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EUROPEAN DATA PROTECTION SUPERVISOR

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Brussels, **23 NOV 2018**  
WW/AP/sn/D(2018)2627 C 2017-1141  
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**Subject: Prior-checking Opinion concerning ‘the handling of complaints to the International Labour Organisation Administrative Tribunal (ILOAT) and EFTA Court by current or former staff members against a recruitment decision taken by ESA (EDPS case 2017-0080)’**

Dear Ms Sneve,

On 14 December 2017, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of the EFTA Surveillance Authority Decision 235/16/COL on the ‘handling of complaints to the International Labour Organisation Administrative Tribunal (ILOAT) and the EFTA Court by current or former staff members against a recruitment decision taken by the EFTA Surveillance Authority (ESA) from the Data Protection Officer (DPO) of ESA.

Applicability of Decision 235/16/COL: Decision 235/16/COL (the Decision) of ESA was adopted in order to protect the fundamental right of natural persons to privacy by aligning the data protection rules of ESA with those of the European Union Institutions (EUIs) laid down in Regulation (EC) 45/2001.<sup>1</sup> The processing of personal data carried out by ESA is subject to monitoring by the European Data Protection Supervisor (EDPS) in accordance with the Memorandum of Understanding signed in 2017 between ESA and EDPS. The processing activity under consideration is carried out by ESA in the exercise of activities which fall within the scope of EEA law (Article 3 (1) of the Decision) and is carried out at least partly by automatic means, which form part of a filing system or are intended to form part of a filing system (Article 3 (2) of the Decision). Therefore, Decision 235/16/COL is applicable.

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

Having analysed the notification and its supporting documentation, the EDPS considers that the handling of complaints issued by current or former staff members against a recruitment decision of ESA, addressed to the ILOAT and EFTA Court, **is not subject to prior checking**.

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

Article 27 of the Decision 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. ESA’s notification indicates Article 27 (2) (d) of the Decision as the legal basis for prior checking, which lists the ‘processing operations for the purpose of excluding individuals from a right, benefit or contract’.

This provision covers processing operations that aim to exclude individuals from a right, benefit or contract (this typically refers to blacklist and asset freezing cases)<sup>2</sup>. However, the purpose of the processing at hand is not to exclude persons of a right, but to assess the admissibility and merit of their complaint against ESA recruitment decisions.

Furthermore, the present notification does also not fall under Article 27 (2) (a), which lists the ‘processing of data relating to health and to suspected offences, offences, criminal convictions or security measures. It is possible that some medical and health-related data are processed in the context of the handling of complaints against a recruitment decision taken by ESA. However, the presence of such data is only coincidental and is neither systematic nor necessary in every case.

Article 27 (2) (b) concerns ‘processing operations intended to evaluate personal aspects relating to the data subject’. Under this provision, the purpose of the processing itself must be to evaluate the data subject. When handling complaints against recruitment decisions, the EFTA Court does not aim at evaluating the data subjects, even if some data relating to the evaluation of the data subject may be processed in certain cases. For this reason, the present notification should not be prior- checked under this provision either.

Finally, Article 27 (2) (c), which concerns ‘processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes’ does not apply either, since the processing operation does not provide any such linkage.

In light of the above, the EDPS considers that the processing in question is **not subject to prior checking**.

## **2. Recommendations**

Without prejudice to the above considerations, we have examined certain aspects of the notified processing operation and would like to provide the following comments:

According to the notification, data collected for the purposes of handling complaints against recruitment decisions of ESA ‘will be retained indefinitely’. This practice is against the storage limitation principle, underlined in Article 4 (1) (e) of the Decision, which states that data should be ‘kept in a form which permits identification of data subjects for *no longer than is necessary* for the purposes for which the data were collected’. It is subsequently mentioned in the notification that ‘once a judgement has been made by the ILOAT or EFTA Court, the data will be anonymised to the extent that this is possible and practical’.

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<sup>2</sup> See eg. EDPS cases 2009-0681, 201-0426 and 2014-0474.



In view of Article 4 (1) (e) of the Decision, the EDPS suggests that you set a maximum data retention period for all personal data relating to the processing operation in question, after which the personal data will be either erased or anonymised. Consequently, the notification should reflect this new data retention period, e.g. for as long as the complaint case is open and, possibly, an additional period during which the file could be subject to audit.

Furthermore, it is mentioned in the notification that closed cases are 'anonymised to the extent possible and used for historic reference/ institutional memory'. The EDPS would like to point out that the purpose of 'institutional memory' does not justify the processing of personal data for historical purposes, which itself implies the carrying out of *research* for historical purposes. Processing of personal data for historical research purposes allows for exceptions from the applicability of some provisions of the Decision, such as the storage limitation principle as outlined above, or the obligation of the controller to provide information to data subjects, which could potentially render the processing subject to consultation from the EDPS.<sup>3</sup> Such processing is also subject to high technical and organisational safeguards, as personal data needs to be anonymised or to the very least be encrypted.<sup>4</sup>

Based on the above, and because ESA does not seem to conduct historical research using the personal data of complainants, the EDPS considers that the 'indefinite' retention of personal data cannot be justified by the processing operation in question and is excessive in relation to its purpose.

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

Yours sincerely,



Wojciech Rafał WIEWIÓROWSKI

Cc.: Mr Anders IHR, EFTA Surveillance Authority

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<sup>3</sup> See Article 12 (2) Decision 235/16/COL.

<sup>4</sup> See Article 4 (1) (e) Decision 235/16/COL.