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Subject: Follow-up of the EDPS prior-check Opinion on "*administrative inquiries and disciplinary proceedings*" at CPVO (case 2011-1128).

Dear Mr Ekvad,

Thank you for the updated notification and documents related to the conduct of an administrative inquiry and a disciplinary proceeding at CPVO. These documents are the follow-up of the EDPS prior-check Opinion of 3 February 2012 on CPVO's notification regarding the processing of personal data in the context of administrative inquiries and disciplinary proceedings.

CPVO has included most of the recommendations that the EDPS provided in his prior-check Opinion. The EDPS is currently revising his existing Guidelines on the processing of personal data in administrative inquiries and disciplinary proceedings by the EU institutions and bodies. The EDPS introduced some further recommendations into the Guidelines and would therefore like to highlight the following issues:

1) Retention periods

Personal data must not be kept longer than necessary for the purpose for which they are collected or further processed in accordance with Article 4(1)(e) of the Regulation¹.

¹ Article 4(1)(e) of the Regulation: "*personal data must be kept in a form which permits identification*

The EDPS has re-considered the issue of retention periods in light of three possible scenarios:

i) Pre-inquiry file: When CPVO makes a preliminary assessment of the information collected and the case is dismissed. In such cases, CPVO should set up a maximum retention period of two years after the adoption of the decision that no inquiry will be launched. This maximum retention period could be necessary for audit purposes, access requests from affected individuals (i.e from an alleged victim of harassment) and complaints to the Ombudsman.

ii) Inquiry file: When CPVO launches an inquiry including the collection of evidence and interviews of individuals, there could be three possibilities: i) the inquiry is closed without follow-up, ii) a caution is issued and iii) the Appointing Authority of your institution adopts a formal decision that a disciplinary proceeding should be launched. For cases i) and ii), a maximum of five-year-period from closure of the investigation is considered to be a necessary retention period, taking into account audit purposes and legal recourses from the affected individuals. For case iii), CPVO should transfer the inquiry file to the disciplinary file, as the disciplinary proceeding is launched on the basis of the evidence collected during the administrative inquiry.

iii) Disciplinary file: CPVO carries out a disciplinary proceeding with the assistance of internal and/or external investigators on the basis of a contract. CPVO should take into consideration the nature of the sanction, possible legal recourses as well as audit purposes and set up a maximum 20-year-retention period, after the adoption of the final Decision. The affected individual may submit a request for the deletion of their disciplinary file 10 years after the adoption of the final Decision. The Appointing Authority should assess whether to grant this request in light of the severity of the misconduct and the penalty imposed and the possible repetition of the misconduct during that period of 10 years.

Recommendation:

CPVO should make a distinction of different retention periods according to the above possible scenarios and update the notification and the CPVO Decision on retention policy.

2) Information to be given to data subjects

Time-limits for storing the data (Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation)

CPVO should inform all affected individuals about the retention periods of their personal data on the basis of the different possible scenarios, as analysed above.

Recommendation:

CPVO should provide information about the retention periods of the personal data processed to the affected individuals in accordance with Articles 11 and 12 of the Regulation.

3) Possible limitations to the rights of information, access and rectification of the affected individuals:

of data subjects for no longer than is necessary for the purposes for which the data are collected or for which they are further processed".

In addition, the CPVO should inform all affected individuals about the processing of their personal data in the context of a specific inquiry or disciplinary proceeding involving them. It should also inform them about any possible limitations to their rights of information, access and rectification regarding the specific processing of their personal data.

The CPVO makes reference in the notification and in the privacy notice to the possible application of Article 20 of the Regulation. In cases where CPVO decides to apply a restriction of information, access, rectification etc. under Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4)², such decision should be taken on a case-by-case basis. In all circumstances, CPVO should be able to provide evidence demonstrating detailed reasons for taking such a decision (i.e. motivated decision). These reasons should prove that providing information would cause actual harm to the informal procedure or undermine the rights and freedoms of the others and they should be documented before the decision to apply any restriction or deferral is taken³.

Reminder:

The CPVO should ensure that, in case of a restriction of a right, the decision to restrict such right is appropriately documented.

In light of the accountability principle, the EDPS trusts that CPVO will implement the above recommendations and reminder, updating the notification and privacy notice accordingly.

We have therefore decided to close the case.

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

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: Mr Carlos Godinho, Vice-President of the CPVO, the controller.
Mr Gerhard Schuon, Data Protection Officer.

² Article 20(5) of the Regulation provides that provision of the information referred to under Articles 20(3) and 20(4) may be deferred for as long as such information would deprive the restriction imposed by Article 20(1).

³ This is the kind of documentation the EDPS requests when investigating complaints relating to the application of Article 20.