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Dear Ms Kaarlop,

Thank you very much for your consultation under Article 28(1) of Regulation (EC) No 45/2001.

Please find below the comments of the European Data Protection Supervisor (EDPS) on the draft implementing rules of the European Training Foundation (ETF) received on 22 October 2009.

The EDPS notes the ETF approach not to limit the implementing rules to the tasks, duties and powers of the Data Protection Officer, as foreseen in Article 24(8) of Regulation (EC) No 45/2001 (the Regulation), but to develop them to cover also the role of controllers and the rights of data subjects.

In order to complete the selected approach, the EDPS suggests the following modifications:

1) Article 2: to ensure better consistency with the Regulation, the EDPS suggests modifying the definitions of 'data protection' and 'data subject' provided in the draft decision as follows:

- 'data protection': *means safeguarding the fundamental rights and freedoms of individuals and in particular their right to privacy in relation to the processing of personal data*. This wording takes better account of the purposes of the Regulation, as outlined in recital 13 of the Regulation.
- 'data subject' *is a natural person whose personal data are processed by Community institutions or bodies*. This wording reflects recital 7 of the Regulation which defines the persons to be protected under the Regulation.

2) Article 3.2 should clearly specify the number of times that a DPO's mandate is renewable. It should further explicitly mention the requirement for the appointing authority to register the newly appointed DPO with the European Data Protection Supervisor, as set forth in Article 24(5) of the Regulation.

- 3) Article 3.6: It should be clearly specified at the end of the sentence that the staff providing support to the DPO "*shall be bound by the same duty of professional secrecy as the DPO as regards any confidential documents or information which they obtain in the course of their duties*" (cf. Point 5 of Annex of Regulation (EC) No 45/2001).
- 4) It should be made clear in Article 3 relating to the DPO's status - rather than in Article 4 which relates to the DPO's tasks - that "*the DPO shall ensure in an independent manner the internal application of the provisions of the Regulation*", and that "*he or she may not receive any instructions with respect to the performance of his or her duties*" (cf. Article 24.1.c) and Article 24.7 of Regulation (EC) No 45/2001).
- 5) Articles 4(a) and 4(d): it should be explicitly stated that the Staff Committee can also consult the DPO (cf. Point 2 of the Annex of Regulation (EC) No 45/2001). Moreover, it should be specified that the DPO can be consulted without going through the official channels (cf. Point 2 of Annex of Regulation (EC) No 45/2001).
- 6) Article 4(k): this Article should be moved under Article 5 of the draft decision as it deals with the DPO's powers to obtain access to data.
- 7) Article 5(d): this Article should be removed as it deals with "the other tasks of the DPO specified in the Annex to Regulation (EC) No 45/2001", which should be dealt with in Article 4 "DPO's tasks and duties". Moreover, this Article is not precise enough as it does not specify the specific tasks that the DPO could carry out. To the extent that those additional tasks are not already mentioned in Article 4, the EDPS recommends adding provisions in Article 4 to describe with relevant details the tasks foreseen in the Annex of the Regulation that would also be incumbent upon the DPO.
- 8) Article 5: the EDPS notes that the implementing rules could mention additional powers of the DPO, such as the possibility to report back to the controller, to investigate matters and occurrences directly relating to his or her tasks, or to refer the matter to the EDPS.
- 9) Article 6: this Article should explicitly refer to the obligation of controllers to notify to the DPO all data processing operations, in accordance with Article 25 of the Regulation. Further, it could be useful to provide for a transitional period (e.g. maximum half a year from the entry into force of the Decision) for controllers to comply with the Regulation concerning their duty to notify the already existing processing operations.
- 10) Article 8: the EDPS recommends that the register is kept in electronic form. Indeed, the register referred to in Article 26 of the Regulation is also a tool to ensure transparency as regards the processing operations in place in the Community Agency.
- 11) Article 9.2: the EDPS recommends making clear that the consultation of the DPO is not mandatory by adding the wording in italics at the end of Article 9.2: "*ETF's staff members may consult the DPO before lodging a complaint with the EDPS, without prejudice to their right to lodge a complaint directly to the EDPS pursuant to Article 33 of Regulation (EC) No 45/2001.*"
- 12) Finally, a few references made in the draft decision should be corrected. In Article 11.1, the reference to a request for investigation should be corrected as this is foreseen in Article 4(j) of the draft decision (and not in Article 4(b)). The reference to Regulation (EC) No 45/2001 in the preamble of the draft implementing rules, second paragraph, should also be corrected.

In terms of good practices, the EDPS particularly welcomes Article 4(1) of the draft decision which provides that the DPO shall submit an annual work programme and an annual report on his activities to the ETF Director and to the EDPS, and that his or her activities shall be further reported in the Foundation's annual activity reports. The report of the DPO's activities to the Director and to EDPS will help ensure good cooperation; furthermore, the annual report is a good opportunity to raise awareness on data protection aspects among ETF staff.

Furthermore, the EDPS would like to encourage ETF to adopt certain good practices developed by other EU institutions and bodies. For instance, in some cases links between the DPO and the institution's IT bodies have been created. This provision is an effective supplement to the DPO's sources of information.

Finally, the EDPS also welcomes the fact that in some institutions the documentation stored by the controller (and transmitted afterwards to the DPO) includes an anonymous inventory of the written requests from data subjects for the exercise of a right referred to in Articles 16 and 18 of the Regulation. In the case of an EU body like ETF, the storage of requests under Articles 13, 14 and 15 could be added to those of Articles 16 and 18 as the storage of such requests would probably not involve a disproportionate amount of effort. This documentation could then be used to conduct an analysis to measure compliance with the Regulation and allow the DPO to identify potential weaknesses of the systems.

We remain at your disposal for any further details you might want to discuss and would be grateful if you could provide us with the final version approved by ETF.

Sincerely yours,

(signed)

Giovanni BUTTARELLI