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Dear Mr Fikatas,

I am writing to you in the context of consultation 2008-0331. Please find below the answer to your questions as well as some other aspects that we have examined..

1) Consultation

Your consultation addressed a very concrete question about special categories of data, namely whether any exemption to Article 10.1 of the Regulation could be applied to the case described, in order to overcome the need to receive permission from Member States authorities to conduct a processing activity.

We have requested you some further information. You sent us the Framework Contract (FWC) and the Specific Contract (SC 01) under which the personal data collection is performed (plus Annex A and Annex A1). You have also sent the "Recontact Agreement Sheet", where some information is provided to the data subject.

2) Facts

FRA (Fundamental Rights Agency) has engaged an external contractor to create a pool of interested people who would like to participate in surveys related to fundamental rights. One of the subjects of the contract is to collect survey data in EU Member States on discrimination and criminal victimisation, as experienced by selected immigrant and other minority groups (such as established national or ethnic minority groups), which can inform the development of evidence-based policies at national and EU level to address differences in reported discrimination and victimisation as revealed through the survey.

This will involve the processing of special categories of data.

3) Legal analysis

In what follows we will not only concentrate on the question you submitted, but also on some other contextual aspects that are relevant for compliance with Regulation 45/2001.

- Applicable law

The processing activity will be conducted by a data processor ([...], established in Belgium) on behalf of FRA, which is the data controller. FRA is a European body and the processing is carried out in the exercise of an activity which falls within the scope of Community law (Article 3.2 of the Regulation). Therefore, the processing activity is governed by Regulation 45/2001.

This is reflected in Clause 1.10.1 of the Framework Services Contract FRA2-2007-3200-T04.

Since the applicable law to the processing activity under analysis is Regulation 45/2001, there is no need to request permission from Member States authorities.

Notwithstanding, it has to be noted that, by *renvoie* of Article 23.2(b) of the Regulation (in particular its reference to Article 17.3 of Directive 95/46/EC when it says "...as defined by the law of the Member State in which the processor is established..."), the applicable law to the obligations with regard to confidentiality and security is the Belgian law (place of establishment of the processor, where he is subject to the national law transposing Directive 95/46/EC). Thus, the EDPS is of the opinion that this has to be reflected in the contract (see *infra*).

- Lawfulness of processing

Article 5(a) stipulates that personal data may be processed only if "processing is necessary for the 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...". In the present case Council Regulation (EC) No 168/2007 establishing the European Union Agency for Fundamental Rights establishes in paragraph 12 of its preamble: "The [FRA] Agency should collect objective, reliable and comparable information on the development of the situation of fundamental rights, analyse this information in terms of the causes of disrespect, consequences and effects and examine examples of good practice in dealing with these matters".

The processing activity mentioned is necessary to perform this task, which is carried out in the public interest.

- Special categories of data

The processing activity described will involve special categories of data (mainly data revealing racial or ethnic origin), which, in principle, is prohibited. Nevertheless, the data will be collected only after having obtained the consent of the data subject.

Considering the sensitivity of the data, special attention should be paid to the nature of the consent as defined in Article 2(h) of the Regulation.

- Information

The "Recontact Agreement Sheet" received contains some information to the data subject. However, not all the requisites foreseen in Article 11 of the Regulation are present. In particular points (c), (d) and (f)(i) and (iii) are missing. It is therefore recommended to elaborate a privacy statement that strictly complies with Article 11 of the Regulation. This is also relevant to comply with the obligation to gather an "informed" consent.

- Processing of personal data on behalf of controllers

Clause 1.10.2 of the Framework Services Contract FRA2-2007-3200-T04 complies, in principle, with Article 23.2 of the Regulation. However, the second paragraph of the Clause says "Appropriate technical and organisational measures will be taken by the Contractor for the security of the processing in accordance with Article 22 of Regulation (EC) 45/2001...". As explained above, since the processor is established in a Member State, the national data protection law is applicable to the confidentiality and security measures. Hence, this has to be reflected in the contract.

Please inform the EDPS on the implementation of the recommendations given above, no later than three months upon reception of the present letter.

Yours sincerely,

(signed)

Joaquín BAYO DELGADO