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GB/SS/sn/D(2014)1811 C 2014-0628
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correspondence

Subject: Prior checking notification of the processing of personal data in the framework of administrative inquiries and disciplinary proceedings at EFCA (Case 2014-0628)

Dear Mr Savouret,

On 5 June 2014, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of your Agency a notification for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation) on the processing of personal data in the framework of administrative inquiries and disciplinary proceedings at EFCA. The notification included also the draft Decision of the Administrative Board of the Agency laying down the General Implementing Provisions on the Conduct of Administrative Inquiries and Disciplinary Procedures (EFCA's draft rules) and the Privacy statement regarding the Conduct of Administrative Inquiries and Disciplinary Procedures at EFCA (the Privacy Statement).

The EDPS has adopted guidelines regarding the processing of personal data in administrative inquiries and disciplinary proceedings (the AI&DP Guidelines)¹. We have also issued a number of prior-check Opinions in this area. The present Opinion will therefore highlight only those aspects that do not seem to be in conformity with the principles of the Regulation and with the Guidelines and limit the legal analysis to those practices. In light of the accountability principle guiding his work, the EDPS would nonetheless highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations under consideration.

¹ The Guidelines are available on EDPS website (www.edps.europa.eu) under the section Supervision/Thematic Guidelines.

The procedure was notified for prior checking under Article 27 of the Regulation on 5 June 2014. Additional information was requested on 30 June and 7 July 2014 and received on 2 and 24 July 2014 with the updated notification and Privacy Statement. The case was suspended for a total of 30 days. According to Article 27(4) of the Regulation, the present Opinion must be delivered within a period of two months, that is no later than 4 September 2014.

Legal analysis

Lawfulness of processing:

The notification states that the legal basis of the processing operation is Article 86 and Annex IX to the Staff Regulations, Article 110 of the Staff Regulations and Articles 49, 50 and 119 CEOS; EFCA's draft rules. EFCA's draft rules as notified provide in Part II implementing measures for the administrative inquiries whereas Part III –Disciplinary proceedings– only contains one provision, Article 16, on introductory training for the staff members appointed as members of the Disciplinary Board. The EDPS was subsequently informed that EFCA's draft rules do not set forth additional provisions as it is intended to follow the already detailed provisions set out in Annex IX of the Staff regulations. In this regard, the EDPS recommends including a new provision in Part III of EFCA's draft rules stating that the provisions of Annex IX to the Staff Regulations apply to the disciplinary proceedings.

In addition, a new provision on data protection should be included in EFCA's draft rules which refers to the Privacy Statement available on EFCA's intranet.

Data Quality:

Principles of necessity and proportionality:

The EDPS reminds EFCA that the principles of necessity and proportionality should be followed in all processing operations, and not only when processing special categories of data, by the investigators and members of the Disciplinary Board. The EDPS recommends including the following provision in Article 5 of EFCA's draft rules and the notification:

"Investigators shall only collect necessary, proportionate and relevant data to the purpose of the investigation and the reports shall only contain such necessary, proportionate and relevant data".

In addition to this specification, the EDPS recommends that investigators and members of the Disciplinary Board be specifically instructed when taking up their tasks about the data quality requirements and restrictive rules concerning the processing of special categories of data. Indeed, these principles do not only apply to the reports on administrative inquiries but also to the Disciplinary Board reports. Declarations of confidentiality signed by investigators and members of the Disciplinary Board (see the point on security measures) could be used to remind them of these principles.

Confidentiality of electronic communications:

EFCA has recognised that the confidentiality of communications needs to be maintained, that the confidentiality can be infringed only in very exceptional circumstances, that any infringement should be a carefully considered extraordinary procedure and must always be restricted to the data which are strictly necessary. In this regard, the EDPS invites EFCA to consult the e-Communications Guidelines that the EDPS will publish in the near future.

Transfers of data:

Internal transfers of data:

Article 7 of the Regulation applies to internal transfers of personal data within EFCA and between EFCA and other EU institutions/bodies. Following the notification, where the disciplinary decision has a financial impact or involves a change in the grade, it is forwarded to the HR section for the adjustment of the salary. The EDPS would highlight that only the data necessary for these specific tasks can be transferred to the HR section. The HR section must also be made aware of the purpose limitation principle, in accordance with Article 7(3) of the Regulation.

Data subject's information:

The EDPS recommends that EFCA complete the Privacy Statement as the EDPS Guidelines outline by stating that the right to information can be restricted if necessary under all the subparagraphs of Article 20(1) from (a) to (e), and not only under Article 20 (1) (a) and 20 (1) (c) of the Regulation, as presently mentioned.

The EDPS would recall that under Articles 11 and 12 of the Regulation, the controller has to provide the information therein listed in all cases of its own motion, not only upon request from the data subject. The only exception to this rule is where one of the derogations foreseen in Article 20 of the Regulation applies. In order to ensure compliance with these provisions, the EDPS recommends standardised privacy notes be drawn up and be provided individually to all relevant data subjects (investigated persons, whistleblowers, witnesses etc.) whenever data related to them are processed. Templates of these notes should be annexed to EFCA's draft rules.

The staff member has the right to rectification in order to ensure completeness of his disciplinary file and is *inter alia* allowed to add comments. For the same reasons the staff member should be allowed to include a recourse or appeal decision in their disciplinary file as well as the personal file, and where appropriate to ask that the decision be replaced or removed from the file. The Privacy Statement should be amended accordingly.

Time limit to block/erase personal data:

EFCA should specify the appropriate time limits for deciding on the requests for deletion and for carrying out blocking / erasure of data after the Executive Director has granted a justified legitimate request from the data subject. The notification and the Privacy Statement should be updated accordingly.

Security measures:

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Conclusions

Taking into account the notification and documents annexed to it as well as additional information and amended notification and Privacy Statement provided by EFCA, the EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations contained in this Opinion are fully taken into account.

In particular, EFCA should:

- include a new provision in Part III of EFCA's draft rules stating that the provisions of Annex IX to the Staff Regulations apply to the disciplinary proceedings;
- include a new provision on data protection in EFCA's draft rules referring to the Privacy Statement available on EFCA's intranet;
- include in Article 5 of EFCA's draft rules a provision that only data that are necessary, proportionate and relevant to the purpose of the investigation should be collected and contained in the investigative report;
- regarding respect for confidentiality of communications, consult the e-Communications Guidelines that the EDPS will publish in the near future;
- complete the Privacy Statement by stating that the right to information can be restricted if necessary under Article 20(1)(a)-(e);
- draw up standardised privacy notes to be provided individually to all relevant data subjects (investigated persons, whistleblowers, witnesses etc.) and annex templates to EFCA's draft rules;
- amend the Privacy Statement so that the staff member is allowed to include a recourse or appeal decision in their disciplinary file as well as the personal file, and where appropriate to ask that the decision be replaced or removed from the file;
- update the notification and the Privacy Statement to specify the appropriate time limits for deciding on the requests for deletion and for carrying out blocking/erasure of data after the Executive Director has granted a justified legitimate request from the data subject;

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The EDPS expects EFCA to implement the recommendations accordingly and will close the case.

Regards,

(signed)

Giovanni BUTTARELLI

Cc : Ms Rieke ARNDT, Data Protection Officer - EFCA
Mr Niall McHALE, Head of Unit Resources - EFCA