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Subject: Prior-check Opinion on EDA’s Whistleblowing procedure - Case 2017-0381

On 7 April 2017, the European Data Protection Supervisor (“EDPS”) received a notification for prior checking relating to the Whistleblowing procedure from the Data Protection Officer (“DPO”) of the European Defence Agency (“EDA”) under Article 27 of Regulation (EC) No 45/2001 (the “Regulation”).

According to Article 27(4) of the Regulation, this Opinion must be delivered within a period of two months, not counting suspensions for requests for further information¹. Since the EDPS has issued Guidelines on how to process personal information within a whistleblowing procedure², the description of the facts and of the legal analysis will only mention those aspects which differ from these Guidelines or otherwise need improvement. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

EDPS recommendations and reminders are highlighted in bold below.

Description and assessment

¹ The case was suspended for further information from 11 April 2017 to 28 April 2017, and for comments from the DPO from 15 June 2017 to 16 June 2017. The EDPS shall thus render his Opinion no later than 26 June 2017.

² Available on the EDPS website on the following link:
https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/16-07-18_Whistleblowing_Guidelines_EN.pdf

1. Transfer information on a case-by-case basis

EDA is subject to its own staff regulations laid down in the Council Decision (EU) 2016/1351³. This is one of the legal basis mentioned together with Decision 16/04 of 22 February 2016 concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity, and in particular to Article 4 thereof. Article 4 of that decision refers to the duty to supply information to OLAF. In the light of this, the EDPS points out that OLAF is the competent body to investigate fraud against the EU budget and alleged serious misconduct. Since the scope of the whistleblowing procedure is not limited to cover potential fraud, there is a possibility that EDA will receive information that it is not within the competences of OLAF. In accordance with Article 7(1) of the Regulation, the transfer of personal information should only take place when necessary for the legitimate performance of tasks covered by the competence of the recipient. Therefore, the **EDA should assess the requirements for transferring the personal information to OLAF on a case-by-case basis and adapt its Decision and the privacy statement accordingly.**

2. Information to data subjects

Information on whistleblowing procedures should be provided to the individuals in a two-step procedure. This includes (i) to publish a general privacy statement published on the website and/or intranet and (ii) to inform the specific persons involved in a procedure. EDA has described that all individuals affected by a particular whistleblowing procedure will be directly provided with the privacy statement as soon as practically possible. However, **EDA should additionally publish a general privacy statement regarding whistleblowing procedures on their website.**

It is furthermore mentioned in Article 10 of the Decision, the notification and the privacy statement that where informing the person named by the whistleblower about the opening of a procedure could jeopardise the conduct of the inquiry, EDA might need to defer this information (Article 20(1)(a) of the Regulation). In this regard, the EDPS points out that the deferral of information also could relate to other involved parties. **The EDPS therefore suggests that the draft decision (under Article 10(2)) includes an obligation to provide information to all individuals affected by a particular whistleblowing procedure as soon as practically possible. Furthermore, there should be a clear referral to Article 20(1) of the Regulation, which lists the possible exceptions to the rights of data subjects. EDA should therefore update the Decision, the notification and the Privacy statement accordingly.** Moreover, any such deferral should be duly documented by EDA.

EDA's draft Decision Article 8(3) mentions that the whistleblower shall be informed of the steps taken in the course of an internal investigation based on the whistleblower's report, including any referral to OLAF. Since this could include information about different persons, **the EDPS would like to remind EDA that the persons involved should only receive information about themselves.**

3. Security measures

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³ Available on the following link:
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D1351>

In light of the accountability principle, the EDPS trusts that EDA will ensure that these considerations and recommendations are fully implemented. The EDPS has therefore decided to **close case 2017-0381**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: Data Protection Officer EDA