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**Subject: Anti-harassment at ENISA - Article 27 notification**

Dear [...],

On 31 July 2013, ENISA's data protection officer (DPO) submitted a notification concerning ENISA's anti-harassment procedure for prior checking under to Article 27 of Regulation (EC) 45/2001 (the Regulation). As this is an ex-post notification, the deadline of two months for the EDPS to issue an Opinion does not apply.<sup>1</sup>

Given that anti-harassment procedures have already been the subject of EDPS Guidelines<sup>2</sup> (the Guidelines), this prior check Opinion will only focus on those aspects that diverge from the Guidelines and/or are not compliant with the Regulation.

**Lawfulness and the processing of special categories of data**

The notification form does not specifically mention the grounds for lawfulness, only a legal basis (Article 12a of the Staff Regulations). This Article is complemented by Article 11 of the Conditions of Employment of Other Servants (not mentioned in the notification, but in the information provided to data subjects and in the documentation of the procedure), which extends certain rules of the Staff Regulations (including Article 12a) to other categories of staff. The processing is thus lawful under Article 5(a) of the Regulation, as the anti-harassment procedure seeks to create a work environment free of harassment.

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<sup>1</sup> On 5 August 2013, 7 March 2014, 18 December 2014 the EDPS asked several questions for clarification; ENISA provided answers on 4 March 2014, including an updated notification, on 9 December 2014, and 9 June 2015 announcing an updated notification, keeping the case suspended. On 10 June 2016, the EDPS announced continuing the examination of the case without the updated notification. On 11 July 2016, the draft Opinion was sent to ENISA's DPO for comments, which were received on 21 July 2016

<sup>2</sup> Available on the website of the EDPS.

The notification mentions Article 10(3) of the Regulation as reason why special categories of data may possibly be processed in the anti-harassment procedure. This Article refers to processing for the "*purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services*". This does not seem to be the case here. Article 10(2)(b) of the Regulation states that the processing of special categories of data may be justified if "*necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorized by the Treaties or other legal instruments adopted thereof*". The legal basis which is relevant in the case (Article 12a of the Staff Regulations) imposes an obligation on the European institutions and bodies to prevent harassment and to guarantee a work environment free of any form of psychological or sexual harassment among their staff. Therefore, the processing of special categories of data can be regarded as necessary for complying with this obligation, inasmuch as those data are relevant for the case. In case a party to the procedure voluntarily provides special categories of data about him/herself, Article 10(2)(a) of the Regulation may also be relevant.<sup>3</sup> **The notification should be updated in this regard.** That being said, the processing of special categories of data should be limited to the amount that is absolutely necessary for the procedure to function.

### **Conservation of data**

The notification mentions the HR team as a recipient. ENISA clarified that this refers only to the opening and closure forms and documents necessary for the administration of the procedure ("hard data" as per the Guidelines). However, the manual of procedures for the anti-harassment procedure states<sup>4</sup> that apart from the opening and closure forms, also "*relevant documents that the confidential counsellor considers necessary to explain and understand the initiatives taken*" may be added to the information kept by the HR department after closure. Other documents are either destroyed or returned to the alleged victim.

Following the guidelines on anti-harassment procedures, **only "hard data", i.e. the opening and closure forms should be stored by the HR department after closure of a case.**<sup>5</sup>

### **Data transfers**

According to the documentation provided, all steps in the procedure are subject to the prior consent of the victim; exceptions are only possible in very rare cases, i.e. where there is a danger to the health of the alleged victim is in danger and he/she is not capable of acting for him/herself.<sup>6</sup> The manual of procedures adopted by ENISA justifies this exception with reference to Article 20(1)(c) of the Regulation.<sup>7</sup>

The reference to Article 20(1)(c) is not pertinent here. Article 20 allows restricting access and other data subject rights; it does not affect the rules on transfers.<sup>8</sup> For such transfers within ENISA, Article 7 of the Regulation is relevant. This Article as such imposes no obligation to seek the consent of the data subject; the criteria used are if the transfer is necessary for the legitimate performance of a task covered by the competence of the recipient. This could e.g. be the case for the medical service. Asking for consent is an additional safeguard in these cases, but not a requirement under the applicable data protection law; however, persons need to be

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<sup>3</sup> See p. 5 of the Guidelines.

<sup>4</sup> See p. 35 of the manual.

<sup>5</sup> This situation is to be distinguished from the situation in which an alleged victim decides to have the case dealt with formally by the HR department.

<sup>6</sup> P. 27 of the manual.

<sup>7</sup> P. 35 of the manual.

<sup>8</sup> Please note that a data subject receiving access to her/his own personal data is not a transfer under Article 7, 8 or 9, but is exclusively governed by Article 13. In case an alleged harasser requests access to his/her own personal data under this Article, it may be necessary to invoke a restriction under Article 20(1)(c) (protection of third parties, here: the alleged victim).

informed about this.<sup>9</sup> **The reference to Article 20 in this context should therefore be removed.**

### **Selection of the confidential counsellors**

The notification does not cover the counsellors' selection, although this part of the procedure is mentioned in the supporting documentation. ENISA explained that currently no counsellors had been selected.

Selecting the counsellors will entail an evaluation of "personal aspects of the [applicant to become a counsellor], including his or her ability, efficiency and conduct" under Article 27(2)(b) of the Regulation and will thus be subject to prior checking. When ENISA plans to select counsellors, it will also have to **notify this part of the procedure**, which is currently out of the notification's scope. This can be done together with the updates requested in other recommendations in this Opinion, as soon as the procedure is defined (independently of whether it is actually used already). It is also worth noting that the supporting documentation also includes the possibility of an external confidential counsellor; this person would presumably act as a processor for ENISA.

### **Conclusion**

There is no reason to believe that there is a breach of the Regulation, provided that the recommendations indicated in bold in this Opinion are taken into account. Please inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

CC: [...], DPO, ENISA

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<sup>9</sup> For Article 8 transfers, the situation is similar - consent is an additional safeguard, but not a strict requirement under data protection law.