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GB/OL/sn D(2013)2001 C 2013-0728, 0729
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correspondence

Dear Ms Bardenhewer-Rating,

On 27 June 2013, you submitted two notifications for prior checking under Article 27 of Regulation (EC) Nr. 45/2001 (the Regulation) to the European Data Protection Supervisor (EDPS). The first of these concerned the "establishment of rights and entitlements upon departure of staff" [our case 2013-0728], while the second concerned the "establishment of rights upon recruitment/appointment of staff" [our case 2013-0729]. As these two processing operations raise largely similar points, the EDPS has decided to address them jointly.

Overview of the Facts

The processing operations notified deal with the establishment of rights and entitlements upon recruitment/appointment and upon departure of staff. These include the place of origin (and thus the expatriation allowance), family allowances, installation allowances, reimbursement of travel costs, severance grants and several others.

F4E collects most of the data on forms provided by the Paymaster's Office (PMO) and is not in a position to change them (except for the leaving form). The data are then transferred to PMO, which decides on the rights and entitlements.

Legal Analysis

Both notifications mentioned Article 27(2)(d), i.e. processing operations "for the purpose of excluding individuals from a right, benefit, or contract", as grounds for prior checking.

Even though failure to supply the information requested will result in not being granted certain rights and entitlements, the purpose of the processing is not to exclude individuals from these rights and benefits but, on the opposite, to grant certain allowances - under certain conditions - to individuals.¹ The provision of Article 27(2)(d) relates to matters such as blacklisting or exclusion databases.²

None of the other indicators for specific risks in Article 27 apply either.³ **The two notified processing operations are thus not subject to prior checking.** Nonetheless, the EDPS would like to make several comments on the notifications and the information provided therein:

In both cases, the privacy statements refer to the Head of F4E's Administration Department as controller. We would like to point out that legally speaking, F4E as an agency is the controller; the Head of Administration leads the organisational parts entrusted with the processing of personal data and is as such an appropriate contact point, but the controller remains F4E as an agency.

The privacy statement for departing staff states that apart from the fact that the processing operations are necessary for the performance of tasks in the public interest (Article 5(a)) and necessary for compliance with legal obligations (Article 5(b)), it is also "considered that the staff member gave his/her consent to the proceeding by submitting the request forms". Given the significant imbalance between employer and employee, using consent as a ground for lawfulness is difficult in the workplace.⁴ As a general rule, consent should only be used as a supplementary ground for lawfulness in employment matters, not the only one; if it is to be used, it has to be ensured that it is actually given freely. In any case, the EDPS considers that the main reason for lawfulness for staff matters as those notified in the present case is Article 5(a). For this reason, Article 5(d) should not be used and the notification should be modified accordingly.

As the data are collected directly from the data subject in both cases, it is not necessary to list all data fields in the privacy statement. It would be sufficient to simply refer to "the data provided by you in the forms as well as any attachments". This could make the statement more concise and easier to read.

Similarly, there is no need to repeat almost the complete wording of Articles 13 to 20 in the sections on data subject rights. It is enough to mention that the rights to access and rectification exist and how to exercise them (e-mail to contact point for controller etc.). It is a good practice to include information on in which time limit a reaction can be expected.

While most of the forms are provided by the PMO and cannot be changed by F4E, the leaving form is established by F4E. The EDPS invites F4E to justify why "future employment data" on the former employee's new job is needed on this form. Similarly, for EU officials transferred to F4E, the purpose of collecting a copy of the lease contract should be explained.⁵

¹ See cases 2007-0561, 2008-0396, and 2011-0644.

² Exclusion databases offer an example of Article 27(2)(d): if a person is placed on the exclusion list, she is worse off (in that she is no longer eligible for participation in calls for tender) than if the exclusion database did not exist. Article 27(2)(d) therefore applies to such databases. See cases 2010-0426 and 2009-0681.

³ Article 27(2)(b) (evaluation of personal aspects relating to the data subject) does not apply either, as this does not constitute an evaluation of the data subject, but rather a collection of facts measured against objective criteria (see cases 2007-0558 and 2008-0396).

⁴ See case 2013-0717

⁵ Proof of residence could also be obtained via other, less intrusive, means.

Please inform the EDPS of the measures taken based on these recommendations within a period of 3 months.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Hans Jahreiss, Head of Administration, F4E