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Subject: your consultation regarding transfer of staff data to Permanent Representations

Dear Mr Tsavalopoulos,

Thank you for your question sent via e-mail on 6 February 2013 on transfers of data on staff to Permanent Representations (and Embassies, Ministries of Foreign/European Affairs; for the sake of brevity, we will just refer to Permanent Representations) of their Member State.

First, there are two questions to consider: lawfulness under Article 5 of Regulation 45/2001 (the Regulation) and the rules on transfers in Article 8 of the Regulation.

Article 5(a) (in this case: necessity for the performance of a task carried out in the legitimate exercise of official authority vested [...] in a third party to whom the data are disclosed) could in principle be a basis for lawfulness. This would however require the recipient to provide reasons why these data are necessary for such exercise of official authority. As you stated in your e-mail, often the reasons given do not rise to this threshold. For example, for inquiries about the representation of nationals at the REA, providing aggregate numbers would be enough. Also, it seems that the requesting Member States often do not make reference to any legal basis. This makes basing the processing on Article 5(a) difficult.

In some similar cases we have dealt with, the requesting Permanent Representation referred to Article 15, second subparagraph of Protocol No 7 (privileges and immunities of the European Union) to the Treaty on the Functioning of the European Union. In the draft Article 25 notification attached to your e-mail you mention Article 16 of the corresponding Protocol to the EC Treaty, which was the predecessor to this provision (the numbering changed with the Lisbon Treaty). This provision obliges the Institutions to regularly communicate the names, professional addresses and contract status of staff to the governments of the respective Member States. In this case, providing the information is a legal obligation on the REA under Article 5(b) of the Regulation. While Protocol No 7 does not clearly state the purposes for which these data are to be transferred, it can be inferred from the context that they are meant to be used by the national administrations to give follow-up to the privileges and immunities

their nationals working in the EU institutions are entitled to. This would exclude the use of such data for other (undeclared and probably incompatible) purposes, such as sending invitations for social events organised by the Permanent Representation.

Article 5(d) of the Regulation (consent) seems to be the most common basis, as staff members could also consent to their data being made available for purposes such as organising social events. This would require obtaining consent prior to the processing (and thus the transfer). Such consent would not need to be given for each individual transfer, but could be given in a general way, providing the addressees are clearly identified and the purposes are specific, for example in a written declaration signed upon start of employment.

The next questions to consider are the specific rules on transfers. Given that the Permanent Representations are subject to national legislation implementing Directive 95/46/EC, Article 8 of the Regulation is applicable. As the draft notification also refers to 'other organisations' that might receive personal data, it should be made clearer what kind of organisations are meant - only other public authorities of the Member State of nationality of the staff member, or also other (non)governmental organisations? In case transfers to organisations that are not subject to national legislation implementing Directive 95/46/EC are envisaged, please be aware that Article 9 of the Regulation applies.

Given that requesting Permanent Representations sometimes do not refer to the specific legal basis for their request, Article 8(a) is difficult to use. When specific legal bases are mentioned (such as Article 15 of Protocol No 7 to the TFEU), Article 8(a) can be used, but it seems likely that these legal bases would not cover use of the data for social activities.

Article 8(b) allows such transfers if the recipient establishes the necessity of the transfer and there is no reason to assume that the data subject's legitimate interests might be prejudiced. It is up for the recipient to show this necessity. This is where prior consent becomes important again: it is not as such the reason for the transfer, but it provides an appropriate safeguard to ensure that these interests are not prejudiced.

In any case, the controller has to provide information to the data subjects and provide means for them to exercise their rights. The notice to be published on the intranet, coupled with a general e-mail to all staff, would be a way to ensure that data subjects are aware of their rights.

In this context, we also have to point out a rather technical aspect on the right to object (Article 18 of the Regulation). This right would not be applicable in case the lawfulness of the processing is based on Article 5 (b) (legal obligation, for obvious reasons), or on Article 5(d) (consent), as in that latter case the data subject could simply revoke consent without having to demonstrate the compelling legitimate grounds required to object under Article 18. In fact, the right to object would only become relevant in case lawfulness is based on Article 5(a), which, as explained above, would not be the best option. This should be taken into account when specifying how data subjects can exercise their rights regarding this processing operation.

I hope this was helpful; please do not hesitate to contact us should you need any further information.

Yours sincerely

(**signed**)

Giovanni BUTTARELLI