

Opinion on notifications for prior checking received from the Data Protection Officers of six EU Executive agencies concerning the "*processing of administrative inquiries and disciplinary proceedings*".

Brussels, 18 December 2014 (Cases 2013-1022 (REA), 2013-1012 (CHAFEA), 2014-0136 (INEA), 2014-0723 (EACEA), 2014-0805 (ERCEA) and 2014-0937 (EASME)).

Procedure

On 4 September 2008, the European Data Protection Supervisor (EDPS) sent a letter to all EU agencies announcing the new procedure for ex post prior checking analysis regarding common procedures within the agencies.

On 23 April 2010, the EDPS issued "*Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European Union institutions and bodies*" (EDPS Guidelines)¹. On 22 June 2011, the EDPS delivered a Joint Opinion, in light of the EDPS Guidelines, on the processing operations related to administrative inquiries and disciplinary proceedings (AI&DP) carried out by five EU agencies².

In order to ensure an efficient implementation of the policy for AI&DP, six executive agencies have decided to set up common lists of candidates for disciplinary boards. In that respect they drafted a "Memorandum of Understanding on a common list of candidates for Disciplinary Boards of Executive Agencies", a "Decision on the adoption of the manual of Investigation and Disciplinary office" and "Procedural rules of an agency's Disciplinary Board". In addition, each agency signed a Service Level Agreement with DG-HR which enables them to have access to the services of the Investigation and Disciplinary Office of the Commission (IDOC) (the SLA).

In the present Opinion, the EDPS has therefore decided to examine jointly the notifications of these six Executive agencies (the agencies):

- Research Executive Agency (**REA**),
- Consumers, Health and Food Executive Agency (**CHAFEA**),
- Innovation and Networks Executive Agency (**INEA**),
- Education, Audiovisual and Culture Executive Agency (**EACEA**).
- European Research Council Executive Agency (**ERCEA**) and
- Executive Agency for Small and Medium-sized enterprises (**EASME**).

The last notification was sent by the **EASME** on 8 October 2014.

¹ <https://secure.edps.europa.eu/EDPSWEB/edps/Supervision/Guidelines>.

² Case 2010-0752.

All six notified cases are analysed in light of the EDPS Guidelines.

Considering that most of the notifications are *ex-ante*, except the one from INEA, the EDPS should deliver his Opinion within two months following receipt of the last notification under Article 27(4) of the Regulation. The Opinion should be issued no later than 24 December 2014.

The EDPS notes that **REA**, **CHAFEA**, **EACEA**, **ERCEA** and **EASME** make reference to "inquiries following a request under Articles 24, 73 and 90 of the Staff Regulations" in their notifications and privacy notices. The SLA between the agencies and IDOC does not cover the above procedures; it concerns the technical and intellectual assistance to each agency during the several stages of AI&DP in light of Annex IX of the Staff Regulations. The EDPS Guidelines concern the processing of personal data in the field of AI&DP. The notifications and privacy notices should therefore limit their scope to this field and the present Opinion will only focus on the analysis of the agencies' data protection practices related to AI&DP.

With regard to the whistleblowing procedures mentioned by **ERCEA** and **EASME** in their notifications, as the notifications should be limited to one general purpose, the EDPS will treat them separately at a later stage.

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

1) Grounds for Prior-checking AI &DP

EACEA, **INEA** and **EASME** specified Article 27(2)(d) of the Regulation as an additional prior-checking ground for submitting the notification on AI&DP to the EDPS. **INEA**, stated in the notification that disciplinary proceedings may lead to the exclusion of a staff member from a benefit or a working contract with the agency, hence the processing operation may present specific risks under Article 27(2)(d) of the Regulation which justifies a prior-checking analysis by the EDPS.

This provision is not applicable here as the primary purpose of conducting an AI&DP is not to exclude individuals from a right, benefit or contract, but to investigate and assess potential misconduct. On the other hand, the procedure involve the processing of data relating to suspected offences, offences, criminal convictions or security measures (Article 27(2)(a)) and the assessment of the allegations of misconduct implies an evaluation of the conduct of the data subject (Article 27(2)(b)).

2) Information to be given to the data subject

All agencies have prepared thorough data protection notices including most of the elements listed in Articles 11 and 12 of the Regulation.

Restriction of the right to inform

As the EDPS Guidelines highlighted, it may be necessary not only to restrict the rights of access and rectification, but also ***not to inform*** the data subjects about the processing of their personal data.

The EDPS draws the attention to the fact that the restriction to the obligation to inform cannot

be absolute. The controller should take into consideration Article 20(3) of the Regulation and inform the data subjects of the principal reasons on which the application of the restriction is based as well as of his/her right to have recourse to the EDPS. In some specific circumstances, however, it might be necessary to defer from Article 20(3) so that the investigation process will not be harmed, as Article 20(5) provides. Such decision should be taken strictly on a case by case basis and it should be documented.

Each agency should therefore add in their data protection notices the above recommendation accordingly.

Meaning of Article 20(3)

The SLA identifies the different stages during the AI&DP when the agency should inform data subjects about the processing of their data. The EDPS recalls that each agency is also responsible to inform the data subjects about the opening of an inquiry related to them. This concerns the evaluation stage (prior to formal opening of case) according to point A.1 of Appendix 4 of the SLA, when the agency is informed of a situation with a possible disciplinary dimension and it forwards the available information collected to IDOC for an initial evaluation.

In cases where the agency decides to apply a restriction under Article 20(1) of the Regulation, such decision should be taken strictly on a case by case basis. The application of Article 20(3) means that the agency should be able to provide evidence demonstrating detailed reasons for taking such decision (e.g. motivated decision). These reasons should prove that they cause actual harm to the investigation and they should be documented before the decision to apply any restriction under Article 20(1) of the Regulation is taken.

Right of rectification

INEA should specify in the privacy statement some means of guaranteeing the right of rectification in the context of an AI&DP. The agency should for instance mention that data subjects, apart from being allowed to add their comments, may also include other documents related to a legal recourse or an appeal decision in their files. Where applicable, data subjects may further ask that the decision is replaced or removed from their file.

3) Security

Due to the sensitive nature of the data likely to be processed, such as data related to health, the EDPS recommends that each agency prepares confidentiality declarations to be signed by all the case handlers involved before an AI&DP is launched with IDOC. The confidentiality declarations should mention that the case handlers involved are subject to an obligation of professional secrecy equivalent to that of a health professional. This organisational measure aims at maintaining the confidentiality of personal data and at preventing any unauthorised access to them within the meaning of Article 22 of the Regulation.

4) Traffic data

In case it is necessary that traffic data are processed in the context of an AI&DP, the EDPS recommends that the DPO of each agency is consulted by IDOC before such data are processed by the latter. The DPO should act as the interface between the traffic data controller and IDOC; it is important that the DPO ensures that the data quality principle (Article 4(1)(c) of the Regulation) is applied *in concreto* and that IDOC processes only adequate, relevant and not excessive traffic data in relation to the purpose for which they are further processed (the

investigation purposes). This principle of proportionality should therefore be fully respected by all actors in the context of an AI&DP.

Conclusion

In light of the above, the EDPS invites all agencies to adopt all their internal documents duly drafted related to AI&DP as well as their data protection notices and publish them on their intranet. On the basis of the accountability principle, the EDPS expects each agency to implement the above recommendations accordingly.

The EDPS has therefore decided to close the case. Please do not hesitate to contact us if you require further information.

Done at Brussels, 18 December 2014

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