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Brussels, **20 FEB 2020**
DH/CCP/ALS/vm/ D(2020) 0368 C2019-0836
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Subject: Consultation on necessity and lawfulness regarding access to an Art. 90(2) Staff Regulations complaint by ERA Management Board members (Case 2019-0836)

Dear ,

On 18 September 2019, you contacted the European Data Protection Supervisor (EDPS) and requested a consultation in accordance with Article 41(1) of Regulation (EU) 2018/1725. Given the urgency of your request, the EDPS informed you in the acknowledgement receipt that your request will be processed as informal and that should you need a formal reply, this would take longer. The EDPS replied informally to your request on 23 September 2019. You requested a formal reply on 30 January 2020. This letter is therefore the EDPS formal reply to your consultation.

1. Facts

You requested an opinion "related to data protection and access to information/documents at the level of the members of the Management Board (MB) of the European Union Agency for Railways" (ERA). You mentioned that the MB "is the Appointing Authority in line with the Agency Regulation (that further delegated its powers to the Executive Director, except complaints against a decision of the Director)".

The MB is composed of:

1. members who have the right to vote, namely one representative per Member State and two representatives of the Commission and
2. members without a right to vote, namely:
 - representatives of EFTA states and
 - stakeholders, representing, at European level the railway undertakings: (a) railway undertakings; (b) infrastructure managers; (c) the railway industry; (d) trade-union organisations; (e) passengers; (f) freight customers.

In accordance with the Decision of the EEA Joint Committee No 82/2005 of 10 June 2005 amending Annex XIII (Transport) to the EEA Agreement:

- "Member State(s)" and other terms referring to their public entities contained in the Regulation shall be understood to include, in addition to its meaning in the Regulation, the EFTA States and their public entities."
- "The EFTA States shall participate fully in the Administrative Board¹ and shall within it have the same rights and obligations as EU Member States, except for the right to vote."

You requested the EDPS' opinion in view of the MB meeting of 25 September 2019 on whether the Agency could disclose a complaint made on the basis of Art. 90(2) Staff Regulations to the members of the MB without voting rights and whether this would violate the data protection principles and applicable data protection legislation.

2. Assessment

It is the EDPS understanding that this personal data processing can be lawful under Article 5(1)(a) and recital 22 of Regulation (EU) 2018/1725, with Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways (thereafter, "the Agency Regulation"), notably Article 51(1)(h) giving the Management Board, "with respect to the staff of the Agency, the powers conferred by the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the Union [...] laid down in Regulation (EEC, Euratom, ECSC) No 259/68 (23) on the appointing authority and on the authority empowered to conclude contracts of employment", providing for the legal basis of this personal data processing.

In accordance with recital 36 of the Agency Regulation, stakeholders ("representatives of the sectors concerned") and implicitly, representatives of EFTA states should attend MB's meetings "in order to guarantee the transparency of the Management Board's decisions". The Agency Regulation links therefore the participation in the MB meetings to the need to ensure transparency of decisions, independently of whether participants have the right to vote.

In terms of limitations of transparency, Article 49(3) of the Agency Regulation states that "When a matter of confidentiality or a conflict of interest arises, the Management Board may decide to examine specific items on its agenda without the members concerned being present.

¹ We understand that the Management Board and the Administrative Board is the same body (which was confirmed by the ERA DPO on 5.02.2020 by phone).

This does not affect the right of the Member States and of the Commission to be represented by an alternate or by any other person." As a result, should a matter of conflict of interest arise in relationship to this particular case, the provisions of Article 49(3) should be applied.

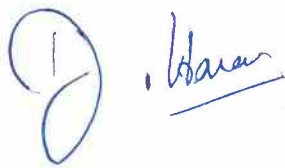
Consequently, in order to guarantee the transparency and, unless a matter of confidentiality or a conflict of interest arises, the EDPS considers that access can be granted to all members of the MB, including to members without the right to vote.

Nevertheless, the EDPS would like to draw attention to the data minimisation principle in accordance with which "personal data shall be [...] adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed" (Article 4(1)(c) of Regulation (EU) 2018/1725). Consequently, an assessment of the personal data to be provided to the MB members should be done in light of this principle. For example, ERA should assess whether MB members need the full details of the case, or whether a summary would be enough.

The EDPS would also like to recall the obligation to provide information to the data subject in line with Articles 15 and 16 of Regulation (EU) 2018/1725, including concerning the recipients or categories of recipients of the personal data and the categories of personal data concerned.

Yours sincerely,

Delphine HAROU

A handwritten signature in blue ink, consisting of a stylized initial 'D' followed by the name 'Harou' written in a cursive script. A horizontal line is drawn under the name.