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Brussels, 23 July 2012  
GB/XK/mk D(2012)1533 C 2012-0361  
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Dear Ms Fierro Sedano,

Thank you for your consultation of 20 April 2012 under Article 27(3) of Regulation 45/2001 ("the Regulation") regarding an exit survey carried out by the EACI which is addressed to the staff members leaving the agency. The issue you have raised relates as to whether the processing operation in question should be subject to prior-checking by the EDPS under Article 27(2)(d) of the Regulation.

According to the facts, described in your e-mail of 20 April 2012 and further clarifications received on 1 June 2012, the purpose of the exit survey is to collect and assess information on the agency's working environment in order to identify areas for improvement.

The exit survey is part of an internal global policy of improving the working conditions of the persons employed by the EACI. As you have indicated, the survey is carried out by an "internal processor", who is the Human Resources Officer of the EACI; he is in charge of collecting and processing the responses of the survey under the supervision of the Head of Unit. Furthermore, as you have pointed out, the processor is bound by confidentiality clauses, he should extract data only once a year and should "in principle" not disclose the information related to the survey to the hierarchy of the agency.

As to the lawfulness of the processing operation, you have referred to Article 5(a) and 5(d) of the Regulation and you have stated that the survey is not mandatory.

According to the information provided, the staff members may participate in the survey anonymously and they are requested to provide the following data: the function group, the unit, the gender, the age range and the seniority of the staff member in the agency.

The questions asked in the survey concern the

- (1) factors that have influenced the decision to leave the agency;
- (2) work experience at the EACI, indicating the most motivating and the most difficult one;

- (3) appraisal of the hierarchy (whether it was available or not, whether it communicated with the staff members, whether it encouraged professional or personal development etc);
- (4) assessment of the unit;
- (5) assessment of the agency, including rating the agency and whether there are suggestions for improvement.

You have pointed out that the agency has approximately 150 staff members. You have also expressed your fear that a staff member might not be completely free to give their opinion, as for instance question (3) could have detrimental consequences on them at a later stage, in case they need a reference letter from their former employer.

Finally, you have stated that the processing operation has been notified to you on the basis of Article 25 of the Regulation.

According to the information provided, although the survey is supposedly anonymous, the small size of the agency and the data collected may lead to the indirect identification of a staff member. It follows that the exit survey may involve the processing of personal data relating to identifiable natural persons within the meaning of Article 2 of the Regulation.

In the present case, on the basis of the information you have provided us, the purpose of the exit survey is to improve the working conditions of the data subjects employed by the EACI based on the personal views and assessment of staff members leaving the agency. The EDPS considers that the purpose of the processing is not to exclude any of the data subjects from a right, benefit or contract and hence the processing operation does not, in principle, present a specific risk to the rights and freedoms of data subjects under Article 27(2) (d) of the Regulation. Consequently, there is no need for the processing to be subject to a prior-checking analysis by the EDPS.

Nevertheless, the EDPS highlights the following issues to be taken into consideration by the EACI in order to ensure full conformity with the Regulation and makes recommendations where relevant:

#### **a) Lawfulness**

In your e-mail you have stated that the legal basis of the exit survey in question would be both Articles 5(a) and 5(d) of the Regulation.

Pursuant to Article 5 (a) of the Regulation, the processing operation in the present case can be lawful if it 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 ...*". According to recital 27 of the Regulation, the processing of personal data for the performance of a task carried out in the public interest includes "*the processing necessary for the management and functioning of those institutions and bodies*".

The processing of personal data (administrative data and personal views) of staff members leaving the EACI, carried out in the context of the exit survey, can be considered as useful information to the EACI in view of improving the working conditions within the agency for the remaining and future staff members. The exit survey is therefore considered as "necessary" for the performance of a task of the EACI carried out in the public interest, that is for the improvement of the working conditions of the persons employed by the EACI, in light of Article 5(a) and Recital 27 of the Regulation.

In the present case, the exit survey is not mandatory and you have made reference to Article 5(d) as a second legal basis. The EDPS highlights that Article 5(d) of the Regulation is considered as a questionable legal basis within the employment context<sup>1</sup>, because staff members might feel obliged to give their consent, by fear that their rights could be prejudiced by the EACI in case they refuse to participate to the survey. It follows that, in principle, a processing operation may not be lawful when it is exclusively based on consent. Therefore, in this case, the consent must be considered as a complementary legal basis to the processing provided that it is a true consent in terms of Article 2 (h) of the Regulation and the rights of the data subjects are not prejudiced.

## **b) Data quality**

According to Article 4(1)(c) of the Regulation, personal data must be, among other characteristics, "*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*".

The EDPS notes that staff members are requested to provide the following data in the context of the survey: the function group, the unit, the gender, the age range and the seniority of the staff member in the agency. The EDPS questions the necessity of these data in relation to the purpose for which they are collected and recommends that EACI assesses and evaluates their necessity accordingly.

## **c) EACI and the internal processor**

You have stated that the processor is an internal processor, the HR officer, which carries out the survey under the supervision of the Head of Unit, considered as a controller of the processing.

It is true that due to organisational reasons, the role of a "controller" may be "in practice" exercised by a specific person, namely the Head of Unit of EACI in the present case. It is however important to underline that from a legal perspective, EACI remains the controller and has the ultimate responsibility of the processing, within the meaning of Article 2(d) of the Regulation<sup>2</sup>. As to the issue of "processor", the EDPS considers that processors are to be understood as external actors and not internal parts of an agency. The Head of HR Unit of the EACI has delegated the collection and processing of the survey to a member of his team. The HR Officer cannot therefore be considered as a processor within the meaning of Article 23 of the Regulation. Consequently, the EDPS recommends that EACI modifies the above qualifications in the privacy statement.

As to the issues on confidentiality and disclosure of information, the EDPS considers that both Articles 22 and 7(3) of the Regulation are covered and respected by the confidentiality clauses.

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<sup>1</sup> See WP29 Opinion 15/2001 on the definition of consent, adopted on 13 July 2001 and WP29 Opinion 8/2001 on the processing of data in the employment context, adopted on 13 September 2001.

<sup>2</sup> See EDPS position of 20 May 2010 on the ERCEA's draft implementing rules, case 2010-0341.

In the light of the above, the EDPS concludes that the exit survey, as described in the facts, should not, in principle, be subject to prior-checking under Article 27(2) of the Regulation.

In order to ensure respect with the Regulation, the EACI should:

- evaluate the necessity of the data collected, as explained in point b), and
- clarify the issues on controller and processor in the privacy statement.

The EDPS invites you to implement the above recommendations and submit to us the relevant documents demonstrating compliance, within 2 months upon receipt of this letter. Should you have any inquiries, do not hesitate to contact us.

Best regards,

**(signed)**

Giovanni BUTTARELLI