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ASSISTANT SUPERVISOR

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WW/BR/sn/D(2015)0958 C 2015-0325
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correspondence

Subject: Prior checking on breach of trust procedure in relation to OSHA policy on management of conflicts of interest

Dear Ms [...],

We refer to the notification for prior checking concerning a "breach of trust procedure establishing remedies in relation to the EU-OSHA policy on management of conflict of interest (Board/Advisory Group members)" submitted to the European Data Protection Supervisor ("**EDPS**") by the Data Protection Officer ("**DPO**") of EU-OSHA ("**OSHA**") on 10 April 2015¹.

We note that the breach of trust procedure of OSHA is in most aspects in compliance with Regulation 45/2001² ("**the Regulation**") as further outlined in the EDPS Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings in EU institutions and bodies. We will therefore only address the existing practices which do not seem to be fully compliant in this respect³.

¹ A question was raised on 16 April 2015 to which the DPO replied on 20 April 2015. The draft Opinion was sent to the DPO for comments on 4 June 2015. The EDPS received a reply on 08 June 2015.

² Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

³ EDPS Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings (The "**Disciplinary Guidelines**") are available at

https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/10-04-23_Guidelines_inquiries_EN.pdf

1. Relevant context

The breach of trust procedure is part of OSHA's policy on management of conflict of interest⁴. It applies in four scenarios related to a member of the Governing Board or of an Advisory Group who – by virtue of his/her relation with OSHA – are subject to the provisions of the Agency's policy on management of conflict of interest:

- lack of cooperation in the implementation of the mitigating/remedial actions taken regarding the member concerned further to being found in a conflict of interest situation by the conflict of interest committee;
- fraudulent omission in the declaration of interests ("**DoI**") and summary of CV;
- submission of false DoI or summary of CV;
- failure to submit a DoI or summary of CV.

2. Grounds for prior checking

The breach of trust procedure, which involves processing of personal data in case of non-compliance with the conflict of interest rules, is intended to evaluate personal aspects notably the conduct of (alternate) members of the Governing Board or of an Advisory Group ("**GB/AG members**"). Consequently, this procedure is subject to prior checking under Article 27(2)(b) of the Regulation. As the breach of trust procedure may reveal suspicions of fraud and result in OLAF's involvement⁵, it is also subject to prior checking under Article 27(2)(a) of the Regulation⁶.

3. Data subjects

The individuals concerned by the breach of trust procedure are GB/AG members. However, information on their family members may appear on their DoI and be further processed in the framework of the breach of trust procedure.

Recommendation: OSHA should:

- request from the GB/AG members, if case arises, to inform their family members that OSHA will be processing data about them and that further information is available on OSHA's website (*on the privacy statement see also Section 7 below*)⁷; this requirement should be expressly mentioned in the guidance note on DoI.

⁴ The breach of trust procedure is appended (Annex 3) to the policy on management of conflicts of interest. The collection and further assessment of DoI by OSHA provided by this policy are not subject to prior checking, as the processing of DoI is not intended to evaluate personal aspects relating to the data subject. Indeed, the purpose of the processing is an objective assessment of the potential conflict in question, i.e. an evaluation of the nature of certain activities or situations and their compatibility with the position of the person within OSHA. The processing thus consists in an objective assessment of the activities or situation in question, not the evaluation of persons (see pp. 22-23 of the EDPS Guidelines on the processing of personal data with regard to the management of conflicts of interest in EU institutions and bodies ("**CoI Guidelines**"): https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/14-12-08_CoI_Guidelines_EN.pdf

⁵ p. 5 of the breach of trust procedure.

⁶ p. 2 of the Disciplinary Guidelines.

⁷ p. 21 of the CoI Guidelines.

4. Lawfulness

The processing personal data with regard to the breach of trust procedure is necessary for a task carried out in the public interest and finds therefore its legal ground in Article 5(a) of the Regulation⁸.

By contrast, it is not appropriate to apply Article 5(d) of the Regulation (consent) as a legal basis as there is no freely given consent in this context⁹.

Recommendation: the reference to Article 5(d) should be removed from the notification and the privacy statement.

5. Data quality, right of access and right to rectify

The breach of trust procedure provides that the GB/AG member concerned is informed at each step¹⁰ but does not mention the documents that are made available to him/her in this context.

Reminder: to be able to exercise his/her rights, the GB/AG member concerned should receive a copy of the conclusions of the conflict of interest committee on a potential breach of trust attributed to him/her and, on request, of all documents directly linked to the allegations made, subject to the restrictions of Article 20 of the Regulation.¹¹

6. Retention

The notification refers to the conservation of the DoI (the latter are kept throughout the mandate of the person and until three years after the end of his/her mandate) and mentions that the exchanges and information related to "*specific cases*" will follow the same retention period¹². The privacy statement includes similar references.

Recommendation: mention explicitly in the notification that the data processed "*in the framework of the breach of trust procedure*" follow the same retention period.

7. Information of data subject

The notification refers to two separate privacy statements, one about OSHA policy on management of conflict of interest, and one about the breach of trust procedure.

Since the breach of trust procedure is part of OSHA policy on management of conflict of interest, it seems more convenient to have one privacy statement on the whole process. OSHA could make a distinction between the two main sets of processing (collection, assessment and publication of DoI; data processing in case of breach of trust) where needed in the privacy statement (for ex.: publication only concerns the DoI and not the data processed in case of breach of trust).

⁸ p. 2 of the Disciplinary Guidelines.

⁹ cf. definition of consent in Article 2(h) of the Regulation.

¹⁰ pp. 5-6 of the breach of trust procedure.

¹¹ p. 4 and pp. 9-10 of the Disciplinary Guidelines.

¹² Section 13 of the notification.

Recommendations:

- Merge both privacy statements into one privacy statement covering the whole management of conflict of interest procedure including the breach of trust and meeting the requirements of Articles 11 and 12 of the Regulation;
- Take into account that:
 - the reference to Article 5(d) of the Regulation should be removed from the paragraph on the lawfulness of the processing (*see above Section 4*);
 - an explicit reference to records "*relating to breach of trust procedures*" should be added to the paragraph on conservation (*see above Section 6*);
- Post the merged privacy statement on OSHA's website.

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In conclusion, there is no reason to believe that there is a breach of the provisions of the Regulation provided that the above-mentioned recommendations are fully taken into account.

The EDPS expects that OSHA implements the recommendations accordingly and will therefore **close** the case.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI