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GB/OL/sn/D(2014)0121 C 2013-0874
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Dear Mr Brouwer,

On 16 July 2013, the Data Protection Officer (DPO) of the EDA submitted a notification for prior checking pursuant to Article 27 of Regulation (EC) 45/2001, on the procedure following alleged psychological or sexual harassment.

The EDPS has already issued Guidelines on anti-harassment procedures.¹ The present Opinion will only focus on those aspects that diverge from the Guidelines or otherwise merit attention.

Given that this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply. Questions were asked to EDA on 18 July and 15 October 2013, to which EDA replied on 6 September and 15 November. A draft Opinion was sent to the DPO on 8 January 2014; on 17 January, EDA indicated that there were no comments. This case has been dealt with on a best-effort basis.

The facts

EDA is subject to its own staff regulations.² The notification as initially provided covered both informal and formal procedures. EDA later clarified that the implementing rules for the formal procedure (administrative inquiries and disciplinary proceedings) have not yet been adopted; these will be notified separately.

EDA has chosen not to select internal staff members as confidential counsellors, but relies on an external service provider. This service provider is bound by professional secrecy. HR staff involved in the procedures sign a specific confidentiality undertaking. The notification refers

¹ Available on the EDPS website

² Council Decision 2004/676/EC as amended, consolidated version: <http://www.eda.europa.eu/docs/default-source/documents/consolidated-eda-staff-regulations-en.pdf>.

to the controller *ad personam* and does not mention under which point of Article 5 of the Regulation the processing is lawful.

The privacy statement refers to the controller as the Head of the Human Resources Unit.

The notification and the privacy statement both mention a number of possible recipients of personal data, such as the External Prevention Advisor/Mediator or the Court of Justice.

The privacy statement does not inform data subjects about their rights to access and rectification, and it does not mention the categories of data concerned.

Legal Analysis

Scope

The initial notification referred to both the informal procedure and the formal one. EDA later clarified that the implementing rules necessary for the formal procedure have not been adopted yet, and announced that the notification for this part would follow later.³ For this reason, this Opinion only deals with the informal part of the procedure. In order to have clarity for persons inspecting the EDPS' register of notifications under Article 27, **EDA should provide an updated notification, describing only the informal phase (updated in line with the other recommendations in this Opinion).**

Controllership

Legally speaking, EDA as an agency is the controller of the processing operation, with the human resources unit being the organisational part entrusted with the processing of personal data. The Regulation never refers to specific individuals as controllers, but always to institutions, bodies, units and organisational entities. This **should be clarified in the privacy statements and the notification** - EDA as an agency is the controller; while the Head of the Human Resources Unit is a good contact point for inquiries from data subjects, the responsibility of the controller rests with EDA as an agency.

Lawfulness

One item that is not clearly mentioned in the notification is under which point of Article 5 EDA considers the processing lawful. In the present case, **Article 5(a) is the relevant provision**, as the procedure serves to ensure compliance with Article 13 of the EDA Staff Regulations.

Information to data subjects

Concerning the list of recipients in the notification and privacy statement, the EDPS has two observations:

- (1) persons/authorities who are an integral part of the procedure, such as the External Prevention Adviser/Mediator, should not be considered as "recipients" in the sense of Articles 7 to 9; their roles should rather be mentioned in the description of the processing;
- (2) authorities which would only receive data in the context of specific targeted inquiries are not considered "recipients".⁴

³ For this upcoming notification, please take the EDPS guidelines on administrative inquiries and disciplinary proceedings (available on our website) into account.

⁴ See Article 2(g) of the Regulation. This is an exception to the information obligations in Article 11 and 12, but not to the rules on transfers in Articles 7 to 9. In practice, this means that authorities such as the OLAF, the European Ombudsman or the EDPS do not *need* to be mentioned in the privacy statement (unless the processing

The privacy statement also does not mention the categories of data that can be processed during the procedure,⁵ nor does it mention the right of access and rectification.⁶ Both of these items are mandatory.

The **privacy statement should be adapted** further to the explanations in this section.

Conclusion

There is no reason to believe that there is a breach of Regulation 45/2001, provided the recommendations contained in this Opinion are implemented.

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

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Gabriele Borla, Data Protection Officer, EDA

operation in question involves transfers to these organisations as part of the procedure); however, the applicable rules on transfers will always need to be respected.

⁵ Article 11 and 12 differ slightly in the amount of information to be supplied to the data subject: while Article 11 (data which are collected directly from the data subject) does not include this requirement, it is included in Article 12 (data which are not obtained directly from the data subject). For this reason, information on the categories of data should be included in the privacy statement.

⁶ It is good practice to mention that access might be restricted in line with Article 20(1)(c).