



EUROPEAN DATA
PROTECTION SUPERVISOR

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Dear Mr BECKERS,

We have examined your notification sent to the European Data Processing Supervisor (EDPS) for prior-checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation) relating to the processing of personal data in the context of the management of personal files by the Innovation and Networks Executive Agency (INEA)". Article 27(2) of the Regulation contains a list of processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes. It is necessary therefore to determine whether the processing of personal files of INEA's staff members falls within the scope of this provision.

The processing operation has been notified under Article 27(2)(a), Article 27(2)(b) and Article 27(2)(d).

Article 27(2)(a) states that a processing is likely to present specific risks under Article 27(1) if the processing of data relates to health and to suspected offences, offences, criminal convictions or security measures. According to our information, personal files do not contain specific medical data in the strict sense but they contain data relating to health within the meaning of the Regulation, namely the medical aptitude certificate. The latter is a note from

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the doctor who conducted the medical examination prior to the individual's entry into service, which simply states whether or not the recruited person is physically capable of doing his/her job. The personal files of staff members of INEA could also contain data relating to suspected offences, offences, criminal convictions or security measures to the extent that decisions may have been taken concerning possible disciplinary measures. Article 27(2)(a) of the Regulation primarily concerns data processing operations whose main purpose is to process data relating to health, suspected offences, criminal convictions or security measures. Although the primary purpose of personal files is not the processing of such data, those data are systematically, not randomly, included in personal files. The question therefore arises as to whether any risk is presented in light of Article 27(2)(a) of the Regulation. In this case, there is no "a priori" risk as the data are generated by previous processing operations which themselves will need to be subject to prior checking¹.

Article 27(2)(b) provides that "processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" are likely to present risks within the meaning of Article 27(1) of the Regulation. Personal files contain not only documents relating to the administrative situation of data subjects, but also reports on their abilities and efficiency. However, the personal file itself is not used to assess the ability or efficiency of the data subject and it does not therefore fall under Article 27(2)(b) of the Regulation.

As to Article 27(2)(d), "processing operations for the purpose of excluding individuals from a right, benefit or contract" are also likely to present risks under Article 27(1) of the Regulation. This provision refers to processing operations which aim to exclude individuals from a right, benefit or contract (this typically refers to black lists). This is not the purpose of personal files².

We have also considered other possible risks that could justify a prior check based on Article 27(1) and we have concluded that such risks are not present either.

Furthermore, the EDPS notes that most of the items listed in the Privacy statement attached to the notification are in compliance with Articles 11 and 12 of the Regulation.

Nevertheless, the EDPS would like to comment on the retention policy of personal files adopted by INEA. INEA foresees a retention period for the personal files of 120 years after the date of birth of the data subject. In light of Article 4(1)(e) of the Regulation, the EDPS has always considered this retention period as excessive and unnecessary to the purpose for which personal data are collected and further processed. As the EDPS recommended in his Guidelines on Staff recruitment³, personal data should be stored in personal files (Article 26 of the Staff Regulations), for a period of ten years as of the termination of employment or as of the last pension payment. The EDPS highlights that the issue of the retention period of personal files is a pending issue subject to on-going discussions between the EDPS and the EU institutions. The EDPS invites INEA to re-consider this issue in light of the agency's practical needs and experiences. The EDPS will inform INEA about the outcome in due time.

¹ In this respect, see cases 2004-0304, 2005-0243, 2008-0197, 2009-0073, 2013-0720, and 2013-0793.

² In this respect, see cases 2009-0681 and 2010-0426.

³ EDPS Guidelines concerning the processing operations in the field of staff recruitment, https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf.

In light of the above, we have concluded that the processing of personal files of INEA's staff members are not subject to prior checking under any of the categories listed under Article 27(2) of the Regulation.

Yours sincerely,

Giovanni BUTTARELLI



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