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ASSISTANT SUPERVISOR

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correspondence

Subject: Prior-checking Opinion regarding the selection of confidential counsellors and informal procedures for cases of harassment at EIF (EDPS cases 2017-1042 and 2017-1043)

Dear Mr [...],

On 28 November 2017, the European Data Protection Supervisor (EDPS) received two notifications for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ('the Regulation') on the selection of confidential counsellors and the informal procedures for cases of harassment from the Data Protection Officer (DPO) of the European Investment Fund (EIF).²

The EDPS has issued Guidelines concerning the processing of personal data during the selection of confidential counsellors and the informal procedures for cases of harassment in the European institutions and bodies ('the Guidelines').³ Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for the selection of confidential counsellors and the informal procedures for cases of harassment at EIF.

1. Facts and analysis

1.1. Data transfers and recipients of data

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.

¹ OJ L 8, 12.1.2001, p. 1.

² As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

³ Available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/11-02-18_harassment_guidelines_en.pdf.

With regard to cases of *structural* transfers, the confidential counsellors are in charge of the core activity of the procedure and the HR Department plays a role of administrative support. Any transfer from the confidential counsellors to the HR Department should be limited to the data necessary for the legitimate performance of their tasks (administrative support) as foreseen in Article 7(1) of the Regulation. In this respect, only ‘hard data’⁴ should be transferred.

In addition, the EDPS considers the involvement of a so called ‘contact person’ or ‘coordinator’ within the HR as a good practice usually involved in charge of the networks of the confidential counsellors and possibly of certain security facilities. 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’⁵.

As an improvement, the EDPS **suggests** that the EIF designate a ‘contact person’ within the HR Department for the informal anti-harassment cases.

As to cases of *ad hoc* transfers of harassment related data (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.

The notification and the data protection statement both mention a number of possible recipients of personal data on a need-to-know basis, such as the Court of Justice of the European Union, the EDPS or the Ombudsman. For your information, with regard to Article 2(g) of the Regulation, authorities which would only receive data in the context of specific targeted inquiries are not considered ‘recipients’ and do not *need* to be mentioned in the privacy statement⁶.

The EDPS **suggests** that EIF remove Court of Justice of the European Union, the EDPS and the Ombudsman from the privacy statement.

In this regard, it is worth mentioning that the list of confidential counsellors available on the intranet may include retired staff members of the EIB, whom the people feeling harassed may directly contact, if they wish so. The retired staff members of EIB may also be part of the formal harassment procedure.

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 alleged harassment victim, 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 and/or the alleged harassment victim.

The EDPS **recommends** that the EIF clarify how and in which circumstances transfers of data may take place in the data protection notice.

⁴ 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.

⁵ 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.

⁶ This is an exception to the information obligations in Article 11 and 12, but not to the rules on transfers in Articles 7 to 9. In practice, this means that authorities such as the OLAF and the European Ombudsman do not need to be mentioned in the privacy statement (unless the processing operation in question involves transfers to these organisations as part of the procedure); however, the applicable rules on transfers will always need to be respected.

1.2. Security Measures

Finally, concerning security measures, it is important to ask the confidential counsellors to sign a declaration of confidentiality to remind them of the sensitivity of the work that they have to carry out⁷. Confidentiality must also be ensured by others involved in a particular informal anti-harassment case.

The EDPS thus reminds the EIF that confidential counsellors, as well as any other staff (e.g. from the HR Department, DPO, etc.), involved in informal anti-harassment cases should sign the declaration of confidentiality and show it to the data subject, if requested. For efficiency purposes, this declaration could also contain a statement about the need to ensure data quality in line with Article 4 of the Regulation, including a reference to the need to guarantee that the data collected is not excessive in the relation to the purposes.

Regarding confidential counsellors that are not under the direct authority of the controller (as, for example, EIF retired staff members), the EIF should ensure the adoption of equivalent data protection safeguards as to the data processors, namely concerning confidentiality.

The EDPS **recommends** that the EIF ensure that the confidential counsellors and other staff involved in the informal anti-harassment procedure sign a declaration of confidentiality, including the need to ensure data quality and that the data collected is not excessive to the purposes.

2. Conclusion

In this Opinion, the EDPS has made some recommendations to ensure compliance with the Regulation, as well as some suggestions for improvement. Provided that the recommendations and suggestions are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

In light of the accountability principle, the EDPS expects the EIF to implement the above recommendations accordingly and has, therefore, decided to **close cases 2017-1042 and 2017-1043**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: [...], DPO, EIF

⁷ Guidelines, section 8, p.15.