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your ref: Ares(2018)2115046 - 20/04/2018
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correspondence

Subject: Phase-out of prior checking under Article 27 of Regulation (EC) No. 45/2001 in the light of delays in the adoption of the new data protection framework for EUIs

Dear colleagues,

Thank you for your note on the delays in the adoption of the new data protection framework for the EU institutions, bodies and agencies and their impact on prior checking under Article 27 of the current Regulation (EC) No 45/2001¹, received on 24 April 2018.

In your note, you invite the EDPS to reconsider the deadlines for submission of prior check notifications in view of those delays, at least for ‘true’ prior check notifications during the remaining applicability of the ‘old’ Regulation (EC) No 45/2001. As you point out, the obligation to notify under Article 27 still applies.

Regarding ‘true’ prior check notifications of processing operations that are not yet in operations at the time of notification, we can still provide some analysis and recommendations.

However, please note that we will focus only on the main points raising compliance issues. For those processing operations that are likely to require a Data Protection Impact Assessment (DPIA) under the new rules, I encourage you to already start that process.² Where available, please provide the DPIA report as supporting documentation for the notification.

¹ OJ L 8/1, 12.01.2001

² For further information, please see the toolkit ‘Accountability on the ground: Provisional guidance on documenting processing operations for EU institutions, bodies and agencies’, available at: https://edps.europa.eu/data-protection/our-work/publications/guidelines/accountability-ground-provisional-guidance_en.

The EDPS will communicate a new cut-off date once we have a clearer timeline for the entry into force of the new rules.

As a general remark, it is for the EUIs to take the necessary measures to comply with the data protection principles in the light of the controller's accountability for compliance, independently of notification obligations. Having notified a processing operation under the 'old' Article 27 does not exempt controllers from their obligations under the accountability principle.

Regarding 'ex-post' prior check notifications of processing operations that are already ongoing at the of time notification, we will not change our approach.

'Ex post' prior checks were meant as a transitional approach to help the EUIs bring in line legacy processing operations. Already in 2012, we announced an end to 'ex-post' prior checks³. We reiterated this message during the DPO meetings in Tallinn on 1 June 2017 and in London on 13 October 2017.

The EDPS no longer analyses 'ex-post' notifications in detail. Should EUIs still submit 'ex-post' notification, the opinion will only contain some information on how the EDPS has dealt with similar cases in the past, but no detailed analysis. The fact that the EDPS does not analyse your notification in detail does not imply 'tacit approval' under Article 27(4) second subparagraph of the Regulation. Independently of the EDPS reply, controllers remain accountable for compliance with the data protection principles (please see above).

I hope this clarifies the situation. As this matter is of general concern to all EUIs, this letter will be published on the EDPS website.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI

³ Our reference D(2012)1388 C 2012-0557, sent to all EU institutions, bodies and agencies existing and under our supervision at that time.