



WOJCIECH RAFAŁ WIEWIÓROWSKI  
ASSISTANT SUPERVISOR

Mr Alexis GOOSDEEL  
Director  
European Monitoring Centre for Drugs  
and Drug Addiction (EMCDDA)  
Praça Europa, 1 Cais de Sodré  
1249-289 Lisboa  
Portugal

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Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu) for all  
correspondence

**Subject: EDPS prior-check Opinion on "*administrative inquiries and disciplinary proceedings*" at EMCDDA (case 2016-0989).**

Dear Mr Goosdeel,

We have analysed EMCDDA's notification on administrative inquiries and disciplinary proceedings at EMCDDA sent on 31st October 2016 for prior checking under Article 27 of Regulation (EC) 45/2001 (the Regulation)<sup>12</sup>.

The EDPS has revised and issued new Guidelines<sup>3</sup> on processing personal information in administrative inquiries and disciplinary proceedings (the EDPS Guidelines). On this basis, the EDPS will identify and examine the agency's practices which do not seem to be in conformity with the principles of the Regulation as further outlined by the EDPS Guidelines, providing EMCDDA with specific recommendations in order to be in compliance with the Regulation.

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<sup>1</sup> OJ L 8/1, 12/01/2001.

<sup>2</sup> According to Article 27(4) of the Regulation, the EDPS has to provide his Opinion within two months of receiving the notification, not counting suspensions. This case was suspended from 16 December 2016 to 16 January 2017 for consulting EMCDDA on the draft Opinion.

<sup>3</sup> Available on our website:

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-11-18\\_Guidelines\\_Administrative\\_Inquiries\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-11-18_Guidelines_Administrative_Inquiries_EN.pdf)

## **1) Grounds for prior checking**

The notification states that the processing operations under analysis is justified for prior checking under Article 27(b) of the Regulation.

The processing operations in the context of an administrative inquiry or disciplinary proceeding are indeed intended to evaluate personal aspects relating to the individuals involved, in particular their alleged misconduct within the meaning of Article 27(2)(b) of the Regulation.

Article 27(2)(a) of the Regulation is also considered a legal ground for prior-checking, as the processing operations under analysis may entail the processing of data relating to suspected offences, criminal convictions or security measures within the meaning of the provision.

### ***Recommendation:***

1. EMCDDA should add to the notification Article 27(2)(a) of the Regulation as a legal ground for prior-checking the processing operations under analysis.

## **2) Lawfulness of administrative inquiries**

The notification states that the legal basis of the processing operations under analysis is Article 86 of the Staff Regulations, their Annex IX and Articles 49 and 119 of CEOS.

The lawfulness of a processing must be justified on the basis of one of the five legal grounds under Article 5 of the Regulation.

Processing operations for administrative inquiries and disciplinary proceedings can in principle considered to be lawful under Article 5(a) of the Regulation.

Article 5 (a) of the Regulation requires two elements: the processing must be based on the Treaties or on an EU legal instrument based on the Treaties (legal basis) and it must be necessary for the performance of a task carried out in the public interest (necessity test).

### ***Legal basis***

The EDPS in his revised Guidelines stresses the fact that Article 86 of the Staff Regulations and their Annex IX set forth the legal basis of the disciplinary proceedings, but they do not provide a sufficiently detailed legal basis for the conduct of administrative inquiries<sup>4</sup>. The EDPS therefore recommends EMCDDA to adopt a legally binding decision, policy or implementing rules regarding administrative inquiries and disciplinary proceedings. This specific legal instrument should define the purpose of an administrative inquiry and of a disciplinary proceeding, establish the different stages of the procedures to be followed and set out detailed rules and principles to be respected in the context of an inquiry and a disciplinary proceeding. A specific legal instrument will set out the process of an administrative inquiry or a disciplinary proceeding with legal certainty, safeguards and clarity in the interest of EMCDDA. It should also enable those involved in the process to have the necessary information about their rights and how to exercise them. This legal instrument could then serve as a specific legal basis for administrative inquiries and disciplinary proceedings, which is missing so far.

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<sup>4</sup> See para. 9-10 of the EDPS Guidelines.

### *Necessity test*

Provided that the EMCDDA adopts a legal basis which further implements the procedures applicable in administrative inquiries and disciplinary proceedings, the processing of personal data in this context can be considered as necessary in compliance with the Staff Regulations.

Following the comments provided by the agency's DPO, the Commission is planning to adopt implementing rules on administrative inquiries and disciplinary proceedings. EMCDDA would like to wait until the adoption of these rules and apply them by analogy in light of Article 110(2) of the Staff Regulations<sup>5</sup>.

### ***Recommendation:***

2. EMCDDA should adopt the Commission's implementing rules by analogy as soon as they are adopted.

In the meantime, in case EMCDDA needs to launch an administrative inquiry, the EDPS should be consulted before any personal data are processed for the inquiry.

### **3) Necessity and proportionality when collecting data**

On the basis of the information provided, it seems that EMCDDA has not adopted written rules on the use of different means for collecting potential evidence in the context of an administrative inquiry or disciplinary proceeding.

In light of Article 4(1)(c) of the Regulation<sup>6</sup> as further outlined by the Guidelines<sup>7</sup>, investigators should rigorously apply the principles of necessity and proportionality when choosing the means of inquiry. The principle of data minimisation should be applied for all means and steps of the investigation. Investigators should limit the collection of personal information to what is directly relevant and necessary to the purpose of the inquiry and of the disciplinary proceeding. They should also retain the information only for as long as it is necessary to fulfil that purpose. In other words, investigators should collect only the personal data they really need, and they should keep it only for as long as they need it.

There are some more and less intrusive means of collecting data in the context of an inquiry or a disciplinary proceeding.

For example, the *hearing* of the person under investigation and of witnesses and victim is usually a proportionate option, as it is the least intrusive and the most transparent means to conduct an inquiry and establish the alleged facts relevant to the inquiry.

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<sup>5</sup> *"Implementing rules adopted by the Commission to give effect to these Staff Regulations...shall apply by analogy to the agencies"*.

<sup>6</sup> *"Personal data must be adequate and not excessive in relation to the purposes for which they are collected and/or further processed"*.

<sup>7</sup> See para. 16-26 of the Guidelines.

When collecting *paper information*, investigators should consider blanking out irrelevant or excessive information to the inquiry.

If *electronic information* related to the person under investigation is necessary and relevant evidence to the inquiry, the IT service should be in charge of implementing the technical aspects of the collection on instructions of the investigators. The number of authorised IT officers in charge should be strictly limited (need-to-know principle). The investigators' request should be specific so that the IT service will extract only relevant information<sup>8</sup>.

EMCDDA should consult its DPO in this regard and take into consideration the DPO's practical guidance and advice.

***Recommendation:***

3. EMCDDA should ensure that the data protection rules on the use of different means for collecting potential evidence for the investigation are reflected in a Manual including specific guidance.

**4) Retention periods**

In accordance with Article 4(1)(e) of the Regulation, personal data must not be kept longer than necessary for the purpose for which they are collected or further processed.

The notification refers to a maximum period of 20 years from the closing date of the inquiry or from the date of the disciplinary decision. The EDPS invites EMCDDA to consider three possible scenarios in light of his revised Guidelines<sup>9</sup>:

1) Pre-inquiry file: When EMCDDA makes a preliminary assessment of the information collected and the case is dismissed. In such cases, EMCDDA should set up a maximum retention period of two years after the adoption of the decision that no inquiry will be launched. This maximum retention period could be necessary for audit purposes and complaints to the Ombudsman.

2) Inquiry file: When EMCDDA launches an inquiry including the collection of evidence and interviews of individuals, there are three possibilities: i) the inquiry is closed without follow-up, ii) a caution is issued or iii) the Appointing Authority of the institution adopts a formal decision that a disciplinary proceeding should be launched.

For cases i) and ii), a maximum of five-year-period from closure of the investigation is considered to be a necessary retention period, taking into account audit purposes and legal recourse from affected individuals.

For case iii), EMCDDA should transfer the inquiry file to the disciplinary file, as the disciplinary proceeding is launched on the basis of the evidence collected during the administrative inquiry.

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<sup>8</sup> See section 2.6 of the "EDPS Guidelines on personal data and electronic communications in the EU institutions" about different methods that can be employed to investigate serious offences (access to e-Communications data, covert surveillance, forensic imaging of the content of computers and other devices, available on our website: [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/15-12-16\\_eCommunications\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/15-12-16_eCommunications_EN.pdf)).

<sup>9</sup> See para. 52-53 of the EDPS Guidelines.

3) Disciplinary file: EMCDDA carries out a disciplinary proceeding with the assistance of internal and/or external investigators. In principle, EMCDDA should take into consideration the nature of the sanction, possible legal recourses as well as audit purposes and set up a maximum retention period, after the adoption of the final Decision.

If the staff member submits a request, under Article 27 of Annex IX to the Staff Regulations, for the deletion of a written warning or reprimand (3 years after the Decision) or in the case of another penalty (6 years after the Decision, except for removal from post) and the Appointing Authority grants the request, the disciplinary file which led to the penalty should also be deleted. If the Decision on the penalty stored in the personal file is deleted, there is no reason to keep the related disciplinary file. The Appointing Authority should assess whether to grant this request in light of the severity of the misconduct, the seriousness of the disciplinary measure imposed and possible repetition of the misconduct.

### ***Recommendation:***

4. EMCDDA should make a distinction of different retention periods according to the above possible scenarios and update the notification accordingly.

## **5) Information to be given to the individuals concerned**

### **Informing individuals concerned**

EMCDDA has prepared a data protection notice which is published on the agency's website in the section on disciplinary issues.

Personal data must be processed fairly<sup>10</sup>. In order to guarantee fairness and transparency about the information processed regarding a specific inquiry, under Articles 11 and 12 of the Regulation, EMCDDA should, as a matter of principle, provide the affected individuals with the data protection notice as soon as it is practically possible, for example before starting the interview of the person. In principle, EMCDDA should inform them of the opening and closing of the administrative inquiry related to them. This concerns the formal opening of an inquiry as well as the following stage, when the available information will for example be transferred to the Disciplinary Board appointed by the agency.

### **Content of the data protection notice**

EMCDDA should ensure that all relevant information is included in the data protection notice in accordance with the elements listed in Articles 11 and 12 of the Regulation. The EDPS draws the attention to EMCDDA to some necessary information that should be provided in the context of a processing operation related to an administrative inquiry and a disciplinary proceeding. For example,

i) In light of Articles 11(1)(e) and 12(1)(e) of the Regulation, EMCDDA should include in the data protection notice some clarifications as to the meaning of the right of rectification in the context of an administrative inquiry and a disciplinary proceeding. It does not only refer to factual inaccuracies; it refers to the right of affected individuals to add second opinions and

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<sup>10</sup> See Article 4(1)(a) of the Regulation. See also para. 39-44 of the EDPS Guidelines.

include their comments as well as any additional testimonies, or other relevant documents to their inquiry file (i.e. a legal recourse or appeal decision).

ii) Under Articles 11(1)(f)(ii) and 12(1)(f)(ii) of the Regulation, EMCDDA should indicate clearly the three different scenarios and their respective retention periods.

**Possible limitations to the rights of information, access and rectification of the affected individuals:**

The data protection notice should also refer to the possibility that EMCDDA might need to restrict the right of information, access or rectification of an individual involved in the specific processing of their personal data in accordance with Article 20 of the Regulation.

For example, **informing** the person under investigation about the inquiry or the disciplinary proceeding at an early stage may be detrimental to the investigation. In these cases, EMCDDA might need to restrict the information to the person under investigation to ensure that the inquiry or disciplinary proceeding is not jeopardised<sup>11</sup>.

In case a person under investigation requests to have access to the identity of a witness, his/her **right of access** may be restricted in order to protect the witness' rights and freedoms. In case a witness asks to have access to the final decision of the inquiry, this should be carefully assessed; it is possible that the final decision in the end does not include personal data of that witness; a request for access from that person would thus be out of scope.

EMCDDA should however inform the person under investigation or the witness of the principal reasons on which the application of the restriction is based as well as of their right to have recourse to the EDPS<sup>12</sup>. In some specific circumstances, it might even be also necessary to defer the provision of such information so that the investigation process will not be harmed<sup>13</sup>.

***Recommendations:***

5. EMCDDA should add to the data protection notice the following necessary information under Articles 11 and 12 of the Regulation; i) include the meaning of the right of rectification in the context of an administrative inquiry and of a disciplinary proceeding and ii) specify the applicable retention periods depending on the various scenarios.

6. EMCDDA should inform all affected individuals about the opening, the different steps and the closing of a specific administrative inquiry or a disciplinary proceeding and provide them with the data protection notice on this occasion.

7. EMCDDA should refer in the data protection notice to possible restrictions to the right of information and access in light of Article 20 of the Regulation.

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<sup>11</sup> See Article 20 of the Regulation regarding the exemptions and restrictions.

<sup>12</sup> See Article 20(3).

<sup>13</sup> See Article 20(5).

## ***Reminder:***

In cases where EMCDDA decides to apply a restriction of information, access, rectification etc. under Article 20(1) of the Regulation, or to defer the application of Article 20(3) and 20(4)<sup>14</sup>, such decision should be taken strictly on a case by case basis. In all circumstances, EMCDDA should document the reasons for taking such decision (i.e. motivated decision). These reasons should prove that the restriction is necessary to protect one or more of the interests and rights listed in Article 20(1) of the Regulation and they should be documented before the decision to apply any restriction or deferral is taken<sup>15</sup>.

## **6) Security measures**

Given that the information processed is sensitive, leaks or unauthorised disclosure of it may have severe consequences for all individuals involved in an inquiry or procedure. Article 22 of the Regulation requires EMCDDA to implement appropriate technical and organisational security measures in view of preventing any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing<sup>16</sup>.

In practice, this means that EMCDDA should carry out a risk assessment<sup>17</sup> in order to determine whether its already existing general security policy adequately addresses the risks and develop, where necessary, specific security measures on access control and management of all the information processed in the context of an inquiry or disciplinary proceeding.

With regard to the technical measure, EMCDDA should develop, document and implement an access review and logging policy with a description of i) the list of authorised categories of officers who have access to the drives shared between the units involved in an inquiry/disciplinary proceeding, ii) what information is logged in the drives, iii) what use is made of the logged information and iv) the process in place to review the access rights. This policy is important in order to allow the agency to ensure that throughout an inquiry or disciplinary proceeding, only authorised officers are attributed access rights and only on a "need-to-know" basis.

As to the organisational measures, due to the sensitive nature of the data processed (for example, it might be the case that data related to health are processed), all officers involved should sign confidentiality declarations stating that they are subject to an obligation of professional secrecy equivalent to that of a health professional. These declarations will contribute in maintaining the confidentiality of personal data and in preventing any unauthorised access within the meaning of Article 22 of the Regulation. This is an example of the measures that agency should take to promote a data protection culture among officers involved in an inquiry or disciplinary proceeding.

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<sup>14</sup> under Article 20(5) of the Regulation.

<sup>15</sup> This is the kind of documentation the EDPS requests when investigating complaints relating to the application of Article 20.

<sup>16</sup> Article 22 of the Regulation. See also para. 66-69 of the Guidelines.

<sup>17</sup> Guidance on Security Measures for Personal Data Processing - Article 22 of Regulation 45/2001, 21 March 2016, available here:

[https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-03-21\\_Guidance\\_ISRМ\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-03-21_Guidance_ISRМ_EN.pdf).

***Recommendation:***

8. EMCDDA should adopt specific security measures on access control and management of all the information processed in the context of an inquiry or disciplinary proceeding in light of Article 22 of the Regulation.

In the context of the follow-up procedure, please provide information to the EDPS on what is planned regarding the implementing rules as a legal basis of administrative inquiries and send a revised version of the notification and of the data protection notice, as well as a copy of the specific security policy, **within a period of three months**, to demonstrate that the above EDPS recommendations have been duly implemented.

Yours sincerely,

**(signed)**

Wojciech Rafał WIEWIÓROWSKI

Cc: Mr Ignacio VÁZQUEZ MOLINÍ, Data Protection Officer  
Mr Dante STORTI, Head of Unit, Administration