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Brussels, 11 November 2010  
GB/MV/kd D(2010) 1705 C 2010-0638

Dear Mrs Le Gouriérec,

On 27 August 2010, the European Data Protection Supervisor (EDPS) received by e-mail a notification for prior checking (Notification) under Article 27 from the Data Protection Officer (DPO) of the European Food Safety Authority (EFSA) on Training Policy. This notification follows a consultation by the DPO on the need for prior checking (2010-533) that the EDPS received on 13 July 2010. In the light of the information which was provided to the EDPS by EFSA at the time on the consultation on the need for prior checking, the EDPS concluded that the processing operations that occur in the context of evaluation of in-house training aim at evaluating individuals. In particular, it was stated in the consultation that the performance of course participants is subject to evaluation (and, as for language courses, it has an impact on their career-Article 45.2 of the Staff Regulation). On 29 July 2010, therefore the EDPS reached the conclusion that the processing operation was subject to prior checking.

On 6 October 2010, the EDPS sent the draft prior check opinion on Training Policy for comments to EFSA. Following comments by the DPO and the data controller on this draft, it was clarified to the EDPS that "*Evaluation language testing aims at "assessing the knowledge of a language" of staff. Evaluation of in-house courses "do not" aim at evaluating individuals, but at assessing the quality of the course and whether the needs, expectations and objectives have been met by participants*". The data collected mainly concern statistical, hence intended for quality assurance purposes of the EFSA Training Policy as such. Although trainer evaluation data may be included, the produced report is not intended to evaluate individual trainers. Only the data controller (SDW Team/HoU HR Unit) is able to produce the BO report course feedback overview mentioned above. Therefore, in the light of these comments, the EDPS concludes that this notification is not subject to prior-check.

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Although not subject to prior check, after having analysed the elements of the procedure which was submitted to him, the EDPS would nevertheless like to make the following recommendations, also in line with other recommendations he made in the EFSA inspection report (case 2008-0575) in order to ensure that there is no breach of the provisions of Regulation 45/2001:

- 1) EFSA should ensure that the statistical treatment of data will be conducted in an anonymous way;
- 2) EFSA should remind the HR departments and hierarchical superiors of Article 7(3) on transfers;
- 3) EFSA should ensure that in the case spouses/partners follow the Italian language courses, they are provided with the same rights of access and rectification as well as information (privacy statement) as the other participants;
- 4) EFSA should reassess its data protection clause in the contracts with data processors. Indeed, external contractors may be involved in processing of personal data in connection with staff training at EFSA. In fact, these contractors may be processing personal data on behalf of the EFSA who would determine the purposes and means of the actual data processing (Article 2(d) and (e) of Regulation 45/2001).

Pursuant to Article 23 of the Regulation, the controller should choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 of the Regulation and that such processing should be governed by a contract or a legal act binding the processor to the controller stipulating, in particular that the processor has also to comply with the confidentiality and security obligations set out in the national law transposing Articles 16 and 17(3) of Directive 95/46<sup>1</sup>.

In the case under review, the companies providing trainers (external language classes for instance) could be for instance subject to Italian law and therefore the requirements of security and confidentiality established under Italian law fall to them.

The framework service contract which EFSA has signed in 2009 on provision of language training and all EFSA contracts signed as result of proper procurement action include a provision on Data Protection.

The EDPS is satisfied by the inclusion of such a clause. However, he has some reservations in relation to the content of this clause. The reference to the right of access and right of rectification to the EDPS states that the contracting party is the beneficiary of this right. The EDPS would point out that every data subject concerned by the data must be able to benefit from it. In addition, this clause should specify that with regard to the processing of personal data, the subcontractor acts only on instruction of the data controller, namely EFSA. Therefore, the EDPS invites EFSA to reassess its clause relating to the protection of the personal data.

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<sup>1</sup> According to Article 16 of Directive 95/46/EC, the processor shall not process personal data except on instructions from the controller, unless required to do so by law.

Article 17(3) of Directive 95/46/EC specifies that appropriate technical and organisational measures must be adopted by the controller and the processor to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

5) All agreements with external contractors should provide for the confidentiality and security obligations set out in the applicable Italian data protection legislation (Article 23 of the Regulation).

The EDPS invites EFSA to adopt specific and concrete measures to implement these recommendations regarding the training policy. To facilitate our follow-up, it would therefore be appreciated if you could provide the EDPS with all relevant documents within 3 months of the date of this letter to evidence that the recommendations have been implemented.

Yours sincerely,

**(signed)**

Giovanni BUTTARELLI

*Cc :* Mr Claus Reunis, Data Protection Officer, EFSA