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C 2015-0532
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Subject: Prior checking Opinion on administrative inquiries and disciplinary procedures at the Body of European Regulators for Electronic Communications – Case 2015-0532

On 22 June 2015, the European Data Protection Supervisor ("**EDPS**") received a notification for prior checking under Article 27.2 of Regulation (EC) No 45/2001 (the "**Regulation**") relating to administrative inquiries and disciplinary procedures, from the Data Protection Officer of the Body of European Regulators for Electronic Communications ("**BEREC Office**").

According to Article 27.4 of the Regulation, this Opinion must be issued within a period of two months, i.e. before 27 August 2015. The draft Opinion was sent to the DPO for comments on 20 July 2015 and his comments were received on 23 July 2015.

Since the EDPS has already issued Guidelines on the processing of personal data in administrative inquiries and disciplinary proceedings¹, the present Opinion will focus on those aspects where the processing operation diverges from the Guidelines or otherwise needs improvement.²

Legal analysis

Specific risks of the processing operation which justify prior checking

¹ [Guidelines concerning the processing of personal data in administrative inquiries and disciplinary proceedings by European institutions and bodies](#) – available on the EDPS website under Supervision, Thematic Guidelines.

² As a general remark, the EDPS recommends that both the notification and the privacy statement, in particular the footnotes, be revised in order to rectify typos and ambiguities.

Under point 16 in the notification, the controller is requested to state the reason(s) for submitting the processing operation to prior checking. However, this information is not clearly provided in the notification, only in the attached draft Internal Administrative Instruction³.

Clarification: The present notification concerns administrative inquiries and disciplinary procedures and therefore falls under both Article 27.2(a) "*processing of data relating to health and to suspected offences, offences, criminal convictions or security measures*", and Article 27.2(b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*".

Controller

The Regulation in its Article 2(d) defines the controller as the "*the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data*". The notification and the privacy statement refer to the Management Committee and the Administrative Manager as controllers, and to the Administrative Manager and the Internal Investigation Service as controllers in practice.

Recommendation: The EDPS notes that the BEREC Office as an organisation is the controller. While where necessary an official can be considered as the "controller in practice" or be indicated as a contact point; final accountability remains with the organisation as such and is not attributed *ad personam*. This should be clarified accordingly in both the notification and the privacy statement.

Lawfulness of the processing operation

According to the notification and the privacy statement, the processing is lawful under Article 5.1(a), which provides that personal data may be processed if "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body (...)*".

However, although the reference to the legal provision is correct, the notification and the privacy statement then erroneously mentions the "unambiguous consent" of the data subject (Article 5.1(d)) as the basis for lawfulness.

Recommendation: This error should be corrected in order to avoid any confusion.

³ No IAI/2015/3.

Data retention

Personal files

The EDPS recommends that a retention period for disciplinary data in the personal files be established in the light of Article 4.1(e) according to which personal data must be "*kept in a form which permits identification of the data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*". This maximum data retention period should be the same as the storage period for the disciplinary files; otherwise the BEREC Office should provide reasons why a longer period is necessary.

Recommendation: A maximum retention period of disciplinary related data in personal files should be established. This retention period should not exceed the storage period for the disciplinary files unless there are reasons for this.

Disciplinary files

The notification and the privacy statement set the retention period of all documents related to the disciplinary procedure to 20 years, "taking into account the time limit for appeal and the principle evoked in Article 4.1(e) of Regulation No 45/2001 and the provisions of section 12.1 to 12.4 including the Common position level retention list for European Commission files". However, under point 9 "Automated/Manual processing operation", in the notification it is stated, under the heading "Destruction of data", that "Following the relevant retention periods, the data will be eliminated following a documented process. In some cases disciplinary files are kept forever, even after the deletion of the reference to the sanction from the personal file". This is clearly in conflict with the provisions of the Regulation and also with the time limit of 20 years that the BEREC Office has imposed on itself.

In its guidelines, the EDPS invites all EU institutions and bodies/agencies to set up an adequate retention period of the disciplinary file taking into account the time limit for appeal and the principle evoked in Article 4.1(e) of the Regulation. As mentioned above, the retention period for the final decision in the personal file should coincide with the one of the disciplinary file.

Recommendation: The notification should be rectified under point 9 as explained above. The retention period for the final decision in the personal file should coincide with the storage period of the disciplinary file.

Recipients

Contrary to the privacy statement, the notification does not enumerate the potential recipients within the agency and there is a certain discrepancy between the two documents as regards potential recipients outside the agency.

Recommendation: The notification and the privacy statement should both include a complete list of potential recipients within and outside the agency.

Rights of data subjects

The notification and the privacy statement both first mention the possibility of restricting data subjects' rights pursuant to Article 20.1 of the Regulation, which provides in particular that the rights of access and rectification may be restricted where such a restriction constitutes a

necessary measure to safeguard "*the prevention, investigation, detection and prosecution of criminal offences*" or "*the protection of (...) the rights and freedoms of others*".

However, the EDPS underlines in its guidelines that the right of access is the right of the data subject to be informed of any information relating to him or her that is processed by the controller. As a rule, the data subject has a right of access and rectification⁴. It would therefore be appropriate to first set out these rights in the notification and the privacy statement, before explaining how they can be restricted.

The EDPS would also like to highlight that when the agency decides to apply a restriction under Article 20.1 of the Regulation, such a decision should be taken strictly on a case-by-case basis. The application of Article 20.3 requires the agency to provide detailed reasons for taking such a decision. The reasons invoked should demonstrate actual harm to the investigation and they should be documented before the decision to apply any restriction under Article 20.1 of the Regulation is adopted.

Should a restriction to the right of access and the right of rectification be imposed, the data subject should be informed of the principle reasons for the restriction and the right to have recourse to the EDPS for indirect access in accordance with Article 20.4.

Recommendation: The notification and the privacy statement should be amended so as to clearly set out the rights of access and rectification and the possible restrictions that can be applied in this respect. The draft Internal Administrative Instruction should also mention that any possible restrictions under Article 20.1 must be documented, as explained above.

Conclusion

The EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations and recommendations contained in this Opinion are fully taken into account.

In light of the accountability principle, the EDPS expects the BEREC Office to implement the above recommendations accordingly and has therefore decided to **close the case**. Please do not hesitate to contact us, should you have any questions.

(signed)

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⁴ See Articles 13-14 of the Regulation.