



GIOVANNI BUTTARELLI  
ASSISTANT SUPERVISOR

Mr Carlo DES DORIDES  
Executive Director of the  
European GNSS Agency  
Janovskeho 438/2  
17000 Prague  
Czech Republic

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GB/ALS/mjs/D(2014)1125 C **2014-0468**  
Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu) for all  
correspondence

**Subject: Notification for prior checking concerning "fixation of individual rights"  
(Case 2014-0468)**

Dear Mr des Dorides,

I refer to the notification on the above quoted processing operation at the European GNSS Agency ("GSA") submitted to the European Data Protection Supervisor ("EDPS") on 24 April 2014.

After a careful analysis of all documents submitted we came to the conclusion that the procedure in question is **not subject to prior checking**.

The reasons for this are the following:

The notification mentioned Article 27(2)(d) of Regulation (EC) 45/2001 ("the **Regulation**") as the ground for prior checking, referring to processing operations aiming at excluding persons from a right, benefit, or contract.

However, Article 27(2)(d) does not apply here, as the purpose of the processing is not to exclude persons from a right, benefit or contract but, on the opposite, to grant certain rights (such as

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Postal address: rue Wiertz 60 - B-1047 Brussels

Offices: rue Montoyer 30

E-mail : [edps@edps.europa.eu](mailto:edps@edps.europa.eu) - Website: [www.edps.europa.eu](http://www.edps.europa.eu)

Tel.: 02-283 19 00 - Fax : 02-283 19 50

allowances) –under certain conditions– to individuals.<sup>1</sup> The provision of Article 27(2)(d) relates to processing operations such as blacklisting or exclusion databases.<sup>2</sup>

None of the other grounds for prior checking seems to apply either. However, if you believe that there are other factors justifying prior checking, we are of course prepared to review our position.

Nonetheless, the EDPS would like to make comments on the notifications and the information provided therein:

1. *Lawfulness*: The privacy statement mentions Articles 5(a), 5(b), 5(c) and 5(d) of the Regulation as grounds for lawfulness. In the view of the EDPS, only Article 5(a) is relevant here. The EDPS considers that Article 5(b) is only applicable when the controller has no discretion as to whether and in which way a processing operation is carried out.<sup>3</sup> It does not apply to cases in which simply the existence of a procedure is mandatory, as in the present case. Given the significant imbalance between employer and employee, using consent as a ground for lawfulness (Article 5(d)) is difficult in the workplace.<sup>4</sup> 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(b),(c) and (d) should not be used and the privacy statement should be modified accordingly.
2. *Conservation periods*: Furthermore, the EDPS would like to comment on the retention period of personal files. GSA foresees a retention period for the personal files of 120 years. In light of Article 4(1)(e) of the Regulation, the EDPS has always considered this retention period as excessive and unnecessary to the purpose for which personal data are collected and further processed. As the EDPS recommended in his Guidelines on Staff recruitment<sup>5</sup>, personal data should be stored in personal files (Article 26 of the Staff Regulations), for a period of ten years as of the termination of employment or as of the last pension payment. The EDPS highlights that the issue of the retention period of personal files is a pending issue subject to on-going discussions between the EDPS and the EU institutions. The EDPS invites GSA to re-consider this issue in light of the agency's practical needs and experiences.

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<sup>1</sup> See cases 2007-0561, 2008-0396, 2011-0644, 2013-0728 and -0729.

<sup>2</sup> 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 he/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.

<sup>3</sup> See cases 2006-0520, 2008-0726, and 2010-0426.

<sup>4</sup> See case 2013-0717.

<sup>5</sup> EDPS Guidelines concerning the processing operations in the field of staff recruitment, [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10\\_Guidelines\\_staff\\_recruitment\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf).

3. *Information provided to the Data Subjects:* With regard to the procedures for data subjects to exercise their rights of access, rectification and others, the privacy statement should explain the meaning of the rights and not only how to exercise them. It is a good practice to include information on in which time limit a reaction can be expected (e.g. 3 months for access request, without delay for rectification, etc.).

The obligation to inform data subjects of whether providing data is mandatory or voluntary and the consequences of a failure to reply to questions as provided by Article 11(1)(d) should be mentioned in the privacy statement.

The EDPS expects the GSA to implement the recommendations accordingly and will close the case.

Thank you for your cooperation.

Yours sincerely,

**(signed)**

Giovanni BUTTARELLI

Cc: Ms Triinu VOLMER, Data Protection Officer - GSA