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Subject: Prior-check Opinion on EMCDDA's internal procedures and guidelines on whistleblowing (case 2016-1083)

Dear [...],

On 23 November 2016, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ('the Regulation') on the internal procedures and guidelines on whistleblowing at the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) from the Data Protection Officer (DPO) of the EMCDDA.²

The EDPS has issued Guidelines on how to process personal information within a whistleblowing procedure ('the Guidelines').³ Therefore, the description of the facts and of the legal analysis will only mention those aspects which differ from these Guidelines or otherwise need improvement. 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 whistleblowing at the EMCDDA.

EDPS recommendations and reminders are highlighted in bold below.

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 Guidelines on processing personal information within a whistleblowing procedure, available at: https://edps.europa.eu/sites/edp/files/publication/16-07-18_whistleblowing_guidelines_en.pdf

Description and assessment

1. Legal basis and lawfulness

According to the notification and the privacy statement, the legal basis is Article 5(a) of the Regulation together with the EMCDDA's internal procedures and guidelines on whistleblowing.

Article 5 does not in itself constitute a legal basis for processing, but rather provides criteria for assessing the lawfulness. The EDPS would therefore like to point out that **the legal basis for this processing activity is Article 22a, 22b and 22c of the Staff Regulations** together with the EMCDDA's internal procedures. Those are the legal provisions that assign 'the performance of a task carried out in the public interest' to EMCDDA, making processing for this purpose lawful in the sense of Article 5(a). **This should be clarified in the internal rules and the privacy statement.**

2. Transfer information on a case-by-case basis

Whistleblowing procedures are intended to provide safe channels for anyone who becomes aware of and reports potential fraud, corruption, or other serious wrongdoings and irregularities. EMCDDA's internal procedures state, under point 2.2 second paragraph, on internal whistleblowing, that the recipient of the information is obliged to transmit the information received 'without delay' to OLAF. It is furthermore mentioned that while the staff member concerned has a choice of reporting channels, the information should ultimately reach OLAF in a short period of time.

In light of the above, the EDPS points out that OLAF is the competent body to investigate fraud against the EU budget and alleged serious misconduct. Since the scope of the whistleblowing procedure is not limited to potential fraud only, there is a possibility that EMCDDA may receive information that it is not within the competence of OLAF. In accordance with Article 7(1) of the Regulation, the transfer of personal information should only take place when necessary for the legitimate performance of tasks covered by the competence of the recipient. Therefore, **EMCDDA should assess, on a case-by-case basis, the requirements for transferring the personal information to OLAF and adapt the internal procedures accordingly.**

3. Avoid processing excessive personal information

According to Article 4(1)(c) of the Regulation, data must be adequate, relevant and non-excessive in relation to the purposes for which the personal data is collected and/or further processed.

There is a possibility that EMCDDA, perhaps involuntarily, receives information from the whistleblower that is of no interest or relevance to the investigation, possibly including special categories of data. This kind of information should not be further processed, which requires that a first check of the report is carried out as soon as possible. **EMCDDA should therefore ensure that all staff members involved in a case are aware of the data quality requirements.**

4. Inform each category of individuals

EMCDDA has provided a privacy statement together with the notification and explained that the new procedure has been communicated to all staff members and is available on its intranet. In light of this, the EDPS points out that information on whistleblowing procedures should be provided to the individuals in a two-step procedure. This includes (i) publishing a general

privacy statement on the website and/or intranet and (ii) informing the specific persons involved in a procedure. It is however not clear from the notification whether EMCDDA will provide the privacy statement to the individuals involved. Therefore, EMCDDA should **provide this information to all individuals who are affected by a particular whistleblowing procedure as soon as practically possible**, unless an exception in Article 20(1) of the Regulation applies.⁴

5. Security measures

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In light of the accountability principle, the EDPS trusts that EMCDDA will ensure that these considerations and recommendations are fully implemented. The EDPS has therefore decided to **close case 2016-1083**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: [...], DPO, EMCDDA

⁴ See page 7 of the EDPS Guidelines on Whistleblowing.