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2017-1039  
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**Subject: Joint Prior-checking Opinion regarding the grants management outside the Participant Portal (COSME programme and EMFF) - EDPS cases 2017-1035 and 2017-1039**

Dear [...],

In November 2017, the European Data Protection Supervisor (EDPS) received from you as the Data Protection Officers (DPO) of EASME two notifications for prior checking under Article 27 of Regulation (EC) No 45/2001<sup>1</sup> ("the Regulation") on grants management of outside the Participant Portal.<sup>2</sup>

The processing operations concern the management of:

- ad-hoc grants under the COSME programme
- grants delegated to EASME under the European Maritime and Fisheries Fund (EMFF).

The EDPS has issued Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts<sup>3</sup> ("the Guidelines"). Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all*

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

<sup>2</sup> As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

<sup>3</sup> Available on the EDPS website: [https://edps.europa.eu/sites/edp/files/publication/13-06-25\\_procurement\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/13-06-25_procurement_en.pdf)

relevant recommendations made in the Guidelines apply to the processing operations put in place for grants management outside the Participant Portal in EASME.

## 1. Legal analysis

### *a) Ground for lawfulness of processing*

The two notifications list consent of the beneficiaries among the grounds for lawfulness of processing. The EDPS considers that in the employment context consent is not the most appropriate ground for processing personal data. The main ground for the lawfulness of processing would be that processing is necessary for:

- the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in EASME (e.g. selection of grant beneficiaries and management of grants),
- the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract (e.g. for the conclusion of the grant agreement with the beneficiaries) or
- compliance with a legal obligation to which EASME is subject (e.g. publication of beneficiaries' data to comply with EASME's obligation to publish information on outcome of procurement procedures and on the beneficiaries of funds deriving from the budget of the Union).

Consent can serve as additional ground for that processing personal data. It can serve as the main ground for the lawfulness of processing non-mandatory data.

### *b) Joint controllership*

The EDPS notes that staff members of the European Commission participate in the evaluation of proposals for grants under the EMFF. EASME and DG MARE have concluded a Memorandum of Understanding on the modalities and procedures of interaction for the implementation of actions covered by the EMFF. The Memorandum and its Annex set out who is in charge of different tasks. The EDPS points out that where the division of tasks would lead to both EASME and DG MARE determining the essential elements of the processing of personal data of experts, EASME and the European Commission (DG MARE) would be joint controllers for the data processing<sup>4</sup>. This could happen e.g. where DG MARE would be in charge of preparation of terms of reference or where DG MARE framework contracts are used.

### *c) Information to data subjects*

Articles 11 and 12 of the Regulation provide for an obligation of transparency with regard to data subjects from whom data are collected and processed and provide a minimum list of information that need to be provided to the individuals concerned. This transparency is necessary both for ensuring the fairness of processing operation and for enabling the exercise of data subjects rights.

EASME has prepared its own general data protection notice to inform data subjects about processing of their personal data related to selection of experts, grant applicants and procurement procedures ("EASME's general data protection notice"). In line with the Regulation, EASME has to inform beneficiaries of the ad-hoc COSME grants and grants under the EMFF about how

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<sup>4</sup> In this regard see [Opinion of Working Party 29 1/2010 on the concepts of "controller" and "processor", WP 169:](#) and Article 28(2) of the new data protection rules for EU institutions and bodies (proposal COM(2017)8 final, political agreement of 23 May 2018).

the Agency processes their personal data outside the Participant Portal before and during the processing.

The EASME's call for proposals for grants under the EMFF contains a data protection provision with a link to EASME's general data protection notice. This notice indicates that:

- files relating to grant procedures, including personal data, are retained in the service in charge of the procedure until it is finalised and in the archives for a period of 7 years following the signature of the grant agreements or decisions, and
- the application from unsuccessful applicants are kept for 3 years following the finalisation of the call.

The notification however indicates that for EMFF grants managed outside the Participant Portal:

- the files of successful applicants are kept for up to 10 years after the end of the particular action under EMFF programme, and
- the files of unsuccessful applicants are kept for 5 years after the end of the particular procedure.

The EDPS **recommends** clarifying the concrete applicable retention periods and providing this information to the beneficiaries of EMFF grants managed outside the Participant Portal.

The invitation to submit proposals ("terms of reference") for ad-hoc COSME grants contains a data protection provision with a link to the privacy statement for grants management inside the Participant Portal. EASME decided to use the privacy statement published in the Participant Portal and the retention periods indicated there also for the ad-hoc COSME grants managed outside the Participant Portal, because the same entities are applying to COSME grants managed inside and outside the Participant Portal.

The EDPS considers that if no personal data in ad-hoc COSME grants is in fact processed inside the Participant Portal, this link is not appropriate. The EDPS therefore **recommends** that EASME inform grant beneficiaries of the ad-hoc COSME grants about the processing of their personal data outside the Participant Portal. This can be done by referring to EASME's general data protection notice with clarified retention periods for ad-hoc COSME grants (for files of successful applicants: up to 7 years after the end of the particular programme; for files of unsuccessful applicants: up to 5 years after the end of the procedure).

#### *d) Contract with experts*

EASME will have to review data protection provisions in grant agreements in view of the forthcoming new data protection rules applicable to the EU institutions and bodies. The EDPS welcomes the fact that the Model Grant Agreements used by EASME in both cases contain data protection provisions differentiating between the processing of personal data by the contracting party and the processing of personal data by the grant beneficiaries. This differentiation should be maintained in the reviewed data protection provisions.

## **2. Conclusion**

In this Opinion, the EDPS has made a number of clarifications and recommendations. Provided these recommendations are effectively implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI