



EDPS  
EUROPEAN DATA PROTECTION SUPERVISOR

# EDPS OPINION ON THE STATUS OF CONFIDENTIAL COUNSELLORS (Case 2021-0430)

## 1. INTRODUCTION

- This Opinion relates to the status, under Regulation (EU) 2018/1725<sup>1</sup> ('the Regulation'), of staff members who are processing personal data as confidential counsellors in the context of informal anti-harassment procedures.
- The EDPS issues this Opinion in accordance with Article 58(3)(c) of the Regulation.

## 2. BACKGROUND INFORMATION

The data protection officer (DPO) and deputy DPO of the Committee of the Regions (CoR) have raised the question whether confidential counsellors and certain other members of staff<sup>2</sup> may be considered **processors** within the meaning of Article 3(12) of the Regulation when they process personal data in the context of informal procedures to be laid down in the revised anti-harassment decision by the CoR Secretary-General ('informal anti-harassment procedures'), or whether they should be,

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<sup>1</sup> Regulation (EU) 2018/1725 of the European Parliament and the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ, L 295, 21.11.2018, pp. 39-98.

<sup>2</sup> The head of the Working Conditions Unit, the HR legal advisor, the social worker, the line managers referred to in Article 6 of the draft revised decision and the coordinator referred to in Article 11 thereof, some of which are to be carrying out the function of conciliator or mediator within the context of anti-harassment procedures. The arguments presented by the DPO and deputy DPO in favour of designating those persons as processors (and against designating them as persons acting under the authority of the controller) most exhaustively apply to confidential counsellors. To other persons mentioned above those arguments apply either to a similar or lesser degree, e.g. they might not be bound by the same confidentiality requirements or enjoy the same level of independence. This opinion therefore focuses on the status of confidential counsellors.

in all circumstances, considered ‘persons acting under the authority of the controller’ within the meaning of Article 30 of the Regulation.

In that regard, the DPO and deputy DPO have pointed out, inter alia, that the processing operations which the confidential counsellors carry out in an independent manner do not form a part of the duties with regard to which they were appointed or recruited. Moreover, the personal data collected by confidential counsellors may, for reasons of confidentiality, only be processed by them and may not be transmitted to the controller.

Furthermore, they have enquired, provided that such persons are considered processors, how the requirement of ‘a contract or other legal act under Union law’ governing the processing by a processor referred to in Article 29(3) of the Regulation should be implemented, i.e. which form it should take. Lastly, they ask whether Article 29(5) of the Regulation would be applicable in this situation.

### **3. LEGAL ANALYSIS AND RECOMMENDATIONS**

#### **3.1. Staff members of EUIs, including confidential counsellors, as processors**

Initially, we would like to highlight that the EDPS recommends not using the notion of processor within an EU institution, body, office or agency (EUI), except in specific circumstances, which involve organisational entities within an EUI, not individuals, and are therefore not relevant in this case<sup>3</sup>.

The European Data Protection Board (EDPB) also took the view that it is not a processor situation if the controller decides to process data itself, by using its own resources within its organisation, for example through its own staff. As further clarified by the EDPB, employees and other persons that are acting under the direct authority of the controller, such as temporarily employed staff, are not to be seen as processors since they will process personal data as a part of the controller’s entity<sup>4</sup>.

In this regard, the EDPS notes that the Regulation imposes on the processor a specific set of obligations which are not, per se, imposed on a person acting under the authority of the controller within the meaning of Article 30 of the Regulation. In part, this is due

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<sup>3</sup> In large EUIs, certain Directorates General (DGs) act as support DGs (e.g. DIGIT at the European Commission) and perform a role that is very similar to that of a processor when they carry out processing operations under strict instructions and on behalf of another organisational unit, through a service level agreement or other working arrangements (see section 4.1.1 of [EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation \(EU\) 2018/1725](#)).

<sup>4</sup> [EDPB Guidelines 07/2020 on the concepts of controller and processor in the GDPR](#), para 78.

to an existing hierarchical relationship between the controller and the staff member as a person who is authorised to process personal data under its direct authority, and the effective measures at the controller's disposal to ensure that the processing of personal data is in compliance with the Regulation.

In view of the foregoing, the EDPS is of the opinion that staff members of EUIs should not be considered processors within the meaning of Article 3(12) of the Regulation.

### **3.2. Confidential counsellors as persons acting under the authority of the controller**

In accordance with Article 30 of the Regulation, any person acting under the authority of the controller may only process personal data on its instructions, unless otherwise required by Union or Member State law. In that regard, as rightly noted by the DPO and deputy DPO, where confidential counsellors process personal data in the context of informal anti-harassment procedures, they do so, to a significant extent<sup>5</sup>, in an independent manner, i.e. without the risk of suffering any prejudicial measures from CoR for carrying out their mandate and without receiving specific instructions from CoR. Such specific instructions cannot be given largely because the confidential counsellors are bound by strict confidentiality requirements which prevent them from disclosing the collected personal data to the controller<sup>6</sup>.

However, it should be borne in mind that the general instructions to the confidential counsellors with regard to the processing of personal data are laid down in the anti-harassment decision. Moreover, while the function of a confidential counsellor has particular characteristics, including as regards processing of personal data, it is nonetheless essentially comparable to certain other functions that staff members may exercise. This is the situation where the controller itself does not have access to the personal data concerned, such as personal data concerning health. In that case, only properly qualified and authorised staff members<sup>7</sup> have access to those personal data. On the one hand, they cannot, for various reasons, receive any specific instructions from the controller, while on the other hand, they must process those personal data in accordance with the general instructions provided for by the controller, usually by way of adopting internal rules.

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<sup>5</sup> Albeit within the framework of the anti-harassment decision.

<sup>6</sup> Additionally, the DPO and deputy DPO suggest that such instructions cannot be given also because confidential counsellors are not necessarily a part of the unit acting as controller and are, hence, not necessarily hierarchically subordinate to the head of that unit. In that regard, it would be important to properly ascertain whether the relevant unit is in fact the one determining the purposes and means of the processing of the personal data, considering that (most of) those means and purposes appear to be determined in the anti-harassment decision by the CoR Secretary-General to whom all staff members are hierarchically subordinate.

<sup>7</sup> This concerns only in-house EUI medical services.

It follows that in order for a staff member<sup>8</sup> to be considered person acting under the authority of the controller, it is not necessary that the controller give him or her specific instructions with regard to every single element of the processing of personal data within the scope of carrying out his or her function(s), as long as general instructions constituting a sufficient basis for any relevant processing of personal data are provided by the controller.

Lastly, the fact that the function of confidential counsellors does not appear in the relevant staff members' job description and that no new post is created for carrying out such a function does not have any bearing on the status of confidential counsellors within the meaning of the Regulation since such persons are nonetheless acting under the authority of the controller. Namely, they are duly appointed to such a position by the controller in order to carry out tasks according to the rules and procedures laid down by the controller in the anti-harassment decision. Similarly, the status of processor attributed to confidential counsellors where this function is outsourced and therefore carried out by persons who are not staff members, is not relevant for the determination of the status of confidential counsellors who *are* staff members since the two categories of persons are fundamentally different.

In light of the foregoing, the EDPS recommends that staff members of EUIs who are processing personal data as confidential counsellors in the context of informal anti-harassment procedures be considered persons acting under the authority of the controller within the meaning of Article 30 of the Regulation<sup>9</sup>.

The remaining questions posed by the DPO and deputy DPO are therefore no longer relevant since they presuppose that the confidential counsellors are considered processors.

## 4. CONCLUSION

The EDPS recommends that confidential counsellors, in so far as they are staff members of an EUI, be considered persons acting under the authority of the controller within the meaning of Article 30 of the Regulation. Conversely, they should not be considered processors within the meaning of Article 3(12) of the Regulation.

In light of the accountability principle, the EDPS expects CoR to implement the above recommendation accordingly and has decided to close the case.

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<sup>8</sup> Including when the staff member is carrying out the function of a confidential counsellor.

<sup>9</sup> This also applies *a fortiori* to other staff members who are processing personal data in the context of informal anti-harassment procedures and are mentioned above.

Done at Brussels on 13 July 2021

*(e-signed)*

Delphine HAROU