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GB/OL/sn/D(2013)0183 C 2013-0744
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Dear Mr Brouwer,

On 28 June 2013, the Data Protection Officer (DPO) of the European Defence Agency (EDA) submitted a notification concerning the "staff assessment procedure" to the European Data Protection Supervisor (EDPS) for prior checking pursuant to Article 27(3) of Regulation (EC) 45/2001 (the Regulation).

On 18 July 2013, the EDPS requested additional clarification; EDA provided answers on 2 August 2013. On 2 October 2013, the draft Opinion was sent to EDA for comments; EDA replies on 14 October 2013.

The EDPS has already issued Guidelines on staff evaluation procedures.¹ For this reason, the description of the facts and the legal analysis will only mention those aspects which differ from the Guidelines. As this notification was submitted after the processing had already started, the deadline of two months for the EDPS to issue his Opinion does not apply. This case was dealt with on a best-effort basis.

The Facts

EDA is subject to its own staff regulations.²

The notification refers to the line manager, the reviewer and the jobholder as organisational parts entrusted with the processing of personal data. Both the notification and the privacy statement refer to the controller as the Head of the HR unit.

¹ Available on the EDPS website.

² Council Decision 2004/676/EC as amended, consolidated version: <http://www.eda.europa.eu/docs/default-source/documents/consolidated-eda-staff-regulations-en.pdf>.

The appraisal reports of seconded officials (in practice, officials seconded from the Council of the European Union) are sent to their home institution; appraisal reports of seconded national experts (SNEs) are sent to their respective home authority if requested by that authority (this is the case for DE, FR, IT).

Appraisal reports are stored for up to five years after the end of employment/secondment (except in case of pending legal action). After this period, they are erased from the personal file and replaced with a note saying that "in compliance with EDA's data protection policy, the appraisal report has been suppressed".

The privacy statement does not mention the rights to access and to rectify data, nor the legal basis of the processing, nor whether answers are mandatory or voluntary.

Legal Analysis

EDA is subject to its own staff regulations; the EDPS Guidelines on the other hand are based on the staff regulations of officials and conditions of employment of other servants of the European Community. Nonetheless, because EDA's staff regulations are based on and in the relevant parts largely identical to those for the other European institutions, the Guidelines can be applied by analogy.

In the view of the EDPS, EDA as an Agency is the controller of the processing; the HR unit, represented by you, is the main organisational part entrusted with the processing of personal data.

Regarding transfers to recipients subject to the Regulation, **recipients should be reminded that according to Article 7(3) of the Regulation, they shall only process the personal data for the purposes for which they were transmitted.**

The appraisal reports of seconded officials are sent to their home institution. Given that the personal files of seconded officials remain with their home institution, receiving the appraisal reports is necessary for the legitimate performance of a task covered by the competence of the recipient (managing the personal file of the official in question). These transfers can thus be justified under Article 7(1).

For SNEs, transfers of their appraisal reports fall under Article 8. Given that SNEs remain employed with their home authority, certain administrative matters related to their career are still carried out by the home authority during the period of secondment. This could for example include career advancement. Transfers for such purposes may be justified under Article 8(a) or (b). It is for the recipient to establish that one of these two cases applies. **EDA should ensure that such transfers only occur when the legitimacy of the transfer is duly established by the recipient.**

While evaluators should be able to consult previous reports to assess the progress made by a staff member, appropriate limits should be established. The EDPS considers a conservation period of five years after the appraisal exercise to be appropriate. **EDA should adapt the conservation period accordingly.**

The privacy statement should be amended to cover the missing elements under Article 11 of the Regulation (existence of the rights to access and rectify data, legal basis, mandatory or voluntary character of answers).

Conclusion

The EDPS has no reason to believe that there is a breach of the Regulation, provided that the recommendations contained in this Opinion are followed.

Please inform the EDPS of the measures taken based on the recommendations within a period of 3 months.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Gabriele Borla, Data Protection Officer, EDA