be sent only via one agreed channel.

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. Frontex cannot influence the standards.

- **Necessity of the transfer:**

a) 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 the returnee in.

b) Limited availability:

It has to be reminded that Frontex / the MS disclose solely the data needed for entry on the territory of the TC. For example no information whether person applied for asylum in MS is provided to TC.

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

c) 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”).

d) 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 organisation of JRO, and if needed in the talks 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 organising/assisting MS and Frontex

Who sends the data = the organising/assisting MS and Frontex

To whom = to TC, to airlines companies

Who organizes = a MS and Frontex