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correspondence

Subject: Prior checking notification of the processing operations concerning the "EASA's Authorisation to engage in an outside activity or to carry out an assignment outside the Union" (Case 2012-1039)

Dear Mr Manuhutu,

I refer to the prior checking ex-post notification on the processing operations concerning the "Authorisation to engage in an outside activity or to carry out an assignment outside the Union" at the European Aviation Safety Agency ("EASA"), which you notified to the European Data Protection Supervisor ("EDPS") on 4 December 2012.

The notification concerns processing of personal data with regard to the management of authorisations of outside activities and assignments outside the Union by the staff of EASA. The data subjects are all temporary and contract agents working at EASA headquarters or abroad as representatives, officials (who are seconded in the interest of the service to the EASA), seconded national experts as well as staff on leave on personal grounds who wish to engage in an outside activity or assignment. It also covers former staff members for a period of 2 years after leaving EASA. The legal bases of the processing are mainly the relevant articles of the Staff Regulations and CEOS, as well as Decision N°2007/006/A of the Executive Director of EASA on Outside Activities and Assignments. The data processed are those provided by the staff member on its outside activities in a form attached to that Decision. Such declarations may include special categories of data such as on political opinions. The possible recipients comprise the data subject's section manager, Head of Department, Director, Head of Technical Training Department the Executive Director and staff members of the HR Administration & Services Section.

After an in-depth examination of the data processing operations as described in the notification and further information received from the DPO of the EASA, for the reasons described below, the EDPS considers that the data processing that occurs in the context of the EPPM is **not subject to prior checking** under Article 27 of the Regulation (EC) No 45/20011 (hereinafter "the Regulation").

In the notification the EASA indicated that the processing concerning the "Authorisation to engage in an outside activity or to carry out an assignment outside the Union" presents certain risks to the rights and freedoms of data subjects within the meaning of Article 27(2)(b) of the Regulation, i.e. that it would entail "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*".

However, the EDPS found in a number of cases on the assessment of outside activities of staff of institutions and agencies that such processing should not be subject to prior checking.¹ In particular the EDPS found that the evaluation in the framework of a staff member's outside activities focused on the "*nature of the outside activity*" itself and not on "*personal aspects related to the data subject*".² The processing thus arguably consists in an "*objective assessment of the activities in question, not the evaluation of staff*".³

Furthermore, it has to be kept in mind that the request for prior permission for outside activities for staff is also an obligation pursuant to the Staff Regulations (see Article 12b of the Staff Regulations for Officials, and Articles 11 and 81 CEOS for Temporary and Contract Staff). Failure to respect this obligation can result in disciplinary actions. However, disciplinary actions are subject to prior checking independently of the sort of violation.⁴ Therefore these disciplinary proceedings in case of failure to comply with the obligations of the Staff Regulations (including the obligations of staff with regard to outside activities) should have been/be prior checked independently in any case pursuant to Article 27.2.(a) of the Regulation.

The EDPS also analysed whether the processing operations could fall under other grounds listed in Article 27 and concludes that this is not the case. Therefore, there is no basis under Article 27 of the Regulation to subject the processing operations concerning the "Authorisation to engage in an outside activity or to carry out an assignment outside the Union" as notified by the EASA, to prior checking. However, if you believe that there are other factors justifying prior checking, we are of course prepared to review our position. Similarly, in the event of any modifications to this data processing, we would kindly ask you to reassess the need for submitting this processing to the EDPS for prior checking.

Without prejudice to the above considerations, the EDPS would like to give some recommendations regarding the processing of personal data in the framework of EASA's authorisations to engage in an outside activity or to carry out an assignment outside the Union:

¹ See also Case 2012-0005 Ombudsman, EDPS Letter of 12 January 2012; Case 2008-0685 European Parliament, EDPS Letter of 12 February 2009; Case 2007-0417 EMEA, EDPS Letter of 16 November 2007.

² Case 2008-0685 European Parliament, EDPS Letter of 12 February 2009.

³ Case 2007-0417 EMEA, EDPS Letter of 16 November 2007. See also Case 2012-0005 Ombudsman, EDPS Letter of 12 January 2012, stating that "*l'article 12ter du Statut des fonctionnaires de l'union européenne vise principalement à une évaluation objective de l'impact potentiel de la nature de (futurs) activités externe*".

⁴ Case 2008-0685 European Parliament.

- Data conservation. The EDPS questions the necessity of a retention period for 120 years after the birth of the staff member and invites the EASA to reconsider the necessity of such long conservation periods for the personal data related to such outside activities and assignments of staff.
- Transfers. With regard to the assessment of outside activities of a seconded national expert the EASA rules provide that EASA shall also consult the employer of the seconded expert before issuing an authorisation. In this case the EASA needs to make sure that the conditions for transfers pursuant to Articles 7, 8 and 9 of Regulation are met when it transfers personal data to third parties.
- Information provided to data subjects. The wording of the Data Protection Information Notice concerning the types of data processed should be checked and could be clarified. First the reference to data being used to evaluate personal aspects of the applicant should be deleted, as -as discussed above- it is the nature of the outside activity which is assessed. With regard to the categories of data processed, it would be clearer to make a reference to data on the nature of activity and organisation for which the outside activity is done instead of referring simply to "personal data concerning the data subject's private sphere" (which would otherwise need to be clarified). Furthermore personal data revealing political opinions will not always be processed (only if the outside activity is related to that). In this respect, the processing of such special categories of data would need to be justified on the basis of Article 10(2)(b) of the Regulation if necessary for the purpose of complying with the specific rights and obligations of the controller in the field of employment law insofar as authorised by the Treaties or other legal instruments adopted on the basis thereof. Furthermore the specific form to be filled in by staff does not seem to contain questions concerning information on bank accounts (which is mentioned in the Note). Finally, the Data Protection Information Notice is currently only published on the EASA HR intranet. We would recommend also including a link to the data protection notice directly in the Form to request an authorisation to engage in an outside activity.
- Lawfulness of the processing. The Information Notice also mentions consent of the data subject pursuant to Article 5(d) of the Regulation as a basis for the processing. However, the EDPS would like to remind that the value of consent given in the context of an employment relationship needs to be assessed very carefully.⁵ The EDPS therefore would suggest to reconsider the inclusion of such legal basis.

I would appreciate if you could share this position with the relevant persons in the EASA and inform us of the follow up measures taken concerning the above recommendations within three months of reception of this letter.

We remain at your disposal should you have any questions concerning this matter.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

⁵ cf. Opinion 8/2001 on the processing of personal data in the employment context adopted by the Article 29 Working Party, on http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2001_en.htm.

Cc: Mr Andrea LORENZET - EASA