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(EACEA)
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Dear Mr Gascard,

Thank you for your enquiry of 14 October 2009 pursuant to Article 28(1) of Regulation (EC) No 45/2001 (hereinafter ‘the Regulation’). Please find below the comments of the EDPS concerning the Preliminary draft decision of the Executive Committee adopting implementing rules concerning Regulation (EC) No 45/2001 (hereinafter ‘the Preliminary draft decision’).

The EDPS takes note of the EACEA’s approach of not merely applying the provisions concerning the tasks, duties and powers of the Data Protection Officer (hereinafter ‘DPO’) set out in Article 24(8) of the Regulation. In the Preliminary draft decision, the Agency has also laid down provisions concerning the role of the controller and exercise of the rights of the data subject.

The EDPS recommends the following changes to the text of the Preliminary draft decision:

Appointment, statute and independence (Article 3):

i) Article 3(2)

Article 3(2) of the Preliminary draft decision states that in principle the term of office of the DPO ‘*shall be from two to four years*’. However, Article 24(4) of the Regulation states that the Data Protection Officer shall be appointed ‘*for a term of between two and five years*’. We therefore recommend that this provision be brought into line with the Regulation.

ii) Article 3(4)

Article 3(4) of the Preliminary draft decision states that the Data Protection Officer ‘*may call upon specialist external staff to help in the performance of his or her duties*’. The EDPS considers that this sentence could be interpreted in a way that is incompatible with the Regulation and therefore needs to be clarified.

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The possibility for the DPO to call upon specialist external staff could be a necessary resource for performing his or her duties. However, this possibility should not undermine the DPO's functions. It is important for the DPO to play a central role within the Agency, as he or she is familiar with the problems that arise in the organisation in which he or she works (the proximity concept) and plays an essential role in providing advice. Furthermore, he or she helps to resolve issues relating to data protection. We therefore feel that it is necessary to add in the second sentence of Article 3(4) of the Preliminary draft decision that the DPO 'may call upon specialist external staff to help in the performance of his or her duties provided that such assistance does not undermine his or her function as DPO or his or her independence'.

In this light, the EDPS would draw your attention to Article 24(2) of the Regulation, which states that '*the Data Protection Officer shall be appointed on the basis of his or her personal and professional qualities and, in particular, his or her expert knowledge of data protection*'. In its reference document on the role played by data protection officers to guarantee effective compliance with the Regulation¹, the EDPS highlighted two elements of this profile covered by the Regulation, namely sufficient knowledge of the organisation and the structure of the institution/body and, if possible, specialist knowledge in the field of data protection. The EDPS has stressed that, according to the Regulation, a good practical knowledge of Community data protection law, particularly Regulation 45/2001, is a prior condition for performing the job. However, the EDPS realises that this may not be possible from the outset. That is why the EDPS recommended in the Regulation that the institution/agency/body should envisage holding data protection training sessions upon taking up the post and on an ongoing basis. Such training could be part of the resources that need to be provided to the DPO to help him or her perform his or her duties. The EDPS therefore recommends that the Agency organises specialist training and that this possibility is indicated in Article 3(4) of the Preliminary draft decision.

Responsibilities (Article 6)

The EDPS notes that paragraph Article 6(4) of the Preliminary draft decision concerns one of the data controller's tasks, i.e. the obligation to inform the DPO without delay of any matters that could have implications in terms of data protection and the application of the Regulation. The EDPS recommends that this paragraph be moved to Article 7(1) of the Preliminary draft decision entitled '*persons responsible for data processing and notifying processing operations*'.

Documents kept by the data controller (Article 9)

The EDPS notes that a record of written requests from data subjects wishing to exercise their rights is covered in Article 9(1)(a) of the Preliminary draft decision. Indeed, this practice could be used by the EACEA's data controllers to measure the effective application of the Regulation. This record would also allow the DPO to identify the potential weaknesses of the system. Meanwhile, the EDPS would like to draw your attention to the fact that requests concerning the right to rectification must also be kept. Article 14 of Regulation 45/2001 should therefore also be clarified in Article 9(1)(a) of the Preliminary draft decision.

The exercise of rights by data subjects (Article 10)

i) Article 10(3)

Under Article 10(3) of the Preliminary draft decision, the information that the data subject must give to the data controller to exercise one of his or her rights includes the category or categories of data concerning the subject him or herself. The EDPS emphasises that when access is requested, data subjects may not be aware of the data categories concerning them.

¹ Published on 28 November 2005 on the EDPS web site www.edps.europa.eu

The EDPS therefore recommends that Article 10(3) makes it clear that it is not mandatory to indicate the data categories concerned when exercising the right of access.

ii) Article 10(4) (first sentence)

The first sentence of Article 10(4) of the Preliminary draft decision states that '*the data controller shall ... in the file*'. The EDPS recommends that the term 'automatic system' be added to this sentence in compliance with Article 3(2) of Regulation 45/2001.

iii) Article 10(4) (second sentence)

The second sentence of Article 10(4) of the Preliminary draft decision states that '*an acknowledgement of receipt shall be sent to the applicant within five working days of the receipt of the request*'. The EDPS considers that this deadline is too short and may be difficult to meet in certain cases. It therefore recommends that this deadline should be extended to 15 days after the request is received, in line with the code of good administrative behaviour.

Restrictions (Article 17)

The EDPS notes the reference in Articles 20(1) and 20(3) of the Regulation in Article 17 of the Preliminary draft decision. Nonetheless, it is important for all the provisions in Article 20 of the Regulation to be mentioned. Therefore, the EDPS recommends that Article 17 refers to the provisions especially envisaged in Articles 20(2), 20(4) and 20(5) of the Regulation.

Monitoring procedure (Article 18)

i) Article 18(3)

Article 18(3) of the Preliminary draft decision states that the DPO replies to the data controller '*within 15 working days*'. The EDPS recommends the insertion of a sentence introducing some flexibility to the procedure for examining questions '*within 15 working days*', followed by '*or within a reasonable period of time depending on the complexity of the request*'.

ii) Article 18(4)

Article 18(4) of the Preliminary draft decision states that the DPO '*reports to the person who submitted the request within three months of receipt of same*'. For practical reasons and for flexibility, the EDPS recommends that the following sentences are added to that provision: '*This deadline may be extended until such time as the DPO has obtained the additional information requested. When the complexity of the file so requires, this deadline may also be extended for a further three months by decision of the DPO*'.

Remedies (Article 19)

The EDPS cannot see the relevance of Article 19(4) within the context of the Preliminary draft decision and therefore recommends that Article 19(4) be deleted.

Creating a link with the Agency's IT services

The EDPS notes that Article 6(3) of the Preliminary draft decision envisages that the DPO may require the aid of the IT services. Closer cooperation is encouraged by the EDPS, and therefore the EDPS invites the Agency to create a direct link between the DPO and the Agency's IT services. Such a link will be a source of useful information for the DPO.

Annual report from the DPO

The EDPS recommends that the DPO prepares an annual report on his or her activities for submission to the Director of the Agency. This annual report could also be included in the Agency's annual general report. An annual report on the DPO's activities would contribute

substantially to raising awareness of data protection among Agency staff. The EDPS therefore recommends that a provision to that effect be added to the Preliminary draft decision.

We will be happy to address any further questions or comments that you may have. We should be grateful if you would send the final version of the Preliminary draft decision approved by the EACEA to the EDPS.

Yours sincerely,

(Signed)

Giovanni BUTTARELLI

Cc: Mr Hubert Monet, EACEA Data Protection Officer.