

From: [REDACTED]
To: [REDACTED]
European Data Protection Supervisor
<EDPS@edps.europa.eu>; [REDACTED]
CC: [REDACTED]
Sent at: 27/11/14 18:15:20
Subject: RE: 2014-0978 PeDRA business case draft general
Implementing Rules

Dear [REDACTED],

This is my second announced mail, focusing on the content of the draft implementing rules under Article 11a of the Frontex Regulation.

One formal question first: I understand that this is still informal at this stage. When do you plan to submit it formally for consultation? Just so I know for our internal planning.

Without prejudice to a formal consultation, please find some remarks below, numbered according to the draft implementing rules, with special attention to the parts highlighted as still more amenable to change and starting from our Guidelines on implementing rules (https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-07-29_Guidelines_DPO_tasks_EN.pdf):

- Article 2: as usual, we'd prefer not diverging from the definitions in the Regulation (controller).
- Article 3: formally speaking, the Regulation establishes a DPO mandate extendable up to a maximum of 10 years; the draft rules in fact have a ceiling of 9 years, not 10. This could be avoided by having wording along the lines of "generally appointed for a 3 year term [...] may be renewed up to a total duration of 10 years".
- Article 4: I just wanted to mention having an obligation to publish the register on the website is really good. For the inventory, maybe add "and planned operations" for clarity.
- Article 6(9) appears a bit redundant, since the independence is already linked to the DPO function; maybe just refer to "not receive any instructions with respect to the performance of his/hers duties as DPO".
- For Article 7, having a look before having notifications formally submitted to you makes sense indeed; the only risk this (and point (2) of the same Article) could create is that that the "controllers in practice" might try to push their work off to you. For point (3): when in doubt about the "prior-checkability" of a certain processing operation, Article 27(3) consultations are indeed the way to go, but let me say that - while quicker and shorter than normal prior checking cases - they are still quite formal, in that the reply will usually result in a letter signed by one of the Supervisors; the draft implementing rules make them sound more like what we do for "informal 46(d) consultations".
- On Article 8(e), I'd have a small remark on terminology: "processor" in the sense of Article 23 of the Regulation basically refers to a third party outside Frontex acting as processor, e.g. when outsourcing certain activities. Frontex staff entrusted to process personal data (e.g. HR staff, or in the future operational analysts for PeDRA) are not considered processors, as they are working directly under the authority of the controller. For "processors" properly speaking, it may also make sense to refer back to Article 23 of the Regulation, on the contract requirements (the last sentence of 8(e) of the Draft goes a bit in this direction).
- Point (i) of Article 8 would cover things like instructions to staff on how to handle personal data, right (such as case manuals, handbooks, etc)? Maybe add something on consultation of the DPO when drawing up such rules here unless covered elsewhere (such rules would be linked to specific processing operations, so you would presumably see them when you're notified under Article 25 of the Regulation).
- On Article 9, just a small remark on point (3)(c) and "technical possibilities of Frontex":

access needs to be given in a form that enables the data subject to understand what is stored about him/her and what is happening with the data; there is a certain margin of manoeuvre here, but the usefulness for the data subject is what matters (this could e.g. mean electronic copies for a blind data subject so a braille reader can be used, or interpretation of medical data). For point (4), a practical thing: it could be helpful to explain a bit more the documentation requirements under Article 20(3) to (5) - I've dealt with some cases where controllers simply repeated the criteria in 20(1) as their justification for restricting DS rights; there needs to be more substantive documentation than that, for example a motivated decision.

- A small question for my understanding on Article 10(5): who would be a "non-individual complainant"? The Staff Committee raising a general data protection matter without relation to a specific case? Or would this target complaints under Article 33, as opposed to 32(2), of the Regulation?
- Article 11: As mentioned in my first mail, general rules (e.g. how to file access requests, cooperation between "controller in practice" and DPO) would appear to be sufficiently covered by these "general" implementing rules; in practice, there will indeed need to be instructions to staff for the processing of personal data in specific processing operations (such as PeDRA), but these rules would be something different, and not implementing rules like under Article 24(8).

Again, all of this is without prejudice to a formal consultation to follow,

I hope this was helpful,

Best regards,

■

From: ■
Sent: 24 November 2014 16:58
To: ■
Cc: ■
Subject: 2014-0978 PeDRA business case draft general Implementing Rules

Dear ■

Thank you for your response.

Let me maybe inform you firstly that, according to the very recent internal decisions in Frontex, there will be a separate Management Board (MB) decision on general Implementing Rules and a separate one covering the processing of personal data for the operational purposes (as foreseen in Art. 11b and 11c of the Frontex Regulation as amended in 2011).

As a result of that important internal decision, the first draft MB-Decision is actually not anymore PeDRA-project related.

While the second draft MB decision (the "operational one") is still under elaboration, the first one (the "administrative one") is almost ready. I attach it therefore for your first look and brief assessment before I submit (very soon) the final version. Actually, only the highlighted draft provisions may change slightly as a result of our Frontex-internal discussion. But you are of course invited to express your first impressions covering both highlighted and non-highlighted parts.

Looking forward to our future collaboration,

■

[Redacted]

[Redacted]

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From: [Redacted]
Sent: 27 October 2014 17:27
To: [Redacted]
Cc: [Redacted]
Subject: [2014-0978] PeDRA business case [was: RE: our phone talk]

Dear [Redacted]

Thank you for your message - we've registered it as an Article 46(d) consultation, which my colleague [Redacted] and I will deal with. The case number is 2014-0978. We'll go through the documentation and come back to you. Please keep us updated on the implementing rules as well.

Best regards,

[Redacted]



[Redacted]
Legal Officer

[Redacted]



[Redacted]

[Redacted]

European Data Protection Supervisor

Postal address: Rue Wiertz 60, B-1047 Brussels

Office address: Rue Montoyer 30, B-1040 Brussels

 [@EU_EDPS](https://twitter.com/EU_EDPS)

 www.edps.europa.eu

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From: [Redacted]
Sent: 21 October 2014 17:16

To: [REDACTED]
Subject: our phone talk

Dear [REDACTED]

Following our recent short phone conversation, please find below some basic info about the planned processing of personal data, which may help you or your experts better understand the future formal Notification for prior checking:

- After the recent amendment of the Frontex founding Regulation, we did receive a legal basis to process “operational” personal data (personal data of persons suspected by the Member States of being involved in cross-border crime). I attach that legal basis (Art. 11c) for you to know. The full Frontex Regulation (non-consolidated version unfortunately) is of course available on our website. Unfortunately Art. 11c contains not the best possible wording but the MS decided on this text and now we have to apply that partially unclear wording.
- Since the future processing of personal data of suspected persons is a serious thing, we started preparatory works many months ago. Finally, on 2 September 2014 the Directorate Board of Frontex approved a Project Initiation Document for a project entitled: Processing of Personal Data for Risk Analysis (PeDRA). The activities of this project are based on a Business Case developed around Article 11c (Processing of personal data collected during joint operations, pilot projects and rapid interventions). A draft outline for the project was presented to Ute, Owe and Andy during their inspection visit to Frontex in May of this year. A need to prepare/adopt following documents has been identified by us:
 - o Notification for prior checking
 - o draft Working Agreement with Europol reg. transmission of personal data to them to be approved by EDPS according to Art. 13 (2) of the Frontex Regulation.
 - o draft Frontex internal Implementing Rules (to be consulted with EDPS and to be adopted by our Management Board)
 - o Business Case document
 - o Draft Operational Plan to be agreed with the MS and
 - o Draft ICT document to describe technicalities of the data flow, formats, etc.
- I attach to this e-mail also the Business Case 2.0 document; please take into consideration that this is living document which will be updated at any occasion depending on the progress of the project.
- The Regulation mentions both processing of personal data for risk analyses purposes and for the transmission by Frontex to Europol. Quite often it will be however the same data packages.
- During the pilot stage, only few Member States will participate in the project. We aim however at one Notification to cover both the pilot and the main phase.

I think that at this stage it is ok to deliver you this information. In few days we will have the draft Implementing Rules ready and the draft Working Arrangement with Europol. They will be forwarded to you asap. We thank you therefore for the possibility of early consultation and we are ready to answer additional questions by phone, Video Conference or a visit. I am sure there will be a lot of exchanges of questions and information on this matter; moreover, the EU Policy Makers have recently signalled the importance of making full use of the possibilities offered by the Frontex Regulation and bringing the our performance to a new level in order to be more effective in the fight against cross-border crime particularly the human smuggling across the Mediterranean Sea.

Therefore, we are under the time pressure on one hand, but on another hand we would like to prepare PeDRA fully in line with your future recommendations and expectations.

Looking forward to receiving your first feedback soon
Will you be present during

[REDACTED]



[REDACTED]
[REDACTED]

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FRONTEX

www.frontex.europa.eu

Rondo ONZ 1, 00-124 Warsaw, Poland · Tel: [+48 22 205 9500](tel:+48222059500) · Fax: [+48 22 205 9501](tel:+48222059501)

CHANGE NOTICE: Effective 1 January 2015, Frontex's new address will be Plac Europejski 6, 00-844 Warsaw, Poland.

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From: [REDACTED]
Sent: 21 October 2014 16:00
To: [REDACTED]
Subject:

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