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ASSISTANT SUPERVISOR

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**Subject: Prior checking opinion on "*External cases of potential fraud and/or other financial irregularities*" by the Research Executive Agency (REA).**

Dear Mr Gascard,

We have analysed the notification and further information you have provided to the EDPS for prior-checking under Articles 27(2)(a) and (b) of Regulation 45/2001 ("the Regulation") on the processing of information related to suspicion of fraud, corruption, conflict of interest or other financial irregularities at the Research Executive Agency (REA). Such information concerns the beneficiaries of EU funds, it is analysed by REA and if necessary, it is transferred to OLAF on the basis of Article 14(2) of REA's Delegation Act<sup>1</sup>.

The EDPS notes that the processing operation has already been established, making this de facto an ex post prior check. The two-month deadline therefore does not apply and this case was dealt with on a best effort basis. The EDPS notes that REA has taken into consideration the recommendations provided to EACI in a similar notification<sup>2</sup>. The EDPS will therefore only identify REA's practices which do not seem to be in conformity with the principles of the Regulation and provide REA with relevant recommendations.

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<sup>1</sup> Commission Decision (C(2008)3980) of 31 July 2008 delegating powers to the Research Executive Agency with a view to performance of tasks linked to implementation of the specific Community programmes People, Capacities and Cooperation in the field of research comprising, in particular, implementation of appropriations entered in the Community budget.

<sup>2</sup> EDPS Opinion of 14 March 2013 on EACI's notification "*Analysis and transfer of information related to fraud to OLAF*", case 2012-0652.

## **Conservation of data**

Article 4 (1)(e) of the Regulation states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

REA keeps all data processed for 10 years after the end of the project or contract (under public procurement), according to the Common Commission-level Retention List.

The EDPS recommends that REA makes a distinction between those cases where

- REA analyses the data and in the end they are not transferred to OLAF,
- REA transfers the data and OLAF decides
  - not to pursue any investigation,
  - to dismiss the case after investigation and
  - to close the case after pursuing investigation and taking action.

In light of previous EDPS Opinions related to the same field, the 10 years of retention period seems excessive to the purpose for which the data are collected. REA should therefore reassess the retention period of data depending on the specific purpose of each case and set up a necessary and proportionate retention period under Article 4(1)(e) of the Regulation<sup>3</sup>.

## **Right of access and rectification**

In the specific processing, Article 14 related to the right of rectification means that data subjects may exercise their right by having the possibility to add their comments to their file in order to be able to keep it accurate and updated. REA should ensure that the right of rectification is granted accordingly and should specify this information in the notification.

As REA states in the notification, there might be restrictions on a case by case basis to the rights of access and rectification. REA refers to the application of Articles 20(1) (a), (b) or (e) for such restrictions. Article 20(1) (c) is also relevant and might be applicable. For instance, REA may restrict the right of access or rectification of a staff member (representative of a beneficiary of an EU fund) suspicious of fraud, in order to protect the identity and the rights of a whistle-blower, informant or witness under Article 20(1)(c) of the Regulation. REA should therefore add this provision in the notification.

## **Information to the data subject**

Articles 11 and 12 of the Regulation relate to the information to be given to data subjects in order to ensure fairness and transparency in the processing of personal data and in respect of the data subjects' rights. These provisions list a series of specific information. In the present case, some of the data are collected directly from the data subject and other data from other sources.

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<sup>3</sup> See the EDPS Opinion of 14 March 2013 on EACI's notification (see above) for consistency and EDPS Opinion of 7 May 2015 on ERCEA's notification on "handling internally and reporting potential fraud and irregularities" (case 2015-0061).

REA stated in the notification that "REA *will inform the data subject concerned if measures are taken due to suspicion (or confirmation of financial irregularities)*". The obligation to inform all data subjects before a processing begins is incumbent on REA, since it is the controller of the data processed, before they are transferred to OLAF. The EDPS recommends a two-step information procedure.

REA should post a general privacy notice on the intranet as well as internet<sup>4</sup> and provide all relevant information (including the above recommendations) about the processing in compliance with Articles 11 and 12 of the Regulation. The privacy notice should be easily accessible to all data subjects where they may also find all relevant Decisions and procedures about the processing in hand.

In order to guarantee fairness and transparency about the information processed regarding a specific case on external fraud, data subjects should be specifically informed about it. REA should therefore send them a specific privacy statement as soon as it is practically possible, for example by email. This specific privacy notice should inform them about the elements listed in Articles 11 and 12 regarding the specific case. Furthermore, REA should inform them about the opening of the case, if and when the available information is forwarded to OLAF, potential extensions and the possibility of a hearing.

It might be however necessary to restrict their right of information about the processing of their personal data, as such restriction might be a necessary measure to safeguard any of the five exceptions under Article 20(1) of the Regulation. A decision to restrict the right to inform should be taken strictly on a case by case basis. The EDPS reminds REA that before taking such decision, it should be able to provide evidence demonstrating detailed reasons (a motivated decision). In light of Article 20(3) of the Regulation, these reasons should prove that they cause actual harm to the investigation and they should be documented before REA decides to apply any restriction under Article 20(1) of the Regulation. Finally, the EDPS highlights that the obligation of REA to document a motivated decision to restrict the right to inform, is also applicable in the case of other restrictions as stated in Article 20(1) of the Regulation (i.e restriction of the right of access, rectification etc.).

In light of the accountability principle, the EDPS trusts that REA will adopt adequate data protection safeguards implementing the above recommendations in conformity with the Regulation. We have therefore decided to close the case.

Should you have further doubts, please do not hesitate to contact us.

Kind regards,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc: Ms Rita BULTYNCK, Head of Unit REA.A.2 (Finance).  
Mr Evangelos TSAVALOPOULOS, Data Protection Officer.

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<sup>4</sup> Considering that external cases might involve accused persons working outside REA.