



EDPS
EUROPEAN DATA PROTECTION SUPERVISOR

**EDPS SUPERVISORY OPINION ON THE
RELATIONSHIP BETWEEN THE EUROPEAN
CLIMATE, INFRASTRUCTURE AND ENVIRONMENT
EXECUTIVE AGENCY (CINEA), THE EUROPEAN
EDUCATION AND CULTURE EXECUTIVE AGENCY
(EACEA), THE EUROPEAN INNOVATION COUNCIL
AND SMES EXECUTIVE AGENCY (EISMEA), THE
EUROPEAN RESEARCH COUNCIL EXECUTIVE
AGENCY (ERCEA), THE EUROPEAN HEALTH AND
DIGITAL EXECUTIVE AGENCY (HADEA) AND THE
EUROPEAN RESEARCH EXECUTIVE AGENCY (REA)
AND THE EUROPEAN COMMISSION WHEN USING
CERTAIN CORPORATE TOOLS
(Cases 2019-1154 and 2022-1064)**

1. INTRODUCTION

1. This Supervisory Opinion relates to the relationship, from a data protection point of view, between the European Climate, Infrastructure and Environment Executive Agency (CINEA), the European Education and Culture Executive Agency (EACEA), the European Innovation Council and SMEs Executive Agency (EISMEA), the European Research Council Executive Agency (ERCEA), the European Health and Digital Executive Agency (HaDEA) and the European Research Executive Agency (REA), hereinafter referred to

collectively as the ‘Executive Agencies’ or ‘EAs’, and certain services of the European Commission (hereinafter ‘EC services’) when using certain corporate tools.

2. The EDPS issues this Supervisory Opinion in accordance with Articles 57(1)(p) and 58(3)(c) of Regulation (EU) 2018/1725¹ (‘the Regulation’).

2. FACTS

2.1. Background

3. On 16 December 2019, the Data Protection Officers (DPOs) of the six then operating EAs² sent a note to the attention of the EDPS. In this note, the EAs challenged their qualification as **sole controllers** in their relationship with several EC services that provide them with IT tools and other services. More specifically, they took the view that EAs and the EC services are in fact **joint controllers** in the meaning of Article 28 of the Regulation, as further outlined by the EDPS Guidelines on the concepts of controller, processor and joint controllership (the ‘EDPS [Guidelines](#)’)³.
4. The EAs have signed a number of Service Level Agreements (SLAs) and Memorandum of Understanding (MoUs) with specific services of the Commission, i.e. mainly the Secretariat-General (SG), the Directorate-General Human Resources (DG HR), the Pay Master Office (PMO), the Directorate-General Budget (DG BUDG) and the Directorate-General for Informatics (DG DIGIT). In these documents, the EC services are qualified as processors whereas the EAs are controllers. In their note, EAs’ DPOs take the view that the purposes and means of the processing activities subject to the SLAs are decided only by the Commission’s services, or jointly by the latter and the EAs, but not by the EAs only. They also point out to the lack of leeway for EAs to modify or adapt the decision-

¹ 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.

² EASME, REA, ERCEA, EACEA, INEA and CHAFEA.

³ https://edps.europa.eu/sites/default/files/publication/19-11-07_edps_guidelines_on_controller_processor_and_jc_reg_2018_1725_en.pdf

making processes, which the Commission sets through the business processes put in place in the IT tools provided under the above-mentioned arrangements.

5. On 27 January 2020, a meeting took place at staff level between the EDPS, the DPOs of the EAs and the Commission. Following that meeting, the EDPS asked by email to the relevant EC services and to the EAs to fill in the checklist from the EDPS Guidelines from their own perspective for each of the processing operations at stake.
6. On 27 April 2020, the EC DPO shared the following documents with the EDPS and the EAs' DPOs:
 - the checklist completed by SG as regards HAN⁴/ARES; DG BUDG concerning the EDES database; DG DIGIT concerning general IT communication tools (Outlook, etc.)⁵;
 - a note from DG HR concerning the use of SYSPER and PMO services⁶.

On 2 June 2020, the EAs shared their own filled-in checklist.

7. The checklists indicate that the EC's and the EAs' **views converged** on the processing operations conducted:
 - (i) on the EDES database (joint controllership between DG BUDG and EAs) and
 - (ii) using the general IT communication tools (EAs are controllers while DG DIGIT is processor).
8. The same checklists showed that the **views diverged** as regards processing operations on:
 - (i) ARES/HAN,
 - (ii) SYSPER and
 - (iii) PMO.

⁴ Hermes-Ares-NomCom.

⁵ DG DIGIT provided a slightly amended table on 26 November 2020.

⁶ DG HR and the PMO provided the filled in checklist on 26 November 2020.

For these, EAs considered themselves as joint controllers with the EC services, while the latter considered themselves processors.

9. On 7 October 2020, following a clarification request from the EDPS concerning possible instructions from the **parent DGs** as to the use of certain tools by EAs, the EAs indicated that the parent DGs are not involved in the conclusion of the SLAs between EAs and the relevant EC services, and do not instruct EAs on the use of the tools and services at stake.
10. On 26 November 2020, the Commission provided the feedback from the parent DGs. The Commission confirmed the absence of any formal instructions to their EAs to use the IT tools/services at stake⁷. Nevertheless, the Commission underlined that the relevant EC services have to consult their parent DG on their IT strategy documents and align HR management procedures as much as possible with the HR management practice of the parent DG⁸.
11. On 9 February 2021, a meeting took place between EDPS staff and the EAs' DPOs to **discuss the checklists**. Another meeting took place between EDPS staff and the Commission's DPO and relevant services (SG, DG HR, and PMO)⁹ on 18 March 2021. As a follow up to that meeting, the SG (HAN-ARES) provided additional information on 26 March 2021, DG HR (Sysper) on 12 April 2021 and PMO on 16 April 2021. On that occasion, the PMO representatives indicated that, contrary to the wording of the SLAs, when EAs delegate their powers conferred by the Staff Regulations¹⁰ on the Appointing Authority (AIPN) within the meaning of Article 2 of the Staff Regulations to PMO, the latter autonomously provides its services, which may include the determination, calculation and payment of financial entitlements of EAs' staff members and former staff members. In other words, the PMO would not be processor but controller of the

⁷ There are references to specific tools for core business.

⁸ According to the working arrangements/MoU in force at the time, ERCEA and REA for example had to consult the parent DG on their IT strategic documents developed 'in compliance with the standards, architecture, development methodologies, IT security and specific IT requirements for the delegated programmes and governance of the Commission and its parent DG' and REA had to make HR management 'aligned as much as possible with HR management practices in the parent DG'.

⁹ The latter provided some follow up information after the meeting (SG on 26 March 2021, DG HR on 9 April 2021 and PMO on 16 April 2021).

¹⁰ Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ 45, 14.6.1962, p. 1385), as further amended.

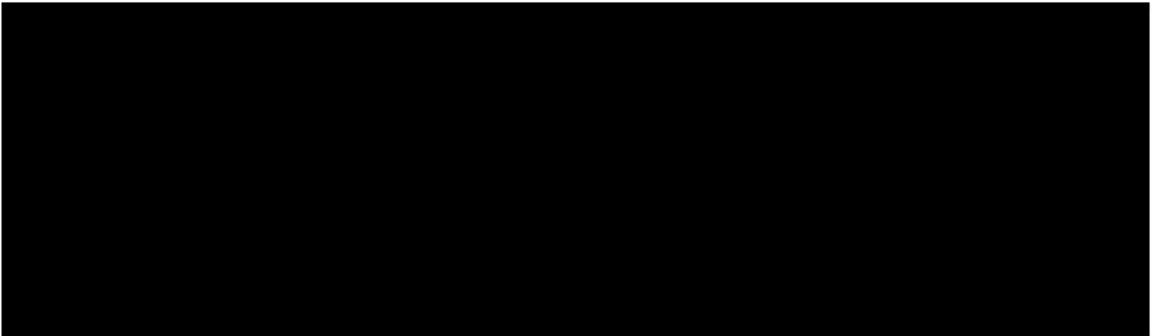
processing operations. In May 2022, the PMO filed a separate consultation with the EDPS on the nature of its relationship with EUs in the context of the SLAs concluded with EUs in general.¹¹

12. A last meeting took place between EDPS staff and the EAs' DPOs on 29 June 2021.

2.2. Data protection audit by the Internal Audit Service

13. In parallel, the Internal Audit Service (IAS) of the EC audited five of the EAs¹² and the EC's Common Implementation Centre (CIC) of DG RTD on data protection covering the period from January 2019 to March 2022. The audit aimed to assess whether the EAs and the CIC had put in place an effective and efficient control system for the protection of personal data in compliance with the Regulation.¹³

- 14.



15. Therefore, by a joint letter of 17 October 2022, the Directors of the EAs asked that the EDPS take a formal position on the matter.

¹¹ EDPS Case number 2022-0528.

¹² CINEA, EACEA, EISMEA, ERCEA and REA.

¹³ See letter from the Directors of the six EAs of 17 October 2022.

3. LEGAL ANALYSIS AND RECOMMENDATIONS

3.1. Legal framework of the EAs

16. Article 1 of Council Regulation 58/2003 of 19 December 2002 'laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes'¹⁴ provides that '**under its own control and responsibility**', the Commission may 'entrust [executive agencies] with any tasks relating to the management of Community programmes'. EAs have **legal personality**¹⁵ and must comply with the Staff Regulations¹⁶. Each executive agency is managed by a Steering Committee, the members of which are appointed by the Commission, and by a director.¹⁷
17. Corresponding recitals of Council Regulation (EC) 58/2003 state that:
- 'The Commission should (...) be able to delegate some of the tasks relating to the management of Community programmes to third parties';¹⁸
 - 'The Commission must have the power to decide to create and, where appropriate, wind up an executive agency (...)';¹⁹
 - 'The activities performed by an executive agency must also fully comply with the programming which the Commission defines for the Community programmes in the management of which the agency is involved';²⁰

¹⁴ Council Regulation (EC) 58/2003 of 19 December 2002 laying down the statute for EAs to be entrusted with certain tasks in the management of Community programmes, OJ, L11 , 16.01.2003, p. 1.

¹⁵ Art. 4.

¹⁶ Art. 18.

¹⁷ Art. 7 and 8.

¹⁸ Recital 4.

¹⁹ Recital 10.

²⁰ Recital 12.

- 'Each executive agency must collaborate intensively and continuously with the Commission departments responsible for the Community programmes which it is involved in managing.'²¹

18. Commission Regulation (EC) No 1653/2004 on a standard **financial regulation** for the EAs²² provides that where the Commission is able to provide services, EAs shall first have recourse to these services before applying a procurement procedure²³.
19. **Commission Decision** (EU) 2021/173 of 12 February 2021 **establishes** six EAs to implement Union programmes in the 2021-2027 multiannual financial framework: the European Climate, Infrastructure and Environment Executive Agency (**CINEA**), the European Health and Digital Executive Agency (**HadEA**), the European Research Executive Agency (**EREA**), the European Innovation Council and SMEs Executive Agency (**EISMEA**), the European Research Council Executive Agency (**ERCEA**), and the European Education and Culture Executive Agency (**EACEA**)²⁴. **This Decision determines the EAs' tasks and portfolios as well general operating rules.** The EAs are subject to the **supervision** of the Commission as to the implementation of the Union programmes they are responsible of²⁵.
20. The six Commission Delegated Decisions (one per EAs) adopted on the same day include in particular the following:
 - Each EA has parent DGs and a **lead parent DG**²⁶;
 - Each EA **acts in its own name** when implementing the delegated tasks²⁷;

²¹ Recital 19.

²² Commission Regulation (EC) No 1653/2004 of 21 September 2004 on a standard financial regulation for the executive agencies pursuant to Council Regulation (EC) No 58/2003 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L297, 22.09.2004, p. 4 . Amended by Commission Regulation (EC) No 182/2005 and Commission Regulation (EC) No 651/2008.

²³ Art. 50(3). This rule seems to apply mainly on administrative expenditures.

²⁴ Commission Implementing Decision (EU) 2021/173 of 12 February 2021 establishing the European Climate, Infrastructure and Environment Executive Agency, the European Health and Digital Executive Agency, the European Research Executive Agency, the European Innovation Council and SMEs Executive Agency, the European Research Council Executive Agency, and the European Education and Culture Executive Agency and repealing Implementing Decisions 2013/801/EU, 2013/771/EU, 2013/778/EU, 2013/779/EU, 2013/776/EU and 2013/770/EU, OJ, L50, 15.02.2021, p. 9.

²⁵ Art. 11.

²⁶ Art. 2.

²⁷ Art. 4(5) or (6), depending on the Commission delegating decision.

- Each EA performs its tasks in accordance with the principle of **sound financial management**, applies **instructions** in operational manuals approved by the Commission and follows **harmonised interpretations** of the rules governing the implementation of the programmes²⁸;
- The modalities and procedures of interaction between EAs and the parent DG are set out in a **Memorandum of Understanding**²⁹;
- Where appropriate, the Commission ‘shall make available’ to the EAs **common IT tools**, for its operational and administrative management, in order to integrate the EAs as much as possible **within the IT environment of the Commission**. This may be done through **service-level agreements**, where appropriate³⁰;
- The delegated decisions include a list of the **logistical and administrative support services** that the EAs’ **must** make use of’ while implementing the delegated tasks³¹;
- Whenever the EAs make any substantial **change in their procedures and systems**, they must **inform** their parent DG prior to the adoption of these changes and communicate the reason for such change³².

3.2. Nature of the relationship between the EAs and the Commission’s services providing common corporate services and IT tools

3.2.1. Preliminary considerations

(i) Concepts

21. According to the Regulation:

- the **controller** is ‘the Union institution or body or the directorate-general or *any organisational entity which alone or jointly with others* [added emphasis] determines

²⁸ Art. 6.

²⁹ Art. 7.

³⁰ Art. 8.

³¹ Art. 9. There is no such provision for EREA.

³² Art. 21.

the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by a specific Union act, the controller or the specific criteria for its nomination can be provided for by Union law³³;

- the **processor** is ‘a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller’³⁴;

- joint controllership exists where ‘two or more controllers (...) jointly determine the purposes and means of the processing’³⁵.

22. The EDPS has further outlined these concepts in its [Guidelines](#). The European Data Protection Board (EDPB) has also issued [Guidelines 07/2020 on the concepts of controller and processor in the GDPR](#) (the ‘EDPB Guidelines’).
23. Where controllership is not determined by Union law³⁶, it stems from an **analysis of the factual elements or circumstances** of the case, in particular by establishing who has influence over the processing by virtue of an exercise of decision-making power.
24. In other words, the actual degree of influence of a party in determining both **purposes and means** of the processing may identify its role as a controller. This does not imply that a party has to determine equally both in order for it to be considered controller. While it must determine the purpose of the processing (‘why’), it might only determine the essential elements of the means of processing (‘how’)³⁷. The processor may therefore determine non-essential elements of the means without assuming controllership.
25. **Essential elements of the means** are closely linked to the purpose and the scope of the processing, such as the type of personal data processed, the categories of recipients and the categories of data subjects. On the other hand, **non-essential elements of the means** concern more practical aspects of implementation, such as the choice for a particular type of hardware or software or the detailed security measures³⁸.

³³ Art. 3(8) of the Regulation.

³⁴ Art. 3(12) of the Regulation.

³⁵ Art. 28(1) of the Regulation.

³⁶ Controllership is not determined in the above-mentioned Commission (Delegated) Decisions.

³⁷ EDPS Guidelines, pp. 9-10.

³⁸ EDPB Guidelines, para. 40.

26. In light of the specificities of the definition of controller in the Regulation³⁹, some EUIs use the notion of ‘internal’ or ‘delegated’ controller or ‘controller in practice’ for departments or entities within the EUI (in the present case EC services) to help clarify internal responsibilities.
27. When it comes to **joint controllership**, what matters is the joint determination of the purpose and (essential elements of the) means of the processing operations. Joint controllership can take the form of a joint decision taken by the entities or result from converging decisions regarding the purposes and essential means.⁴⁰ Decisions are converging on purposes and means when they complement each other and are necessary for the processing to take place in such manner that they have a tangible impact on the determination of the purposes and means of the processing.⁴¹ In other words, the processing would not be possible as it is without both parties’ participation in the purposes and means.⁴² The fact that a party does not have access to the personal data does not influence the joint controllership situation.⁴³ This may nonetheless matter when establishing the degree of responsibility of the parties involved. Entities can be involved at different stages of the processing and to different degrees so that the level of responsibility of each of them must be assessed with regard of all circumstances of the case.⁴⁴
28. The use of a common data processing system or infrastructure will not in all cases lead to qualify the parties involved as joint controllers, in particular **where the processing they carry out is separable and could be performed by one party without the intervention from the other** or where the provider is a processor in the absence of any purpose of its own, except for a mere commercial benefit.⁴⁵
29. The fact that several actors are involved in the same processing does not mean that they are necessarily acting as joint controllers of such processing. For example, there can be situations where various actors successively process the same personal data in

³⁹ Art. 3(8) of the Regulation.

⁴⁰ EDPS Guidelines, p. 24; EDPB Guidelines, para. 54-55.

⁴¹ EDPB Guidelines, para. 55.

⁴² EDPB Guidelines, para. 55.

⁴³ CJEU, 5 June 2016, C-201/16, Wirtschaftsakademie Schleswig-Holstein, ECLI:EU:C:2016:388, para 38; CJEU, 10 June 2018, C-25/17, Jehovah's Witnesses, ECLI:EU:C:2018:551, para 69 and 75; CJEU, 29 July 2019, C-40/17, Fashion ID, ECLI:EU:C:2019:629, para 69.

⁴⁴ EDPB Guidelines, para 58. CJEU, 29 July 2019, C-40/17, Fashion ID, ECLI:EU:C:2019:629, para 74.

⁴⁵ EDPS Guidelines, para 68.

a chain of operations, each of these actors having an independent purpose and independent means in their part of the chain. In the absence of joint participation in the determination of the purposes and means of the same processing operation or set of operations, joint controllership has to be excluded and the various actors must be regarded as **successive independent/separate controllers**.⁴⁶

(ii) Parent DGs and Support DGs/services

30. There is a **clear distinction to be made** in the EC services **between parent DGs** of EAs, **and support DGs** providing corporate tools and services to EAs.
31. The EAs' mandate derives from a **delegation of tasks by the Commission**.⁴⁷ The Commission Decision establishing the EAs and their respective delegated acts reflect this specificity. Even though the EAs enjoy the legal personality and have leeway as to how they conduct their activities, **the Commission** has a significant influence on the way EAs process information, in particular on their core business activities, i.e. the implementation of Union programmes. The goal is to ensure a smooth and harmonised cooperation between the Commission and the EAs acting on delegation, also in line with the principle of sound financial management.
32. In light of this, the EDPS considered in the past that the EAs and the Commission (i.e. their parent DGs) are, as a matter of principle, joint controllers of the personal data processed on *ad hoc* IT tools developed with a view to managing the EU funding projects delegated to the EAs⁴⁸.
33. The subject matter of this Supervisory Opinion however relates to the relationship between the EAs and **support DGs/services** in the provision of corporate IT tools and services, which is of a different nature.

⁴⁶ EDPB Guidelines, pp. 24-25.

⁴⁷ See above paragraph 19.

⁴⁸ EDPS Joint Prior-checking Opinion of 10 December 2018 regarding grants award and management in the Participant Portal under the H2020 tools: https://edps.europa.eu/data-protection/our-work/publications/opinions-prior-check-and-prior-consultations/joint-prior_en

34. The SG, DG HR and the PMO provide EAs with **common supporting tools and services**, i.e. HAN/ARES, SYSPER, PMO services. These tools and services support processing operations pursuing several purposes:

- HAN/ARES is used for management and archiving of all documents processed by EAs to fulfil their missions;
- SYSPER supports HR matters including time management, leave management, annual appraisals, promotions, etc.;
- PMO services determine individual financial entitlements such as family and school allowances, pension rights, etc.

These tools and services are used throughout the Commission, including the parent DGs.

(iii) Processing operations v. means of processing

35. Controllorship relates to (a set of) processing operations with similar purposes, whereas one same tool can support processing operations conducted for various purposes, and by different controllers and processors.

36. The nature of the relationship between the EAs and the Commission (the individual EC services at stake) stems from their role in processing operations and not (only) from their means, i.e. the supporting tools. For HAN/ARES and SYSPER, the Commission and the EAs have analysed the situation and filled in the EDPS Guidelines checklist **per tool**. By doing so, they put the **focus on the means** of processing, where the EC services involved (SG and DG HR) undeniably play a prominent role, **and less on the purposes of the processing operations supported by the IT tools**, which is decisive though as to the identification of controllorship.

(iv) Current arrangements: EAs a controller and support DGs/services as processors

37. The EAs have recourse to HAN/ARES, SYSPER and PMO services through the signature of SLAs or MoUs with the SG for HAN/ARES services, DG HR for SYSPER and PMO (the 'support DGs/services'). Parent DGs are not part to these arrangements.⁴⁹
38. The current arrangements qualify the EAs as controllers and the Commission (the support DG/services) as processors of the data processed using HAN/ARES and SYSPER, as well as for PMO services.
39. However, the EAs take the view that these arrangements do not reflect the reality and that, for the purposes of the Regulation, they are joint controllers together with the support DG/services.

3.2.2. Controllership of processing operations using HAN/ARES (SG) and SYSPER (DG HR)

40. The very nature of the EAs, i.e. executive bodies dependent on the Commission, frames their margin of manoeuvre in performing their core tasks As indicated above⁵⁰:
 - EAs perform the **tasks delegated** to them **by the Commission in line with the modalities and procedures defined in MoUs with their parent DGs**; even though the MoUs do not oblige the EAs to use specific common corporate tools and in particular HAN/ARES and SYSPER⁵¹, they include general instructions to consult the parent DG and/or to **align as much as possible IT and HR management**

⁴⁹ See paragraphs 9 and 10.

⁵⁰ See paragraph 20.

⁵¹ There are references to specific tools for core business.

practices with the parent DG⁵²; EAs notably agree to adopt and apply document and archive management rules that are compatible with those of the Commission⁵³;

- **Common IT tools** are **made available** by the Commission services to the EAs for their operational *and administrative* management, in order to **integrate them** as much as possible **within the IT environment of the Commission**;
- Whenever EAs make any substantial **change in their procedures and systems**, they must **inform their parent DG** prior to the adoption of these changes and communicate the reason for such change⁵⁴.

Moreover, the fulfilment of their legal mandate naturally implies that EAs process personal data for **document management** and **HR matters purposes** for their daily tasks.

41. Thus, because of their very nature and their obligation to collaborate closely with the Commission⁵⁵, as well as in line with the principle of sound financial management, **the EAs are *de facto* obliged** - or at least strongly encouraged - **to align with the Commission's practices and procedures**, as regards document management and HR matters and therefore to use the same tools, while having nevertheless some leeway as to the extent of the functionalities of HAN/ARES (storage of documents, management of workflows, distribution of documents, etc.) and SYSPER modules they wish to use.

⁵² Examples provided: for ERA and ERCEA, the WA/MoU (under previous legal framework) relating to the use of tools require that both EAs consult the parent DG on their IT strategic documents developed 'in compliance with the standards, architecture, development methodologies, IT security and specific IT requirements for the delegated programmes and governance of the Commission and its parent DG'. REA has to make HR management 'aligned as much as possible with HR management practices in the parent DG'.

⁵³ Art. 20 of the respective MoUs shared with the EDPS.

⁵⁴ Art. 21.

⁵⁵ See for instance above paragraph 17: 'Each executive agency must collaborate intensively and continuously with the Commission departments responsible for the Community programmes which it is involved in managing' (Recital 19 of Council Regulation 58/2003).

42. In light of the above, the use of the **checklist of the EDPS Guidelines**⁵⁶ for the data processing operations by EAs on HAN/ARES and SYSPER leads to the following conclusions:

<i>Who decides to process personal data or cause that another entity processes personal data</i>	The legal framework assigns tasks to EAs that require them to process personal data, notably for document and HR management purposes. The legal framework in which EAs operate is notably defined by (delegated) decisions of the Commission and complemented by MoUs between parent DGs and EAs that have a significant influence on the way EAs process personal data. As regards HR management, EAs have to comply with the Staff Regulations as any other EUI.
<i>Who decides what purpose or outcome the processing operations need to have</i>	Purpose of the processing: EAs can theoretically decide on the purposes of their administrative processing activities, including for document management and HR management, under their legal framework and in accordance with the Staff Regulations. In practice, however, they align practices with those of the parent DGs (they must inform the latter about any change in the procedures and the reasons for the change). In practice, all EAs apply the same document management and HR rules as the Commission.
<i>Who decides on the essential elements of the processing operation, i.e. what personal data should be collected, about which individuals, the data retention period, who has access to the data, recipients, etc.</i>	EAs under control of the parent DGs. EAs are strongly encouraged to align administrative practices with those of the parent DGs (they must inform the latter about any change in the procedures and the reasons for the change) and within the technical framework provided by the support DGs as to the available functionalities of the systems (type of data, data fields, etc.).
<i>Whose employees are the data subjects</i>	On HAN/ARES: EAs staff and third parties inside and outside EUIs. On SYSPER: Mainly EAs staff.
<i>Who exercise professional judgement in the processing of personal data</i>	EAs
<i>Who has a direct relationship with the data subjects</i>	EAs
<i>Within the tasks assigned as public institution, who has autonomy and independence as</i>	EAs. EAs margin of manoeuvre for the choice of the means is limited by some constraints: the requirement to align practices with the Commission, to use the IT tools provided by the

⁵⁶ Page 13 of the EDPS Guidelines.

<i>to how the personal data are processed</i>	Commission and the obligation to inform and justify any changes in the procedures and practice.
<i>Was a processor appointed to carry out processing activities on behalf of the EUI, even if the entity chosen for that purpose implements specific technical and organisational means (non-essential elements)</i>	EAs appointed SG as processor for HAN/ARES and DG HR as processor for SYSPER. The choice of processor is, however, limited because of the above constraints.

Relationship between EAs and their parent DGs

43. In view of the above, the Commission (parent DGs) does not formally instruct EAs to manage their documents and process HR data in a certain way and to use the tools at stake. Nevertheless, the way EAs perform data processing for these purposes and their use of HAN/ARES and SYSPER result from **converging decisions** of EAs and their parent DGs. Indeed, because of the executive nature of EAs, both the Commission and EAs converge on determining:
- the purposes, which derive from the tasks delegated by the Commission to the EAs and the need for the Commission (parent DGs) and EAs to interact closely in a smooth and efficient manner, which cause them to follow similar administrative processing operations in place;
 - essential means (the IT tools) of the processing at stake, as they apply *de facto* the same procedures and use the same tools.
44. Therefore, **the EAs and the Commission (parent DGs) are joint controllers** of the processing operations for document management and HR matters purposes using HAN/ARES and SYSPER under the respective SLAs.

This does not mean that EAs and their parent DGs would have to share their responsibilities equally. On the contrary, joint controllers may be involved at different stages of the processing operations and to different degrees.⁵⁷ Therefore, their respective responsibilities should be set out in a **joint controllership arrangement** in accordance with Article 28 of the Regulation: This arrangement should in particular

⁵⁷ See EDPS Guidelines, pp. 27-26 and case law mentioned.

clarify their respective duties to provide information to data subjects and as to the exercise of data subject rights. The arrangement should also determine how they interact with the support DGs (SG and DG HR), in view of the latter's actual role in the processing. For instance, one of them could be in charge of the technical improvements/updates to the IT tools supporting the processing operations,

Relationship between EAs and support DGs

45. Under the SLAs, **the SG and DG HR** as support DGs⁵⁸ **are** considered **processors** of the EAs. The determination whether these entities are indeed processors depends on the level of flexibility left *de facto* for the parent DGs and the EAs, to take decisions about the purposes and means of the processing. Even if the SG and DG HR act as processors of the EAs, the SLAs should be adapted to reflect the respective responsibilities assigned in the joint controllership between EAs and their parent DGs.

Recommendation 1

The **EAs and the Commission in the role of their lead parent DGs should clarify** in writing **their actual respective roles** of joint controllers as to the data processed by the EAs for document management and HR purposes using respectively HAN/ARES and SYSPER.

Recommendation 2

The EAs and the Commission as support service should **carefully check the actual role of the SG and DG DIGIT support DGs** to ensure that they match the obligations under the Regulation and amend the respective SLAs if and where appropriate.

Recommendation 3

The **data protection notices should be checked/adapted** accordingly, in order to comply with the duty to provide the information referred to in Articles 15 and 16 of the Regulation.

⁵⁸ See EDPS Guidelines, pp. 15-16, which describe the role of support DGs: '(...) certain EU Directorate General act as 'support DGs', often carrying out processing operations under strict instructions and on behalf of other DGs (who are the owners of the business process. (...) this is reinforced by the existence of Service Level Agreements or other working agreements between Directorate Generals, which set out the governance process and the division of tasks and responsibilities between the different organisational entities involved in the processing.'

3.2.3. Controllorship of processing operations aiming to establish financial entitlements (PMO services)⁵⁹

46. The PMO is in charge of determining, calculating and paying out individuals' entitlements in accordance with the Staff Regulations, the Commission Decision of 6 November 2002 establishing an Office for the administration and payment of individual entitlements⁶⁰, as well as the Commission Decisions that designate the PMO as appointing authority for the provision of certain services within the Commission.⁶¹ The PMO provides services to other EUIs in a broad range of areas such as determination of individual financial rights for staff, pensioners and rights holders, payment of salaries and allowances, payment of unemployment allowances, reimbursement of sickness and accident insurance expenses, etc.
47. According to Article 2(2) of the Staff Regulations, one or more EUIs may entrust to any other institution or to an inter-institutional body the exercise of some or all of the powers conferred on them, as Appointing Authorities (AIPN), other than decisions relating to appointments, promotions or transfers of officials. According to Article 2(4) of the Commission Decision of 6 November 2002, the PMO may act *at the request of and on behalf of* another body or agency established under or based on the Treaties.
48. Some of the **services** that the PMO provides to EUIs that apply the Staff Regulations (including the EAs), are **rendered exclusively** by the PMO.⁶² In accordance with the

⁵⁹ The present opinion refers to the PMO, instead of the Commission for ease of reference. It is to be noted that in accordance with Article 2 of the Commission Decision (EU) 2020/969, "(...) the Commission shall be considered to be the controller within the meaning of Article 3(8) of Regulation (EU) 2018/1725), while the Head of a Directorate-General, Service or Cabinet, which carries out a processing operation on behalf of the Commission in fulfilment of the mission of the Directorate-General, Service or Cabinet, is to be considered a "delegated controller" in accordance with Article 3(4) of the above Commission Decision.

⁶⁰ Commission Decision of 6 November 2002 establishing an Office for the administration and payment of individual entitlements (2003/522/EC), OJ L 183, 22.7.2003, p. 30–34.

⁶¹ See for instance Commission Decision C(2021)9126 of 15.12.2021 on the exercise of powers conferred by the Staff Regulations on the appointing authority (AA) and by the Conditions of Employment of Other Servants on the authority authorised to conclude contracts of employment (AACE).

⁶² Such services concern:

- the reimbursement of medical costs (Article 72 of the Staff Regulations and the Joint Rules on Sickness insurance for EU officials);

information provided by the PMO, such services are provided exclusively on the basis of the attribution in the applicable statutory rules of exclusive competence to the Commission, in conjunction with the Commission Decision that designate the PMO as appointing authority for the provision of certain services within the Commission.⁶³

49. The PMO provides **other services on demand** under SLAs concluded between the PMO and the EUIs concerned. The delegation of powers by the EUIs to the PMO takes place through an AIPN delegation decision annexed to the SLAs.⁶⁴
50. As indicated above⁶⁵, the SLAs between the PMO and EUIs including EAs qualify the EUIs as controllers and the PMO as processor for all processing operations resulting from the activities performed by the PMO. However, the PMO raised doubts about this qualification⁶⁶.
51. In order to assess the roles of PMO and the EAs to which it provides its services, a distinction has to be made between (i) services that are rendered exclusively by the PMO to EUIs that apply the Staff Regulations and (ii) services that the PMO provides to EUIs on demand.

(i) Services that are rendered exclusively by the PMO

52. Some of the services provided by the PMO to EUIs, such as the reimbursement of medical costs, are rendered exclusively by the PMO. The provision of these services by the PMO entails the processing of personal data of staff members and former staff

- the payment of unemployment allowance (Articles 28a and 96 of the Conditions of Employment of Other Servants - CEOS); and
- the payment of retirement pensions, invalidity allowance and survivor's pensions (Article 45 of Annex VIII to the SR and Articles 44 and 114 of the CEOS read in conjunction with Decision 63/491/EEC of 10 July 1963). The SLAs concluded between the PMO and the EUIs, confirm that certain services are 'exclusively rendered' by the PMO and provide details concerning the processing of personal data entailed by the provision of these services.

⁶³ Idem

⁶⁴ Such services include:

- the management and determination of financial benefits related to staff in active service, retired staff (including staff on invalidity and beneficiaries of a survivor's pension), and former staff who are eligible to an unemployment allowance;
- the management of mission expenses of staff members; the management of costs related to external experts;
- the calculation of expenses of Seconded National Experts (SNEs);
- assistance with obtaining visas for staff members; and
- assistance with the management of salary attachments (*saisies sur salaires*).

⁶⁵ See above paragraph 4.

⁶⁶ See above paragraph 11.

members of the EUIs. For instance, the PMO has to process personal data (e.g. identification data and health data) of staff members of the EAs to reimburse their medical costs.

53. As indicated above⁶⁷, the Commission (PMO) is directly mandated by the legislator to provide these services to the EUIs that apply the Staff Regulations, including the EAs. The PMO as a Commission service is in charge of providing such services in accordance with the applicable Commission Decision.⁶⁸
54. Therefore, the *purpose* of the processing operations that such services entail is defined in the Staff Regulations and the relevant legal bases, which grant to the PMO, as a service of the Commission, exclusive power to these such services to other EUIs including the EAs.
55. With regard to the *means* of the processing operations concerned, the PMO unilaterally determines such means in accordance with the applicable legal rules, as well as with the procedures and practices determined within the Commission, without receiving any instructions from the EUIs concerned. In particular, the PMO decides what personal data should be collected, who has access to such data, who the recipients are, and for how long such data are kept. Additionally, the PMO unilaterally decides on the IT applications used for the processing of the personal data in question. Overall, the PMO acts **independently** in the provision of these services.
56. In the framework of the SLA, exchanges of personal data of the data subjects concerned take place between the EAs and the PMO. In particular, the EAs identify the persons who are its staff members and/or former staff members who are eligible for the different benefits that the PMO manages under the SLA, and forwards their identification data (first name, surname, personal address, etc.) and their financial data (bank agency code, BIC code, bank account number, etc.) to the PMO. In light of the information provided, it is established that the PMO does not determine the purposes and means of processing operations that take place by the EU institutions prior to the transmission of personal data to the PMO (e.g. the collection of personal data by the EAs). Therefore, for these processing operations, each EA determines the means and

⁶⁷ See above paragraph 48.

⁶⁸ See Commission Decision C(2021)9126 of 15.12.2021 on the exercise of powers conferred by the Staff Regulations on the appointing authority (AA) and by the Conditions of Employment of Other Servants on the authority authorised to conclude contracts of employment (AACE).

purposes and is to be considered as ‘controller’ within the meaning of Article 3(8) of the Regulation.⁶⁹

57. By contrast, after the transmission of such personal data to the PMO has taken place, the EAs no longer take any decisions on the purposes and means of the processing operations that the PMO undertakes when it provides its services. Therefore, the EDPS concludes that **the PMO, as a Commission service, is a separate controller** within the meaning of Article 3(8) of the Regulation with regard to the processing of personal data it undertakes **in the context of the provision of the services that it renders exclusively** to the EAs. It is apparent that such controllership starts from the moment the personal data in question are transmitted to the PMO by the EAs.

(ii) Services provided by the PMO on demand

58. The services provided by the PMO on demand are listed in the SLA with each EUI, including EAS, and may include delegations of powers with regard to the management and determination of financial benefits, management of mission expenses of staff members, management of costs related to external experts, etc. The implementation of these tasks entails processing of personal data. For instance, the PMO processes personal data of staff members of the EUIs concerned to determine their financial benefits.
59. In the framework of the SLA, exchanges of personal data of the staff and former staff of the EAs to whom the PMO provides its services take place. The EA identifies its staff members and/or former staff members who are eligible for the different benefits that the PMO manages under the SLA, and forwards their identification data (first name, surname, personal address, etc.) and their financial data (bank agency code, BIC code, bank account number, etc.) to the PMO.
60. The mere fact that an entity provides services to another entity, upon request of the latter, does not automatically result in a controller-processor relationship. In the case at hand, the EUIs (in this case the EAs) can take the decision to entrust certain powers, such as the power of financial determination of pension’s rights of their staff members, to the PMO. At the same time, the PMO can accept such delegation of powers insofar as the delegated powers correspond to the AIPN powers attributed to the PMO within

⁶⁹ This is not in dispute.

the Commission. In other words, the PMO can take over the responsibility to carry out certain tasks for other EUs only if it is competent to carry out such tasks within the Commission based on the relevant Commission Decisions.

61. For the PMO to be able to provide the services outlined in the SLA, the EAs send the identification data of the staff members (and former staff members) who are eligible for different financial benefits to the PMO. After such personal data are transmitted to the PMO, the PMO decides autonomously how it should be processed to render its services in accordance with the rules applicable at the Commission.
62. From the above, it is apparent that the PMO is not following instructions set out by the EAs with regard to the purpose and means of the processing of personal data in order to provide its services. Therefore, the EDPS' assessment is that the PMO is not acting on behalf of the EAs when it processes personal data to provide the services concerned under the SLA, and hence, the conditions set out in Article 3(12) for an entity to be considered a processor, are not fulfilled.
63. Subsequently, it is relevant for the EDPS to assess whether the PMO is a separate or joint controller, together with the EAs, when it processes personal data in the context of providing its services under an SLA. *Prima facie*, the EAs together with the PMO converge on the same general objective, which is the processing of personal data for the purpose of the provision of certain services delegated by the EU institutions to the PMO. Nonetheless, the joint determination of the purpose(s) of the processing operation, including in the form of converging purposes⁷⁰, is not sufficient for two entities to be considered joint controllers within the meaning of Article 28(1) of the Regulation. As it is clear from the wording of the said article and based on settled case law⁷¹, joint controllers must jointly determine **cumulatively** the purpose(s) **and** means of processing. If the joint determination by the entities in question concerns **solely** either the purpose(s) or the means of processing, the conditions set out in Article 28(1) of the Regulation are not fulfilled and the entities concerned are not joint controllers.
64. In the case at hand, after the transmission to the PMO of the identification data by the EAs, the PMO autonomously decides on the means of processing. Namely, the PMO

⁷⁰ EDPB guidelines 7/2020, para 53: "Decisions can be considered as converging on purposes and means if they complement each other and are necessary for the processing to take place in such manner that they have a tangible impact on the determination of the purposes and means of the processing".

⁷¹ CJEU judgment of 29 July 2019, Fashion ID, C-40/17, para 74.

decides **unilaterally** what personal data should be processed, who has access to the data, who the recipients are, and for how long data are kept, in accordance with the procedures and practices determined within the Commission. The data subjects for whom the PMO manages financial benefits also transmit certain personal data directly to the PMO, without the involvement of the EAs at stake. In other words, while the EU institutions and the PMO seemingly converge on the same general purpose, which is the processing of personal data for the provision of certain services delegated to the PMO under an SLA, the PMO enjoys independence in the determination of the means of processing. Therefore, the PMO is a separate controller for the processing undertaken when it provides its services to EU institutions upon request on the basis of an SLA. It is apparent that the EU institutions in question are separate controllers for any processing operations that precede or are subsequent to the processing undertaken by the PMO in the context of the SLA. For instance, EAs are separate controllers for any processing undertaken before the transmission of identification data of their staff members to the PMO.

Recommendation 4: The SLAs should clearly indicate that the PMO, as a Commission service, is a separate controller concerning the processing of personal data that it carries out both in the context of the provision of services rendered exclusively as well as in the context of the provision of services that are provided on demand.

Recommendation 5: For the sake of legal certainty, the SLAs should include provisions that determine the details of the exchanges of personal data that take place between the PMO and the EAs. Such provisions should at least indicate the subject matter and the purpose of the processing, the categories of personal data exchanged and the categories of the data subjects concerned.

4. CONCLUSION

65. In order to ensure compliance of the processing with the Regulation, the EDPS **deems necessary** that:

- CINEA, EACEA, EISMEA ERCEA, HaDEA and REA and their lead parent DGs, as joint controllers of the processing operations by the EAs for document management and HR matters purposes using HAN/ARES and SYSPER respectively conclude an arrangement under Article 28 of the Regulation; the arrangement should in particular clarify the sharing of responsibilities between the joint controllers vis-à-vis the SG (in relation to HAN/ARES) and DG DIGIT (in relation to SYSPER), and ensure compliance with data subject rights (**recommendation 1**);
 - check the actual roles of the SG regarding HAN/ARES and DG DIGIT regarding SYSPER and adapt the respective SLAs accordingly, where necessary (**recommendation 2**);
 - ensure that data subjects are duly informed about the respective roles of the above-mentioned actors in the processing operations and can exercise their rights under the Regulation (**recommendation 3**).
66. In relation to PMO services, CINEA, EACEA, EISMEA ERCEA, HaDEA and REA should strive to adapt their SLA with the PMO in order to reflect the allocation of responsibilities between them in light of the present Opinion (**recommendations 4 and 5**);
67. In light of the accountability principle laid down in Article 4(2) of the Regulation, the EDPS expects that CINEA, EACEA, EISMEA ERCEA, HaDEA and REA **implement the recommendations** with the cooperation of the relevant Commission's services and has decided to **close the case**.

Done at Brussels on 19 June 2023

Leonardo CERVERA NAVAS
(*e-signed*)