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DG/XK/mk D(2013)0609 C 2012-0902/3

Subject: Prior-checking notification on the processing operations related to the informal procedure for cases of psychological and sexual harassment and the selection of confidential counsellors for the informal procedure in cases of harassment in the European Railway Agency (ERA) (cases 2012-0902/3)

Dear Mr Mikkel Emborg,

We have analysed the documents you have provided to the EDPS concerning the notification for prior checking under Article 27(3) of Regulation 45/2001 ("the Regulation") on the processing operations related to harassment and confidential counsellors at the European Railway Agency in light of the EDPS Guidelines on the same subject ("the EDPS Guidelines").

The EDPS points out that the analysis and principles laid down in the EDPS Joint Opinion on the "*anti-harassment policy and the selection of confidential counsellors*"¹ may also be relevant in the present case and the Agency is therefore invited to consider it thoroughly.

In this letter, the EDPS will only identify and examine ERA's practices which do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing ERA with relevant recommendations.

1. Reasons for prior-checking

ERA's notification indicates that the processing operations under analysis justify prior-checking since they present specific risks on the basis of Articles 27(2)(a) and 27(2)(b) of the Regulation.

The processing operations are indeed subject to prior-checking on this legal ground: they may concern data relating to health within the meaning of Article 27(2)(a) of the Regulation.

¹ Joint Opinion issued on 21 October 2011 (case 2011-0483).

Furthermore, the procedures involve the processing of personal data intended to evaluate personal aspects relating to data subjects, including in particular their conduct in the case of an informal procedure, and their ability to perform the required functions in the case of the selection of confidential counsellors, in light of Article 27(2)(b) of the Regulation.

2. Transfer of data

The EDPS Guidelines state that only hard data should be transferred to the HR Department, i.e. administrative and identification data, usually collected directly from the data subjects (possibly by means of opening and closing forms). The selection of such data should not be excessive in relation to the administrative purpose pursued. HR should instead not process "soft" data, particularly the personal notes of the counsellors (other than possibly keeping in its facilities the electronic or paper files, so as to safeguard security and confidentiality). Although the ERA procedure indicates that HR only has access to the information necessary to perform its tasks, there may be a risk that the transfers of "soft" data could become structural as opposed to ad hoc.

Recommendation: ERA should ensure that data transfers are only made to the HR Sector when necessary for the performance of its administrative tasks.

3. Retention

The EDPS welcomes the fact that ERA has agreed to shorten the retention periods for personal data relating to the selection of confidential counsellors. Any changes should now be reflected in the privacy policies and manual. However, it is noted that the five year retention period for other case documentation including opening and closing sheets remains in place.

Recommendation: Retention periods for opening and closing sheets and all other case documentation, should be reconsidered in light of Article 1(e) of the Regulation. This states that personal data must be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed". ERA should re-assess and report to the EDPS whether it is strictly necessary, in light of Article 1(e), that the HR Sector would require five years to fulfil their mandate.

4. Rights of access and rectification

The rights of access and rectification are enforceable rights of the data subject. This reality should be reflected in the manual and in the privacy statements where Articles 13 and 14 are not presently quoted. Articles 13 and 14 are the general rule and any application of the limitations foreseen in Article 20(1)(c) must be granted on the basis of a case by case analysis.

Recommendation: The EDPS recommends that ERA focuses on legal substance. It could be useful to make reference to (or to quote) Articles 13 and 14, and to clarify the limitations foreseen under Article 20.

5. Data Quality

Section 3 of the EDPS Guidelines stresses that the "hard" data collected in the forms should be adequate, relevant and not excessive in relation to the purpose of their collection. The analysis on

what type of "soft" data should be collected in relation to any given case, should be done on a case by case basis.

With regard to the collection of data for statistical purposes, the EDPS insists that this should not allow the identification of the data subject. It should be borne in mind that data subjects may be identifiable purely by inference, especially within smaller European entities.

It may be possible that the data fields on the ERA's anonymous statistical records may still permit the identification of the individuals concerned in some circumstances.

Recommendation: ERA should consider minimising the data on the statistical records. This could include removing nationality (if not strictly necessary) and widening the age bands. The EDPS would also recommend that counsellors anonymise their personal notes as far as possible. For example, by using initials or abbreviations instead of full names.

6. Information to be given to the data subject

Articles 11 and 12 of the Regulation provide that data subjects must be informed of the processing of data relating to them, and be given specific additional information in order to guarantee fair processing. In the present case, the data processed in the framework of the selection of counsellors and the informal procedure are partly provided by the data subject and partly by other means.

In the case of harassment, the information must be twofold: (i) the general information relating to the procedures put in place to fight against harassment (informal procedure, network of confidential counsellors) and (ii) the specific information given to the data subjects directly involved in a particular procedure as alleged victim, alleged harasser, witness etc. To an extent, these two levels of information are dealt with in the documents provided by ERA.

However, the EDPS has carefully analysed the manual of procedures and the specific privacy statements on the protection of personal data within the framework of an informal procedure and selection of confidential counsellors. As to the specific information given to the data subject, it seems that ERA has mainly focused on the alleged victim and confidential counsellor. Witnesses and alleged harassers also need to receive relevant information, unless one of the exceptions under Article 20 applies.

Recommendation: Additional details may need to be given to alleged harassers and witnesses, depending on any possible interactions or outcomes. However, the limitations foreseen under Article 20 should always be carefully considered, and the exceptions highlighted to any potential data subjects.

7. Recipients

The EDPS notes that the privacy statements for both the selection of confidential counsellors and the informal procedure contain a section entitled "Who has access to your information and to whom is it disclosed?". The privacy statement for the informal procedure does not make reference to potential disclosures to third parties other than the Medical Service.

Recommendation: If the ERA envisages scenarios in which personal data may be disclosed to other third parties like independent psychologists for example (even with explicit consent), this possibility should be pointed out in the privacy statement and in the manual.

8. Security

According to Article 22 of the Regulation, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"*.

All potential counsellors attend comprehensive training at the EC, which highlights the importance of confidentiality and security. All paper documents will be stored in a secure and dedicated space.

Recommendation: The EDPS would recommend that ERA highlights the importance of security in terms of the personal notes kept by the counsellors and the HR service. For example, clear written advice should be provided to each party on the security measures that the documents should be subject to. Although confidentiality is covered in training, it is suggested that confidential counsellors, and any other parties processing the data, should sign a declaration of confidentiality including conflict of interest requirements. In addition, this declaration should include clauses relating to the (exceptional) grounds on which data can be transferred to internal or external parties.

9. Conclusion

The EDPS recommends that the ERA adopts specific and concrete measures to implement the above mentioned **recommendations** regarding its harassment and confidential counsellors procedures. The EDPS should be provided with all relevant documents within three months of the date of this letter to confirm that any such actions have been implemented.

Sincerely yours,

(signed)

Giovanni BUTTARELLI

Cc: Ms Zografia PYLORIDOU, Data Protection Officer, European Railway Agency