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GB/XK/ktl D(2010)327 C 2009-0838

**Subject: Prior-checking notification, case 2009-0838**

Dear Mr Storti,

We have analysed the documents you have provided the EDPS concerning the notification for prior-checking under Article 27(2) of Regulation 45/2001 on the performance appraisal of EMCDDA staff. As was indicated in the DPO's letter, the new procedure replaces the existing procedure on staff evaluations/assessments which was the subject of a previous prior-check by the EDPS<sup>1</sup>. The EDPS shall therefore concentrate on any new elements of the procedure which have an impact on the data protection principles as defined in Regulation 45/2001 and on the way the EDPS recommendations have been implemented by the agency in the context of the new procedure.

**New elements of the procedure**

The EDPS notes that the changes introduced by the EMCDDA regarding the staff appraisal procedure result mainly from the adoption of a decision on staff appraisal by the Management Board (MB) and the adoption of new appraisal reports.

**Lawfulness of the processing operation**

The EDPS welcomes the adoption of the MB's decision on staff appraisal. Although the legal basis of an appraisal exercise can be found in the Staff Regulations, these do not anticipate the detailed procedure and specific parties involved within the agency. The internal decision therefore reinforces the lawfulness of the processing which under Article 5(a) of Regulation

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<sup>1</sup> The opinion was issued on 11 January 2008 giving to the agency some recommendations, Case 2007-334.

45/2001 requires a specific legal basis and that the processing should be necessary for the performance of a task carried out in the public interest.

### **Data quality**

The EDPS has thoroughly analysed the data processed through the new appraisal reports and considers them all necessary for the evaluation of the staff members of the agency. They are adequate and not excessive for the purpose for which they are collected in conformity with Article 4(1)(c) of the Regulation.

### **EDPS recommendations considered in the new procedure**

Furthermore, the EDPS notes that in its new appraisal procedure the EMCDDA has taken into consideration the four recommendations given in his opinion of 11 January 2008. On the basis of the information provided to the EDPS, the issue of data retention and the adoption of adequate measures regarding the data kept in the data subject's personal file seem to be in conformity with the EDPS recommendations. Nevertheless, we would like to highlight a few elements regarding the other two recommendations related to the principle of transfer and the privacy statement.

### **Transfer of data**

The privacy statement indicates that "data will be processed in strict confidentiality and exclusively for the purpose for which they were submitted".

The EDPS clarifies that in accordance with Articles 11 and 12 of Regulation 45/2001, a privacy statement should aim to inform the data subject about all their rights and other necessary information relating to the data processing, so that full transparency and fair processing is ensured in respect of the data subject. Articles 11 and 12 are not addressed to third party recipients of the processing, but instead refer to the information to be given to the data subject. Consequently, the above statement is indeed important in the context of the data subject's information regarding the processing of their data, but is not useful to third parties. The latter should be informed directly and explicitly as to their obligations regarding the processing. The EDPS therefore recommends that a different note should be addressed to third party recipients which should explicitly indicate that they should process data in confidence and only for the purpose for which they were transmitted to them (in accordance with Article 7 of Regulation 45/2001).

### **Information to the data subject**

In accordance with Articles 11 and 12, the agency prepared a privacy statement regarding the staff appraisal. The EDPS notes that the privacy statement indicates all the elements listed in the said Articles. Nevertheless, it is not clear from the information provided to us **how** the privacy statement is communicated to the data subject and **at what time**.

#### *Ways to provide the privacy statement*

Taking into consideration the purpose of the privacy statement as explained above, the EDPS insists that all adequate means are used to ensure that the data subject receives the information. It should for instance be easily accessible on the intranet of the agency or attached to the staff appraisal reports sent to the employee concerned.

#### *Timing of communicating the privacy statement*

Under the new staff appraisal procedure, data are collected by third parties (reporting officer, head of units, director, appeal assessor, etc.) and a disclosure of data to a third party is also envisaged. As per Article 12 of the Regulation, the controller should therefore at the time of

recording the data, or no later than the time when the data are first disclosed to a third party, provide the data subject with the information listed in the provision.

Consequently, the EDPS emphasises that **adequate ways** should be found to ensure that the privacy statement can be easily accessed by the data subject **before** the appraisal exercise begins. Moreover, the privacy statement should include a link to the new MB's decision on appraisals, so that data subjects can easily obtain information about the procedure.

To facilitate our follow-up, it would be appreciated if you could provide the EDPS with all relevant documents which prove that our recommendations have been implemented within 3 months of the date of this letter.

Kind regards,

(signed)

Giovanni BUTTARELLI

Cc: Ms Cécile Martel, Data Protection Officer, EMCDDA