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**Subject: Notification for prior checking concerning “Article 24 and Article 90 of the Staff Regulations” at the European External Action Service, Case 2017-0262**

Dear Mr (...),

On 2 March 2017, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001<sup>1</sup> (the Regulation) from the Data Protection Officer (DPO) of the European External Action Service (EEAS).<sup>2</sup> The notification concerns processing of personal data in establishing facts for decisions taken by the Appointing Authority (AA) following requests under Article 24 and Article 90(1) of the Staff Regulations (SR) and complaints under Article 90(2) SR.

Having analysed the notification and its supporting privacy statement, the EDPS considers that the data processing activity mentioned above is **not subject to prior checking** (see section 1. Need for prior checking). However, the EDPS issues **two recommendations** in order to ensure compliance with the Regulation (see section 2. Recommendations).

### **1. Need for prior checking**

Article 27(2) of the Regulation subjects a number of processing operations "likely to present specific risks" to prior checking by the EDPS. Paragraph 2 of that Article lists processing operations likely to do so.

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<sup>1</sup> OJ L 8, 12.1.2001, p. 1.

<sup>2</sup> Ex-post: As this is an ex-post case, the deadline of two months does not apply, because the Service Level Agreement with the Commission dates from 21/12/2012 and the processing takes already place. This case has been dealt with on a best-effort basis.

The submitted notification indicates Article 27(2)(a), (b) and (d) of the Regulation as grounds for prior-checking the processing operation.

Firstly, Article 27(2)(a) of the Regulation aims at processing operations whose main purpose is processing “*data relating to health and to suspected offences, offences, criminal convictions or security measures*”. According to the notification, the EEAS does not process data relating to health suspected offences, offences, criminal convictions or security measures in general, but only “marginally”, if at all. Even if such data may be processed in certain cases, the mere possibility that data related to suspected offences, offences and criminal convictions or security measures is processed in requests/complaints is neither systematic nor necessary.<sup>3</sup> Therefore, the present notification is not likely to present specific risks and should not be prior checked under Article 27(2)(a) of the Regulation.

Secondly, Article 27(2)(b) of the Regulation aims at processing operations whose main purpose is to evaluate personal aspects relating to the data subjects (“*processing operations intended to evaluate personal aspects [...]*”). Typically, Article 27(2)(b) of the Regulation covers procedures developed for annual appraisal exercises, probationary period reports, administrative inquiries, etc. In the present case, the main purpose of the processing is to establish facts for decisions of received requests under Article 24 SR and appeals under Article 90 SR and not to evaluate personal aspects of the complainant.<sup>4</sup> It might be that in some cases the requests/complaints could be related to an evaluation of the personal aspects of the data subjects, for example a complaint against an annual appraisal report. However, in such case, the evaluation would already be covered by the prior checking notification on the annual appraisal exercise. Hence, Article 27(2)(b) of the Regulation is not applicable in this case.

Finally, Article 27(2)(d) of the Regulation aims at processing operations whose main purpose is to specifically exclude data subjects from a right, benefit or contract.<sup>5</sup> An example for a processing aiming to exclude data subjects from a right, benefit or contract are blacklists or asset freezing cases<sup>6</sup>. The intention of the data processing by the EEAS is not to exclude data subjects from a right, benefit or contract but to establish facts for decisions of received requests under Article 24 SR and Article 90(1) SR and complaints under Article 90(2) SR, which may sometimes result in the exclusion of a right. Hence, Article 27(2)(d) is not applicable in this case.

None of the other criteria triggering a need for prior checking by the EDPS under Article 27 of the Regulation appear to apply either. Therefore, processing data in the context to establish facts for decisions taken by the AA on received requests under Article 24 and 90(1) or complaints under Article 90(2) SR, is **not subject to prior checking**.

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<sup>3</sup> EDPS Opinion of 18 December 2014 concerning “The processing of personal data in the context of administrative appeals under Articles 90(1) and (2) of the Staff Regulations and Article 45 of CEOS”, case 2013-0837, page 1, available at: [https://edps.europa.eu/sites/edp/files/publication/14-12-18\\_easme\\_appeals\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-12-18_easme_appeals_en.pdf).

<sup>4</sup> EDPS Opinion of 18 July 2005 concerning “Complaints Art. 90 of the Staff Regulations - Committee of the Regions”, case 2005-0175, page 2, available at: [https://edps.europa.eu/sites/edp/files/publication/05-07-18\\_cor\\_complaints\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/05-07-18_cor_complaints_en.pdf).

<sup>5</sup> EDPS Opinion of 26 May 2010 concerning “The Registration of a Data Subject in the Central Exclusion Database, case 2009-0681”, page 10 section 3.1, available at: [https://edps.europa.eu/sites/edp/files/publication/10-05-26\\_commission\\_central\\_exclusion\\_database\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/10-05-26_commission_central_exclusion_database_en.pdf) and EDPS Opinion of 22 February 2012 concerning “The processing of personal data in connection with regulations requiring asset freezing as CFSP related restrictive measures”, case 2010-0426, page 17 section 3.2, available at: [https://edps.europa.eu/sites/edp/files/publication/12-02-22\\_cfsp\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/12-02-22_cfsp_en.pdf).

<sup>6</sup> EDPS Opinion of 18 December 2014 concerning “The processing of personal data in the context of administrative appeals under Articles 90(1) and (2) of the Staff Regulations and Article 45 of CEOS”, Executive Agency for Small and Medium-sized enterprises (EASME)”, page 2 section 2, available at: [https://edps.europa.eu/sites/edp/files/publication/14-12-18\\_easme\\_appeals\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/14-12-18_easme_appeals_en.pdf) and EDPS Opinion of 18 July 2005 concerning Complaints Art. 90 of the Staff Regulations - Committee of the Regions, case 2005-0175, page 2 section 7, available at: [https://edps.europa.eu/sites/edp/files/publication/05-07-18\\_cor\\_complaints\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/05-07-18_cor_complaints_en.pdf).

## **2. Recommendations**

That being said, the EDPS issues nonetheless **two recommendations** in order to ensure that processing data in the context to establish facts for decisions taken by the AA on received requests under Article 24 and appeals under Article 90 SR will comply with the Regulation. The analysis below does not cover all aspects of the Regulation, but only those which require improvements or otherwise give rise to comments.

### **a) Legal basis for the lawfulness of the processing operation**

The notification and the privacy statement mention Article 5 point (b) and (d) of the Regulation as lawful grounds for the processing. The EDPS recommends that the EEAS reconsider these articles for justifying the lawfulness.

First, the EDPS notes that the notification refers to Article 5(b) of the Regulation and states that the processing is necessary for compliance with the legal obligation to which the EEAS is subject under Article 24 SR and Article 90 SR.

The EDPS recommends not to use Article 5(b) of the Regulation as a legal basis for lawfulness processing. Article 5(b) of the Regulation applies if the provision in question requires the EEAS to process the data without leeway in the implementation. This implies that EU institutions have no choice as to whether or not fulfilling the legal obligation but also that the obligation itself must be sufficiently specific as to the processing of personal data it requires. For example, Article 5(b) of the Regulation applies when an EU institution or body needs to comply with an obligation resulting from national legislation of the Member State where it is set up.<sup>7</sup> This has been the case in processing operations which relate to the safety and security of staff members at their workplace.<sup>8</sup> Articles 24, 90(1) and 90(2) SR are not such a legal obligation since the EEAS has discretion on how to comply with the legal obligation in terms of processing of personal data. Therefore, Article 5(b) is not an appropriate basis for the lawfulness.

Second, the EDPS notes that the notification refers to Article 5(d) of the Regulation as legal basis for the processing and states that the data subject has given unambiguously consent to the processing.

The data subject's consent is defined in Article 2(h) of the Regulation as "any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed". In this regard, the EDPS underlines that consent should be used with caution in the employment context. Such consent is valid only in exceptional circumstances where the employee has a genuine free choice and is subsequently able to withdraw the consent without negative consequences. Hence, given the link of subordination, it is unlikely that consent is freely given by the staff as defined by Article 2(h) of the Regulation.<sup>9</sup> Therefore, the EDPS recommends not to use Article 5(d) of the Regulation as a legal basis for lawfulness processing for the processing at stake.

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<sup>7</sup> EDPS Opinion of 9 June 2013 concerning "The selection procedures in view of recruiting personnel to the European agency eu-LISA from DG HOME", case 2013-0156, page 2 section 6, available at: [https://edps.europa.eu/sites/edp/files/publication/13-06-19\\_pc\\_home\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/13-06-19_pc_home_en.pdf).

<sup>8</sup> EDPS Opinion of 6 September 2010 concerning "The Safety Inspections at the JRC Ispra Site", case 2009-682, page 3 section 3.2, available at: [https://edps.europa.eu/sites/edp/files/publication/10-09-06\\_jrc\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/10-09-06_jrc_en.pdf). ", EDPS Opinion of 2 May 2007 concerning "Study on stress at work by OHIM", case 2006-0520, page 4f. section 2.2.2, available at: [https://edps.europa.eu/sites/edp/files/publication/07-05-02\\_ohim\\_stress\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/07-05-02_ohim_stress_en.pdf).

<sup>9</sup> EDPS Opinion of 5 January 2017 concerning "360° feedback exercise at the European Agency of Fundamental Rights", case 2016-1007, page 2 section 1.1, available at: [https://edps.europa.eu/sites/edp/files/publication/17-01-05\\_fra\\_pc\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/17-01-05_fra_pc_en.pdf). See also Opinion 8/2001 of the Article 29 Working Party on the processing of personal data in the employment context adopted on 13 September 2001, page 23: available at: <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2001/wp48en.pdf>: "An area of difficulty is where the giving of consent is a condition of employment. The worker is in theory able to refuse consent but the consequence may be the loss of a job opportunity. In such circumstances consent is not freely given and is therefore not valid. The situation is even clearer cut where, as is often the case, all employers impose the same or a similar condition of employment."

The EDPS therefore recommends using Article 5(a) of the Regulation as legal basis for the lawfulness of the processing. Article 5(a) of the Regulation provides that personal data may be processed if “*processing is necessary of the performance of a task carried out in the public interest on the basis of the Treaties...or the legal instrument adopted on the basis thereof*”. In general, Article 5(a) applies when a task is attributed to the Commission and in order to fulfil it, personal data need to be processed. The Staff Regulations are adopted on the basis of the Treaties.<sup>10</sup> The privacy statement of the EEAS also needs to be changed accordingly to reflect the use of Article 5(a) as legal basis.

#### **b) Description of the processing in the notification and the privacy statement**

Both the notification (under point “4/Purpose [...]” and the privacy statement under point “2. Purpose (...) mention under the first bullet point that “[...] *the EEAS does not process personal data of complainants and is only informed on a restricted basis of the identity of complainants and the limited data of the subject matter of the complaint for the purpose of checking the service invoiced by the Commission in the framework of the SLA*”. The EDPS notes that even if the EEAS does not process personal data relating to the substance of the claim/request, it nevertheless processes the identity of the staff member concerned and information related to the case. This constitutes personal data (see Article 2(a) of Regulation 45/2001). The EDPS therefore recommends that the EEAS corrects the relevant parts in the notification and the privacy statement.

In light of the accountability principle, the EDPS expects the EEAS to implement the above recommendations accordingly and has therefore decided to **close** the case.

Yours sincerely,

Wojciech Rafał WIEWIÓROWSKI

Cc.: Mrs (...), DPO EEAS

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<sup>10</sup> EDPS Guidelines concerning processing operations on staff recruitment on Staff Recruitment, page 1 section B.1, available at: [https://edps.europa.eu/sites/edp/files/publication/08-10-10\\_guidelines\\_staff\\_recruitment\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/08-10-10_guidelines_staff_recruitment_en.pdf).