

EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

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Identification of African citizens in transit to the European Union: functioning of data collection and privacy

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There is a long-standing link between EU-supported data-collection projects in African states, and the EU's external border control (and that of member states), even where it might not be expected. The Migrant Information and Data Analysis System (MIDAS), a migration database partially funded by the EU and installed at land borders, can already interconnect with other databases which themselves can be accessed by other states and Interpol.¹ In the near future, MIDAS might also be included in EU plans to connect the West Africa Police Information System (WAPIS), a criminal database funded by Brussels to gather and share biometric information in 17 countries in West Africa.² The EU's border and coast guard agency, Frontex, intends to be able to analyse a part of this information.³

Frontex is able to ask national governments to match biometric data in one system to that held in another, in order to determine country of origin, relating directly to the agency's role in facilitating deportations from EU states.⁴ It is particularly worth noting that the European Commission and some member states very much wanted the agency to have the mandate to coordinate return operations from one non-EU state to another.⁵ These plans, though currently unfulfilled, demonstrate an intention that must not be ignored – to directly intervene in the immigration policy and actions of non-EU states in order to prevent people reaching Europe's own borders.

Designs for Frontex to access data held in EU and non-EU based information systems in order to facilitate return operations (the EU's preferred term to refer to "deportations"), linked also to the aim

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¹ <https://www.thenewhumanitarian.org/news-feature/2019/06/06/biometrics-new-frontier-eu-migration-policy-niger>

² https://ec.europa.eu/trustfundforafrica/region/sahel-lake-chad/regional/support-strengthening-police-information-systems-broader-west_en

³ <https://www.mediapart.fr/journal/international/280219/au-niger-1-ue-mise-sur-la-police-locale-pour-traquer-les-migrants?onglet=full>

⁴ 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 [2019 Regulation], article 48(1)(a)(ii), (3)

⁵ <https://data.consilium.europa.eu/doc/document/ST-13329-2019-ADD-2-REV-1/en/pdf>

of preventing people from reaching the EU's external borders in the first place, engage the principle of 'purpose limitation'. A core principle of data protection law, this outlines that personal data can be collected for a specific legitimate purpose, and may only be further processed in a manner compatible with that purpose.⁶ Throughout this piece, the capability of Frontex to access and process personal data will be considered alongside other expressions of EU interest in the use of non-Europeans' data. The focus of this piece is on EU collective actions, particularly via Frontex, but it is important to bear in mind bilateral agreements and trade with individual member states, which also affect the functioning of data collection and privacy. Additionally, other relevant organisations that receive EU funding are not considered in this piece.

Data collection and privacy

The 2019 Frontex Regulation covers the agency's mandate to collect operational data, its obligation to exchange information with union bodies, the establishment of a communication network to provide analytical tools and exchange information, and its role in the facilitation of information exchange systems, including with non-EU countries.⁷ Several provisions in the Regulation assert that activities must be carried out with full respect for fundamental rights, "in particular...the right to the protection of personal data and non-discrimination".⁸ Despite this proviso, according to this regulation the agency can legitimately process personal data for the performance of its tasks. These tasks cover a wide array including coordination of joint operations, pilot projects, return and pre-return activities (including support of non-EU countries for return activities), facilitating information exchanges, risk analysis, the operation of EUROSUR, and administrative tasks.⁹

Further articles dealing with the processing and sharing of personal data in the context of return operations include the operation of an integrated return management platform to link the return management systems of all EU-member states. This includes the operation and maintenance of a platform for the exchange of data and information to facilitate return operations, which should enable the automated transfer of statistical data. Agency staff are permitted to consult union and national databases in order to verify individuals' nationality and identity. When approving or refusing entry, staff will introduce relevant data into the Visa Information System, and will register fingerprints into the Eurodac system at the external borders of the EU. Agency staff will liaise with non-EU countries to identify and obtain travel documents for people subject to deportation.

The agency is bound to abide by Union law on data protection, but this body of legislation permits the regulation to include various exemptions to individuals' rights. The Agency may, in accordance with Article 25 of Regulation on the Protection of Natural Persons with Regard to the Processing of Personal Data by the Union Institutions, Bodies, Offices and Agencies,¹⁰ adopt internal rules restricting the application of Articles relating to individuals' rights to access, amend, limit and correct processing of personal data in that Regulation.¹¹ In particular, the Agency may, for the performance

⁶ Regulation (EU) 2016/679 (General Data Protection Regulation), article 5(1)(b)

⁷ See 2019 Regulation (n4), in particular article 10 on tasks, Section 11 on cooperation, and Section 12 on the processing of personal data by the European Border and Coast Guard

⁸ 2019 Regulation article 81(2)

⁹ 2019 Regulation, article 10

¹⁰ Regulation (EU) 2018/1725

¹¹ See also: article 49 of Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. Article 38 of the Directive on the protection of natural persons with regard to the

of its tasks in the area of return, provide for internal rules restricting the application of those provisions on a case-by-case basis as long as the application of those provisions would risk jeopardising return procedures.¹²

The European Data Protection Supervisor has criticized this Regulation based on its lack of clarity and limits over purpose and responsibility for collecting personal data.¹³

Frontex and data collection

The European Commission's interest, and the interest of some member states, in Frontex as a tool to intervene well outside Europe's borders, is evident from its original proposed text for the recasting of Frontex's regulation in 2019, as discussed above. Although the final draft, which entered into force in December 2019, demonstrates some compromise on this point, the agency still has a number of means to gather and influence information and data collection beyond the European external border.

Africa Frontex Intelligence Community

The Africa Frontex Intelligence Community (AFIC) was launched in 2010 as a framework for intelligence sharing about migrant smuggling and border security threats, based on cooperation with "countries along the main smuggling routes".¹⁴ It is modelled on the Frontex Risk Analysis Network (FRAN) and two already-established regional risk analysis networks: the Western Balkans Risk Analysis Network (WB-RAN) and the Eastern Partnership (formerly called Eastern Borders) Risk Analysis Network (EaP-RAN).

AFIC's core purpose is to create a "pre-frontier" intelligence picture by monitoring migratory movements. This "pre-frontier intelligence" is intended to give greater opportunities for pre-emptive border control and extraterritorial migration management. AFIC received a €4 million grant from the Instrument Contributing to Stability and Peace (under its article 5, managed by the Directorate General for International Cooperation and Development – DG DEVCO)¹⁵ to cover:

- training activities;
- setting up integrated border management systems;
- improving collection, sharing and analysis of data.

The outputs of the Community include the publication of joint reports, which include policy recommendations.¹⁶

processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences, also relates directly to derogation for specific situations.

¹² 2019 Regulation article 86 (2)

¹³ Formal comments of the EDPS on the Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action 98/700/JHA, Regulation (EU) 1052/2013 of the European Parliament and of the Council and Regulation (EU) 2016/1624 of the European Parliament and of the Council, https://edps.europa.eu/sites/edp/files/publication/18-11-30_comments_proposal_regulation_european_border_coast_guard_en.pdf

¹⁴ https://frontex.europa.eu/assets/Publications/Risk_Analysis/AFIC/AFIC_2017.pdf

¹⁵ For more information, see: https://ec.europa.eu/fpi/what-we-do/instrument-contributing-stability-and-peace-preventing-conflict-around-world_en

¹⁶ Available retrospectively on Frontex website: <https://frontex.europa.eu/publications/?pq=AFIC&year=&category=>

Risk Analysis Cells

Risk Analysis Cells are staffed by Frontex-trained local analysts to collect and analyse strategic data on cross-border crime, and to “support relevant authorities in border management”.¹⁷ Information is collected on cross-border security threats including illegal border crossings, document fraud, and human trafficking. Analysis produced at these sites is shared with national and regional authorities, and also with Frontex, in order for the agency to produce analysis and policy recommendations. The cells can access information from the MIDAS and PISCES systems, but stress that “no personal data collected in analysis”.¹⁸ The cells were first set up after the 2015 migratory increase to Europe, with the first located in Niamey, Niger.

Working Arrangements

Frontex can also form bilateral Working Arrangements with states concerning agency activities and powers on their territory.¹⁹ Under its new regulation, it will be able to carry out executive tasks on the territory of states that do not share a border with the EU, subject to Status Agreements between that state and the EU.²⁰ Under such arrangements, coordination points can be established at border crossings between two non-EU states where Frontex has a Working Arrangement, where Frontex “observers” can facilitate coordination and information exchange, particularly in relation to “early detection of irregular migration trends”.²¹

Research

Aside from these overt forays into data collection, the research interests of Frontex are telling when it comes to issues of personal data and privacy. The agency’s interest in social media is particularly intriguing; especially as EU agencies have set a precedent of overstressing their mandate in terms of data collected on non-EU citizens. In the past, the European Asylum Support Office (EASO) has monitored social media through group and page searches, as well as keyword lists, looking for escape routes from conflict zones, offers for smuggling across borders, exchange of documents, and the broadly termed “mood among the refugees”.²² EASO reported its findings to EU member states and bodies, UNHCR and Interpol, and was called to provide information on smugglers gathered through this research to Europol in 2018.²³ The fact that this style of monitoring picked out certain key words (in specific individual languages) raised concerns that the research could directly cause profiling or misconceptions of particular groups, itself a discriminatory practice.²⁴

Confirming suspicions that this gathering of data shared by individuals was overstepping boundaries, the EU Data Protection Commissioner advised EASO that they had no legal mandate for this data collection, and the Data Protection Authority ordered its suspension.²⁵ A further problem identified

¹⁷ <https://frontex.europa.eu/media-centre/news-release/frontex-opens-first-risk-analysis-cell-in-niger-HQIoKi>

¹⁸ <https://www.spiegel.de/politik/frontex-sammelt-in-afrika-daten-von-migranten-a-2a5011f7-8d60-428c-8477-06176367ca9d>

¹⁹ 2019 Regulation Article 73 (4)

²⁰ 2019 Regulation article 73

²¹ See, for example, working arrangement with Nigeria:

https://frontex.europa.eu/assets/Key_Documents/Working_Arrangements/WA_with_Nigeria.pdf

²² <https://netzpolitik.org/2019/eu-asylbehoerde-beschattete-fluechtende-in-sozialen-medien/>

²³ <https://netzpolitik.org/2018/zerschlagung-der-online-kommunikation-europol-bekaempft-fluchthilfe-im-internet/>

²⁴ https://edps.europa.eu/sites/edp/files/publication/19-11-12_reply_easo_ssm_final_reply_en.pdf

²⁵ https://edps.europa.eu/sites/edp/files/publication/19-11-12_reply_easo_ssm_final_reply_en.pdf

with EASO's research concerned not the ethics, but the security of the project: several breaches of personal data occurred, including email addresses and one phone number found in reports submitted by EASO to authorities.²⁶

Frontex has its own a history of interest in social media use by non-EU nationals. In September 2019, the agency published a call to tender, cancelled before the call closed, for a contract for the "provision of social media analysis services concerning irregular migration trends and forecasts".²⁷ The aim of services to be provided by the successful bid was to contribute to a "pre-warning mechanism" through analysis of the social media activities of people on the move. The budget allocated to this project over four years was to be €400,000.

Frontex cancelled the call to tender following enquiries made by *Privacy International* about the legality of such actions based on Regulation 2018/1725,²⁸ though the agency claimed that the cancellation was due to "the upcoming entry into force of the European Border and Coast Guard Regulation" (the text of which had been publicly available months before the publication of the call to tender).²⁹

Such activity could hinder access to the EU and therefore to the right to seek asylum, as well as the infringement on the right to Freedom of Expression. For people on the move, social media can be a very important tool for everything from controlling the narrative of people's own journeys and experiences, to finding legal support. The likely infringement on Freedom of Expression could have massive consequences.

Regarding the security of personal data collected, when asked how Frontex complies with its data protection obligations, the agency's press office has remarked:

When it comes to data breaches, for those including personal data, Frontex follows the provisions of Article 34 of the Data Protection Regulation, as well as the EDPS guidelines issued on how to handle data breaches...Consequently, Frontex needs to report to the EDPS security incidents that breaks confidentiality, availability or integrity of personal data.

Statewatch plans to follow up on how compliance works in practice.

The growing "function" of social media

Aside from Frontex's own designs to utilise social media data from outside the EU, the Union pursues information from this source through its own dedicated research budget, "Horizon 2020". This budget funds research into topics such as health and environment, as well as security. The total funding for Horizon 2020 is €77bn, of which security research receives €1.7bn.³⁰ One of four primary aims of this stream is to improve border security including external security policies. The Border and

²⁶ https://edps.europa.eu/sites/edp/files/publication/19-11-12_reply_easo_ssm_final_reply_en.pdf

²⁷ <https://etendering.ted.europa.eu/cft/cft-display.html?cftId=5471>

²⁸ Regulation (EU) 2018/1725 of the European Parliament and of 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 (Text with EEA relevance.)

²⁹ <https://privacyinternational.org/advocacy/3289/privacywins-eu-border-guards-cancel-plans-spy-social-media-now>

³⁰ https://ec.europa.eu/info/news/commission-invest-eu-11-billion-new-solutions-societal-challenges-and-drive-innovation-led-sustainable-growth-2019-jul-02_en

External Security arm of contributes to the development of European Border Surveillance System – EUROSUR – operated by Frontex.

Two research calls are of critical interest. In 2019, Horizon 2020 invited research proposals for the following topics, inter alia:

- MIRROR (Migration-Related Risks caused by misconceptions of Opportunities and Requirement).
- PERCEPTION (Understanding the Impact of Novel Technologies, Social Media and Perceptions in Countries Abroad on Migration Flows and the Security of the EU & Provide Validated Counter Approaches, Tools and Practices)

MIRROR seeks to define “misperceptions and targeted misinformation campaigns [that] can lead to security threats”.³¹ It is coordinated by the Gottfried Wilhelm Leibniz Universitaet Hannover, Germany, and has a budget of € 5, 181, 997, 50. The project monitors media, especially social media, to find “misperceptions and targeted misinformation campaigns” about Europe or travelling to Europe, to inform border agencies and develop their abilities to counteract “such misperceptions and the security threats resulting from them”. It includes the sub-topic of detecting security threats that may result from certain perceptions of the EU.

“PERCEPTION”, coordinated by SYNNO GmbH, Austria with a budget of € 4 994 652,50, focuses on non-Europeans’ perception of the EU as a so-called “pull factor”, and aims to identify misperceptions of the EU through research on social media and new communication networks, developing policy recommendations and action plans based on this. This project includes the sub-topic of “developing indicators of threats at the EU external borders on the basis of sound risk and vulnerability assessment methodologies” of “external threats”, a research project which “could also further enrich the vulnerability assessment tasks as defined in the EBCG Regulation”.³²

Conclusions and considerations

Under the most recent iteration of its governing regulation, Frontex has increased capacity to process personal data, and can adopt internal rules restricting individuals’ data protection rights. The agency’s growing role in the collection of data, as well as accessing information held in databases run by the EU and by African states and regional authorities, links overtly to the agency’s role in deporting individuals from the EU. Although no longer worded in the regulation, it is still possible to gauge the agency’s designs to use information on African citizens moving towards the EU’s external borders in order to prevent their possible arrival. In official language, this is called a “pre-frontier intelligence picture”, but this underlying aim can also be detected in Frontex’s research interests, as well as the research interests of the EU more broadly. The agency has undergone three major changes to its founding regulation, each one increasing the remit of its tasks and powers, though its political and legal accountability does not seem to have increased proportionally.³³

³¹ <https://cordis.europa.eu/project/id/832921>

³² <https://cordis.europa.eu/project/id/833870>

³³ See, for example, work by Mariana Gkliati, Dr David Fernandez-Rojo

Frontex's current forays into data collection and analysis risk threatening African citizens' rights under data protection law, to freedom of expression, and exercise of the right to seek and enjoy asylum. The established pattern of over-reaching the limits of the agency's mandate, followed by the expansion of this mandate in a recast regulation, demonstrates the need for continued vigilance of the agency's role in the identification of individuals in transit to the European Union.