EUROPEAN DATA PROTECTION SUPERVISOR

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PH/MVPA/et D(2010)1494 **C 2010-0614**

Dear Ms Pavesi,

By e-mail of 17 August 2010, you consulted us, pursuant to Article 46(d) of Regulation (EC) 45/2001, on an issue related to international transfers of personal data.

Your e-mail contains a brief summary of the relevant facts.

Background

The European Aviation Safety Agency (EASA) performs some activities (especially services in the field of certification) that give rise to the payment of fees and charges by applicants. Part of these certification activities may be conducted fully or partly outside the territory of the Member States.

These tasks are normally carried out by EASA staff members and/or by experts of the National Aviation Agencies (NAAs) (with whom EASA has a framework contract) who perform these activities on behalf of EASA.

In accordance with Articles 6 and 11 of Commission Regulation (EC) 593/2007, the payment invoiced to the applicant shall also include the travel costs of the experts.

In some cases the Agency has been asked by the applicants to provide them with the names and date of travelling of the experts in order to allow them to proceed to the payment of the invoice. The applicants ask EASA in such cases to make available the names of the experts and the date of travelling in order to ascertain who they are being charged for and to relate the expenses to each individual.

It has to be noted that applicants already have the names of the EASA/NAAs experts who provided a service at their premises, but they need EASA to link the amount of expenses to

each individual before being able to proceed to the payment. The data to be transferred is therefore the name and the date of travelling of the given experts.

Request for consultation

In your e-mail you mentioned that you would like to ask the advice of the EDPS on the application of Article 9 of the Regulation to the case described.

Recipient based outside the EEA

According to Article 9.1 of the Regulation *"[p]ersonal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out"*.

If the third country in question – outside the EEA – does not ensure an adequate level of protection, account should be taken of other conditions mentioned in Article 9. Indeed, Article 9.6 stipulates that *"[b]y way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if: (...) (d) the transfer is necessary or legally required on important public interest grounds, (...)"*.

This derogation has to be interpreted in the light of Recital 27 of the Regulation, which reads as follows: *"Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*. Since the performance of the services described above is one of the core activities of EASA, the transfers conducted for the payment of those services could be considered, in principle, as necessary for the functioning of this body, so as to qualify for a derogation under Article 9.6 sub (d).

In this context, it is essential to bear in mind that the use of Article 9.6 derogations could not be applied under all circumstances. Article 9.6 of the Regulation is analogue to Article 26.1 of Directive 95/46/EC, and has to be interpreted in the light of it. The Article 29 Working Party has adopted a Working Document on a common interpretation of Article 26.1, where it is stated that *"transfers of personal data which might be qualified as repeated, mass or structural should, where possible, and precisely because of these characteristics of importance, be carried out within a specific legal framework"*.[1] Other factors to be considered are *"the risks induced for the data subjects"*.

In the present case it seems, *a priori*, that transfers would not be "repeated, mass or structural", but they would take place as a "one shot" transfer to different recipients in different countries. As to the risks to the data subjects, no specific risks have been mentioned in your letter. The categories of data to be transferred (name and the date of travelling of the given experts) do not seem to give rise to particular concerns either, taking into account the information provided to us in your email.

[1] Article 29 Working Party, Working document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, WP 114, available at: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf , page 9.

It has to be noted, however, that in those cases where an exception is applied, no safeguards are, in principle, ensured. For this reason we recommend the inclusion of a clause, in the context of the transfer, specifying that the recipient (a) is legally authorised to request this data, and (b) will limit the use of the data for the sole purposes motivating the transfer.

I hope that these comments are helpful for your analysis and decisions.

Yours sincerely,

(**signed**)

Peter HUSTINX