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Dear Mr Placco

On 26 June 2013, the European Data Protection Supervisor (EDPS) received a consultation under Article 27(3) of Regulation (EC) No 45/2001 (the Regulation) regarding the ‘display on the Curia website of photos of Unit staff and their direct telephone and fax numbers’.

Facts

The Court publishes the names, photos and contact information of staff in the Press and Information Unit on its website.¹ According to the data controller, such publication is necessary for the purposes of transparency. The staff sign a form which has two boxes to be ticked by the data subject to indicate whether or not they consent to their photograph being published.

Legal analysis

In your covering letter, you make reference to the EDPS Opinion in Case 2004-259 in which we considered photos to be a special category of data since they may reveal racial or ethnic origin (Article 10(1) of the Regulation). For that reason, you are submitting the processing for consultation on the need for prior checking.

¹ http://curia.europa.eu/jcms/jcms/Jo2_25870/

First, therefore, with regard to the need for prior checking, we remind you that the processing of special categories of data is not in itself likely to present risks within the meaning of Article 27: Article 27(2)(a) does not make reference to all special categories of data, but only to data relating to health, suspected offences, offences, criminal convictions or security measures. Article 27(1) makes processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes subject to prior checking. The processing of special categories of data **may be one of the factors** leading to the existence of such a risk. In the present case, and according to the information received, the EDPS does not consider that the processing involves specific risks within the meaning of Article 27(1) even if the photographs are available to a large number of people (thus everyone who visits that part of the Court's website). Of course, the EDPS is willing to reconsider his position if you were to have additional information to the contrary.

Second, the EDPS's approach regarding whether or not photographs are a special category has evolved. In Case 2004-259, to which you refer, we have indeed taken the view that at issue was a special category of data pursuant to Article 10. Since then, the EDPS considers that the use of the photograph and not the photograph itself gives rise to whether or not it is classified as special data in accordance with Article 10. That approach has also been followed by the Article 29 Working Party in its Opinion on facial recognition in online and mobile services.² The Article 29 Working Party considers that digital images of individuals may be considered as a special category of data 'specifically where digital images of individuals or templates are further processed to derive special categories of data, For example, if they are going to be used to obtain ethnic origin, religion or health information can be derived'.

In the present case, the EDPS therefore does not consider that photos of staff are special categories of data. Accordingly, there is no need to apply for an exemption under Article 10(4)³ as mentioned in your letter.

Finally, you also highlight the question of whether the processing is lawful, mentioning problems regarding the use of consent to legitimise the processing of that type of data (Article 10(2)(a) of the Regulation). In the present case, the fact that the photographs are not considered to be particularly sensitive data changes the basis of the legal analysis. It is no longer a question of analysing the appropriateness of an exemption under Article 10. Nevertheless, the lawfulness pursuant to Article 5 must still be assessed. As the Press and Information Unit must be easy to contact from outside the organisation in order to perform its duties, the publication of names and contact data may be considered to be 'necessary for the performance of a task carried out in the public interest' (Article 5(a), in conjunction with Recital 27 in the preamble to the Regulation). However, although publishing photographs on the website may give a more transparent and open image of the Unit, as the data controller has pointed out, it is not strictly necessary for that purpose.⁴

Therefore, reference must be had to a different basis for lawfulness in that respect. As you have pointed out, the use of Article 5(d) (consent) is difficult in a professional context, having regard to the power imbalances at issue, which requires certain precautions to be taken to ensure that 'freely given specific and informed' (Article 2(h) of the Regulation) consent is not forced. In the present case, the Court obtains consent by a form to be signed by the staff in the Press and Information Unit. The form has two boxes to be ticked, neither of which is pre-selected.⁵ This seems to provide adequate safeguards with respect to the freely-given and

² http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp192_en.pdf, p. 5.

³ In that regard, the EDPS wishes to point out that the possibility of authorising the processing of sensitive categories of data outside the exceptions provided for in the Regulation is transitional, as is clear from Recitals 28 and 29 in the preamble to the Regulation. The EDPS no longer gives such authorisation.

⁴ See also Article 38 of the Regulation.

⁵ Contrary to the 'opt-out' approach initially provided by the Committee of the Regions in Case 2010-0721.

specific nature of the consent. **To ensure informed consent, either a link to a statement on personal data protection with regard to that processing, or information to be supplied to data subjects pursuant to Article 11 of the Regulation must be added to the form.**

Conclusion

In conclusion, the processing does not appear to present specific risks in accordance with Article 27. **Prior checking is therefore not necessary.** Nevertheless, the EDPS points out the importance of having a solid basis for the lawfulness of the processing. **The use of consent as a basis for the lawfulness of the processing in a professional context requires certain precautions to be taken to safeguard the rights of employees.** One of those precautions is to ensure that the consent is freely given, specific and informed, as explained above.

Please notify the EDPS within three months of the measures adopted in order to comply with the recommendation made in this letter.

Yours sincerely

(signed)

Giovanni BUTTARELLI