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Dear Professor Bruyninckx,

We have analysed all the documents you have provided to the EDPS on the ex-post notification for prior-checking under Article 27(2) of Regulation 45/2001 (the Regulation) in the context of the selection of confidential counsellors and the informal procedure on the prevention of psychological and sexual harassment at the European Environment Agency (EEA).

As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply; this case has been dealt with on a best-effort basis.

The EDPS has analysed the present notification in light of his Guidelines issued on 18 February 2011 on the selection of confidential counsellors and the informal procedures for cases of harassment in EU institutions and bodies (the EDPS Guidelines). On this basis, the EDPS will only identify and examine the agency's practices which do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing the EEA with relevant recommendations.

1) Transfer of data

Point 6.3 on the "rules for the processing and transmission of data" and point 6.6 on "*data recipients*" of the Manual of procedures for confidential counsellors, make reference to the explicit consent of the victim except in exceptional cases (Article 20(1)(c) of Regulation 45/2001), when it is necessary to protect the individual.

The EDPS recalls that transfers of data should always be analysed in light of Articles 7, 8 and 9 of the Regulation. Restrictions foreseen in Article 20(1)(c) do not apply to transfers of personal data. As far as Articles 7 and 8 are concerned, the consent of the data subject cannot be the main basis for a transfer of data.

In general, in order to keep the confidential character of the informal procedure, transfers of data should be avoided. Nevertheless, they cannot be excluded a priori. Articles 7 and 8 must be strictly respected. Article 7.1 provides for strict and cumulative conditions (necessity, legitimate performance of tasks, competence of the recipient) to allow transfer of data. Article 7.2 makes clear that both the controller and the recipient bear the responsibility for the legitimacy of the transfer in case the request comes from the recipient. All the conditions established under Article 7 must be evaluated in light of the confidential character of the informal procedure.

As far as **internal transfers** are concerned in the context of an informal procedure, *structural* (automatic), and *ad hoc* (case by case) transfers should be distinguished.

With regard to cases of *structural* transfers, the EDPS considers that the HR Department may also be the recipient of the data processed. While the confidential counsellors are in charge of the core activity of the procedure, the HR Department plays a role of administrative support. Any transfer from the confidential counsellors to the HR Department should however be limited to the data necessary for the legitimate performance of their tasks (administrative support) as foreseen in Article 7(1). In this respect, only "hard data"¹ should be transferred.

In addition, the EDPS welcomes the involvement of the "contact person" within the HR Department. Transfers of harassment related hard data to the "contact person" are allowed under the same modalities as to the HR Department; and the same limitations apply as regard the processing of "soft data"².

As to cases of *ad hoc* transfers of harassment related data (be hard or soft data), they may take place, for example, to the DPO, the appointing authority, the Director (in the event of recurrent cases) or the internal audit. Data may also be transmitted to the Court of Justice of the European Union, the EDPS or the Ombudsman. Such transfers may be considered as legitimate if they are necessary for the legitimate execution of the tasks of those recipients. If the transfer follows a request from the recipient, then both the controller and the recipient shall bear the responsibility of the legitimacy of this transfer in accordance with Article 7 (2). The controller should verify the competence of the recipient and evaluate the necessity for the transfer of the data. If doubts arise as to the necessity, the controller shall seek further information from the recipient.

As far as **external transfers** are concerned in the context of an informal procedure, they may take place in exceptional circumstances, for example, when data are transferred to third actors who have to play a role in the harassment procedure (social advisors/psychologists) or to judicial national authorities, as it is stated in the privacy statement. The necessity for transferring data must be carefully analysed beforehand on a case by case basis, in compliance with the conditions of Article 8.

Consequently, the EDPS recommends that EEA revises points 6.3 and 6.6 of the Manual of procedures for confidential counsellors clarifying how and in which circumstances transfers of data may take place and which potential recipients may be involved.

¹ Data qualified as "**hard**" or "objective", i.e. administrative and identification data, usually collected directly from the data subjects (possibly by means of opening and closing forms). The collection of "hard" data aims at the identification of the person, the management of historical records and most importantly at the identification of recurrent and multiple cases.

² Data qualified as "**soft**" or "subjective", i.e. allegations and declarations based upon the subjective perceptions of data subjects, usually collected by means of the personal notes of the counsellors.

2) Information to be given to the data subject

In the privacy statement related to the informal procedure (Annex V), point 2 on "*recipients of the data processed*" states, among others, that "*transmission without prior consent can only occur in exceptional cases covered by Article 20(1)(c) of Regulation 45/2001, i.e. when necessary to ensure the protection of the alleged victims*".

In light of the EDPS Guidelines and our analysis in point 1, the EEA should also revise the issue of recipients and adapt the privacy statement accordingly in conformity with Articles 11(1)(c) and 12(1)(c) of the Regulation.

3) Processing data on behalf of controllers

Point 6 of the Manual of procedures for confidential counsellors states that, "*confidential counsellors and the contact person are considered as processors in the sense of Article 23 of Regulation 45/2001*".

The EDPS has always recommended in his Article 28.1 consultations relating to the implementing rules concerning the tasks, duties and powers of the Data Protection Officer not to use the notion of processor within an agency due to its size³. In the present case, taking into account that the confidential counsellors are internal staff and that the HR department, apart from being the controller, may also be a recipient, the EDPS is not in favour of making a distinction between controller and processor within the EEA.

The EDPS therefore recommends that EEA erases the above sentence in the Manual to avoid confusion.

In light of the above, the EDPS expects the EEA to adopt and implement the above recommendations regarding the processing operation under analysis. It would be appreciated if you could provide the EDPS with all relevant documents to evidence that the recommendations have been implemented within 3 months from receipt of this Opinion.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Olivier CORNU, Data Protection Officer
Ms Lene B. PEDERSEN, Head of HRM Group

³ See among other the consultation under Article 28 of the Regulation dated 20 May 2010, case number 2010-341, on the implementing rules pursuant to Article 24.8 adopted by the European Research Council Executive Agency.