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**Subject: Consultation regarding the launch of new research projects at the European Agency for Fundamental Rights (FRA) - Case 2008-777**

Dear Mr Fikatas,

I am writing to you in the context of your request for consultation under Article 27.3 of Regulation (EC) No 45/2001 dated 19 December 2008, concerning the need for prior checking by the EDPS of new research projects to be launched by FRA.

On 26 January 2009, following a request for additional information from the EDPS, you provided the following information: (i) a copy of signed service contracts for research projects 1, 2, 3, 4, 5 and 6; (ii) sample letter from the FRA to National Focal Points; (iii) sample RAXEN questionnaire for conducting interviews with official representatives and with civil society representatives; sample respondent consent form; and (iv) FRA annual work programme 2008.

A conference call was then organized on 20 March 2009 in order to discuss remaining questions concerning the matter. In light of the discussions held, the EDPS sent out to you on 1st April 2009 a draft outline of his legal analysis. On 30 April 2009, you provided comments about the draft outline as well as additional information, namely: (i) replies received from contractors; (ii) revised sample consent form; and (iii) the Multi-annual Framework of FRA for 2007-2012.

After having carefully examined all the documentation provided, the EDPS is hereby providing you with his response below.

## 1. Facts

FRA is launching various research projects on several of the thematic areas concerning fundamental rights, as determined in its Multiannual Framework pursuant to Council Regulation 168/2007 of 15 February 2007, as follows:

- Research project 1: Comparative report on the housing conditions of Roma and travellers in EU;
- Research project 2: Separated asylum seeking children in EU Member States: an examination of living conditions, provisions and decision-making procedures;
- Research project 3: The role of commemoration sites, original sites and historical museums in Holocaust education and Human Rights education in the EU;
- Research project 4: Respecting, protecting and promoting the right to free movement and residence in the Member States of the European Union: the case of the Roma;
- Research project 5: Assessing the impact of the Racial Equality Directive: a survey of trade unions and employers in the Member States of the EU;
- Research project 6: Racism and ethnic discrimination in sport in the EU and preventive initiatives.

FRA has outsourced to several research agencies by means of service contracts the completion of these research projects. Contractors are in charge of gathering all the necessary information, and of analysing it, in order to provide FRA with final comparative reports concerning the research project that they have been entrusted with. Upon completion of the research projects, contractors have been required to return to FRA all the material collected and used for completion of the research projects, including transcripts of interviews as well as contact data of identified data subjects, and to destroy any copy in their possession.

The completion of these research projects involves the processing of data collected from individuals in the course of interviews. For all research projects, interviews will be carried out on an identified basis with representatives of relevant national authorities and civil society organisations to gather information in order to understand the sociological trends on the topic at stake. Personal data collected from them will mainly consist in their contact data. These data subjects will be provided with a privacy notice containing information about the processing of their personal data by research agencies and by FRA, and their express consent to the processing will be obtained by signing the form.

In addition, for projects 2 and 4 only, FRA indicated that interviews will also be done with individuals on a truly anonymous basis (i.e. there would be no collection of personal data in the sense of Article 2.a of Regulation (EC) No 45/2001). Information collected from them will relate to their personal experience (i) as children seeking asylum, or (ii) as Roma/Sinti/travellers in EU Member States, which may also include information relating to their health or to their involvement in deviant behaviour (such as drug use, petty theft, begging). Concerning children, and without prejudice to the anonymous collection of data, the consent of their legal representative will be sought for participating in the interview as well as from children themselves - whom verbal consent will be obtained in a manner comprehensible to them.

## **2. Legal analysis**

The data processing operations to be carried out by contractors and by FRA raise a number of legal issues relating to compliance by contractors and by FRA with their respective obligations under applicable laws relating to statistics (section 2.1 below) and to data protection (section 2.2 below). Further, the EDPS provides recommendations to FRA concerning the processing of the data gathered and transferred by contractors, so that it is in line with Regulation (EC) No 45/2001 (section 2.3 below).

### **2.1. Compliance with applicable legislation on statistics**

The processing of data by contractors is exclusively oriented towards sociological surveys purposes with a view to produce quantitative and qualitative comparative reports. The carrying out of these surveys notably allows for the production of statistics for scientific purposes.

The processing of data for statistical purposes is regulated at EU level (amongst others Regulation (EC) No 322/97 of 17 February 1997 on Community Statistics) as well as at national level. The processing of data in the context of statistics relies to a large extent on the principles of confidentiality, statistical secrecy and anonymity of the data. These regulations define the specific measures that must be complied with when processing data for statistical purposes, and in particular those aimed at preserving the confidentiality of the data, statistical secrecy and anonymisation.

Taking into account the purposes of the processing - the production of statistics and scientific analysis - the EDPS notes that the processing to be carried out by the appointed research agencies - and their network of organisations and researchers at local level - shall be done in consistency with applicable EU and national legislation governing statistics, in particular as it concerns the preservation of confidentiality, statistical secrecy and anonymity.

Moreover, any further in-house analysis by FRA of the research material sent by contractors at the end of the research projects shall be done in compliance with applicable EU legislation on statistics.

### **2.2. Compliance with applicable data protection law**

The carrying out of the research projects entails two types of processing operations: on the one hand, the processing of personal data of identified individuals interviewed in their capacity of representatives of an organisation/public authority, and on the other hand the processing on a truly anonymous basis of data of individuals interviewed about their personal experience. The EDPS understands that only a limited amount of personal data will be processed - mainly the contact details of identified respondents - and that a large part of the processing operations that will take place will be done on an anonymous basis.

In view of the facts and of the information in his possession, the EDPS understands that FRA shall be considered as the data controller in respect of the personal data processing taking place<sup>1</sup>. Even if FRA only receives certain personal data from contractors at the end of the research project, and thus does not have possession of such data for a certain period of time until completion of the projects, FRA considers to be the data controller of any personal data

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<sup>1</sup> To support this view, see also EDPS consultation in the case 2008-0331, letter to FRA DPO dated 16 July 2008, and in particular the EDPS analysis of the applicable law and of the processing of personal data on behalf of controllers.

processing operations taking place as it is FRA who has determined the purposes and means of the processing. In this perspective, the EDPS notes that FRA has determined the means of personal data collection by providing contractors with a standard "Consent form", which clearly indicates that the given contractor is acting on behalf of FRA, and which provides information to identified respondents from whom personal data are collected about the processing of their data by FRA. Further, it is the EDPS' understanding that contractors cannot process and further use the data for any other purpose than the one determined by FRA, and in particular that they cannot use the data for their own purposes. To this end, contractors have been asked by FRA to return all material to FRA upon completion of the project and to destroy any copy in their possession. The fact that contractors cannot use the data for their own purposes is also relevant in this view, as it confirms the assumption that they have no control over the purposes and means of the processing.

The EDPS stresses that any processing of personal data by FRA, and by contractors carrying out a processing operation on behalf of FRA, shall comply with Regulation (EC) No 45/2001.

With respect to the data processing carried out in respect of identified individuals interviewed in their capacity of representatives of an organisation/public authority, the personal data processed about them will mainly consist in their contact details. With respect to such processing, and according to available information, the EDPS is of the opinion that it does not trigger any of the criteria of Article 27.2 of the Regulation and that it is therefore not subject to prior checking by the EDPS.

Concerning the data collected in interviews carried out with individuals in respect of their personal experience, it is the EDPS' understanding that research agencies may collect a wide range of data, that may include data relating to health and to suspicions of offences, from certain categories of individuals interviewed (i.e. Roma travellers and children seeking asylum), which data will be processed anonymously. To the extent that such data are processed in a truly anonymous manner, as per the requirements outlined in section 2.1 above and considering the definition of personal data set forth in Article 2.a of the Regulation (see further section 2.3 below), the EDPS is of the opinion that the processing of such data would not fall under the scope of Article 27.2 of the Regulation insofar as such data do not actually relate to identified or identifiable individuals.

The EDPS moreover stresses that, notwithstanding the data protection obligations incumbent on FRA, the data collection and data processing to be carried out by the appointed research agencies - and their network of organisations and researchers at local level - shall comply with Regulation (EC) No 45/2001 and national legislation implementing Directive 95/46/EC as regards the confidentiality and security measures to be put in place. The EDPS notes that Article 1.9 of the standard service contract with contractors sets forth an obligation upon them to comply with data protection rules and to implement appropriate confidentiality and security measures, in accordance with Regulation (EC) No 45/2001 and Directive 95/46/EC.

### **2.3. Recommendations concerning the processing operations**

The EDPS outlines below his recommendations for the processing operations to be undertaken, taking into account the specificities of the categories of data subjects concerned.

a) With respect to data subjects interviewed on an anonymous basis, the EDPS recommends that:

- All data gathered about these data subjects shall be truly anonymous. FRA shall ensure that data are truly anonymous, i.e. that persons cannot be directly or indirectly identified. When considering anonymity from a data protection point of view, account should also be taken of the interpretation of the Article 29 Working Party in its opinion on the concept of personal data (Opinion 4/2007). In its view, based on Directive 95/46/EC, anonymous data is any information relating to a natural person where the person cannot be identified, whether by the data controller or by any other person, *taking account of all the means likely reasonably to be used either by the controller or by any other person* to identify that individual.
- Considering that quotes on a no-name basis of individual experiences may be provided in final reports, which will be made public, the EDPS advises that FRA minimizes to a great extent the data published in final reports about individuals' experiences so that it cannot lead to the possibility to indirectly identify the said persons. In cases where it is found necessary to quote specific individual experiences, the FRA shall assess the proportionality of the information to be disclosed in the final reports.

b) With respect to data subjects interviewed on an identified basis, the EDPS has the following comments:

- The EDPS is satisfied with the revised data protection notice ("Consent form"), which provides adequate notice about the use by FRA of the personal data collected and processed by the research agencies, and which meets the requirements of Article 11 of the Regulation. The EDPS further stresses that any representation made in the Consent form should be consistent with the reality.
- The EDPS outlines that the retention of data must comply with the proportionality principle, in particular data should not be retained in an identifiable form for longer than is necessary to achieve the purposes for which the data is kept (Article 4.e of Regulation (EC) No 45/2001). In this view, the EDPS is satisfied with the 48 months data retention period adopted by FRA for the retention of contact details and interview transcripts, taking into account the justification provided by FRA that "this retention period aims at addressing needs for feed-back and the cross-checking of data in the light of data analysis and research results." The EDPS further outlines that with respect to interviews with identified individuals, these could only be kept further than the 48 months period for research and statistical purposes provided that they are truly anonymised and can therefore no longer be linked to an identified or identifiable individual.
- FRA shall ensure that the processing of the data by its staff complies with the confidentiality and security obligations set forth in Articles 21 and 22 of Regulation (EC) No 45/2001.
- Concerning the right of data subjects to access and rectify their data, the EDPS stresses that any arrangement between FRA and its contractors to ensure the effective exercise of the right of access and rectification by data subjects shall include the following provisions:
  - FRA shall be entitled to request and obtain access to the data processed on its behalf from contractors at any time.

- FRA shall be informed promptly by contractors of any request of access and rectification that they receive directly from data subjects.
- Contractors shall await instructions from FRA before responding to any such request, and shall act promptly upon receiving instructions from the FRA.

The EDPS understands that FRA has already implemented some of the above recommendations. Please keep the EDPS informed on any further measure adopted by FRA in view of satisfying these recommendations.

I thank you very much for your cooperation.

Yours sincerely,

(signed)

Giovanni BUTTARELLI