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Dear Mr Renaudière,

I am writing to you regarding the data processing operations concerning "Complaints handling" (hereinafter "CHAP") and "EU-Pilot" at the European Commission submitted as consultations on the necessity for prior checking under Article 27(3) of Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (hereinafter referred to as "Regulation (EC) No 45/2001" or "Regulation").

After examining the documents received from you on 22 August 2008 and the information provided by the controllers during the meeting of 24 September 2008 to EDPS staff members, we have concluded that the data processing operations concerning CHAP and EU-Pilot are **not subject to prior checking** under any of the grounds set forth by Article 27 of Regulation for the reasons explained under Section 2. Below, under Section 3, you will find some recommendations that aim at assisting the data controllers to comply with the obligations of Regulation (EC) No 45/2001, which, as you know, remains fully applicable despite the fact that the processing operations are not subject to prior checking.

We have decided to deal with the two cases jointly for a number of reasons: First, the life-cycle of a complaint/inquiry starts by entering it into CHAP and in many cases continues by entering it into the EU pilot, which can be considered as a second step in such life-cycle. Second, the data processing features of CHAP and EU Pilot are alike (similar purposes, risk of occurrence of certain type of data, overlapping data subjects, security features). Moreover, the two databases are interlinked. Therefore, the EDPS assessment on whether the two data processing operations are subject to prior checking rely on the same legal arguments. Furthermore, the EDPS recommendations to ensure compliance with Regulation (EC) No 45/2001 are similar and in some cases apply to both data processing operations.

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1. Description of the processing operations

1.1. CHAP

The European Commission is in the process of creating a repository, an electronic "CHAP database" for the management of enquiries and complaints sent by individuals and legal entities ("correspondents") to the European Commission alleging infringements of Community law by Member States.

CHAP will contain all complaints and enquiries whether these arrive via the web-mail of "Europa" site or by emails or regular post; all of these will be entered into CHAP database by the General Secretariat or the respective Directorate General.

The information collected by the database includes certain identification data and the full text of the enquiry or complaint. This text itself is provided voluntarily by the correspondent and may contain rather diverse categories of personal data, including annexes to a complaint. Even if CHAP does not aim at collecting sensitive data, it may happen that data related to health are provided by the correspondent and is thus processed in the CHAP database.

CHAP database has **two main applications**: one "external" where citizens can enter their complaint or query and one "internal" used by staff of the Secretary General and the concerned Directorate General in charge of handling complaints.

The "Accueil des plaignants (CHAP)" site on "EUROPA" will provide a number of information before a correspondent would introduce his/her complaint/inquiry.

- the possibility of using other means to lodge a complaint/inquiry with the European Commission (email or regular mail),
- a short explanatory note about the infringement procedure: complainants can introduce not only their complaints but also complementary information and request information about their own file,
- informing correspondents about the possibility of using confidential or non-confidential treatment of their complaint/inquiry. In case correspondents did not make an explicit choice, the Commission presumes the preference for confidential treatment,
- it also informs correspondents about the consequences of opting for non-confidentiality (the identity of the correspondents will be used in all correspondence with the authorities of the Member State concerned).

There will also a link to the privacy policy on the "Accueil" site.

Complaints/inquiries are attributed to the respective DG at the Commission. A complaint/inquiry entered in CHAP can be treated in three ways:

- a) direct treatment (refusal or complete response);
- b) if it concerns a clear infringement of Community law by a Member State, it goes to the NIF database by importing all relevant information and documents to NIF database. The case is then be closed in CHAP and NIF will assign a new case number and send automatically back the new case number to CHAP; and
- c) if complementary information is needed from a Member State/s, it is registered in EU pilot with a case number (for more details, see "EU pilot" below).

The processing operation is mainly automated, partly manual.

As outlined above, correspondents have by default option the possibility to ask for **confidential treatment** of their complaint/inquiry which is then respected by the services of the Commission.

The default option of confidentiality applies also to the uploaded documents. Nevertheless, in certain cases the disclosure of correspondent's identity to a Member State might be necessary. In those cases, correspondents are asked for their consent to reveal their identity to the Member States concerned later in the "EU pilot".

1.2. EU PILOT

EU Pilot will contain information on inquiries and complaints registered in CHAP whose resolution requires assistance from Member State authorities.

The *purpose* of EU Pilot is to provide an efficient communication mechanism between the Commission's services and Member State authorities to resolve inquiries and complaints related to the application of Community law more efficiently.

Personal information uploaded in EU Pilot includes (i) identities of legal and physical entities that send complaints and inquiries, i.e. "correspondents" to the Commission' and EU pilot users identification and contact information (contact points at Member States and Commission's services) and, (ii) information related to the complaint or inquiry. As it happens with CHAP, such information may reveal correspondents sensitive (and non-sensitive) personal information.

The information is entered in structured files (e.g. correspondence details, issue description) and also in an unstructured way, particularly the original correspondence of the correspondent which will be uploaded in each complaint/inquiry.

The *data processing operations* can be summarised as follows:

1.2.1. The initial uploading of information is carried out by the responsible Commission Department. As explained above, the information of a case in EU-pilot is transferred from CHAP.

Access to the documents uploaded in EU Pilot is allowed only for the Commission staff, who, based on the content of the complaints/inquiries, send specific request for information to the Member State concerned. The Commission staff is advised not to include any personal information of the correspondent in the requests sent to the Member States. In this way, the correspondent's original correspondence will remain only visible to the competent Commission's services. In addition, prior or immediately after to the uploading of the information, the Commission department will ask the correspondent whether he/she wishes to keep his/her identification data confidential from Member State authorities. By default, EU Pilot is set up so that Member State authorities will only see information related to the correspondent without identification. Only when the correspondent has provided express consent (by standard mail), will the Commission's services be allowed to change the settings showing the correspondent's identity.

1.2.2. If the Member State accepts the file it will have to provide an answer within a 10 week deadline. The answer will be provided through the EU Pilot.

1.2.3. Following the receipt of the answer, the Commission will assess how to resolve the issue and will reply to the correspondent. The outcome can be either to close the file or to take further action which may include the possibility of launching an infringement procedure, forwarding the case to the NIF database. In such a case the file is closed in EU-pilot and continues further in NIF. The reply will be recorded in EU Pilot and it will be accessible to the Member State authority concerned.

CHAP and EU Pilot will, in fact, implement in an electronic way some of the procedures already applied within the Commission for complaints handling. To this end, both databases will avoid storing physical files in the future and will maintain only electronic archives in a structured way.

2. Applicability of Article 27 of Regulation (EC) No 45/2001

Article 27(1) of the Regulation requires data controllers to submit for prior checking by the European Data Protection Supervisor 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. Article 27(2) of the Regulation contains a list of processing operations likely to present specific risks in the above sense. The consultations have been submitted under Article 27(2)(a) and 27(2)(b) of the Regulation.

Article 27(2)(a) of the Regulation concerns cases where the processing of data typically involves data relating to health, suspected offences, offences, criminal convictions or security measures ("sensitive data").

It is not excluded that correspondents in the context of making complaints/inquiries provide data relating to health or it could happen that they provide data related to suspected offences/offences, etc. Such data will be entered in CHAP and EU pilot databases and they will be processed (i.e. viewed and analysed) by the competent services of the European Commission. Article 27(2)a of the Regulation aims at processing operations whose main purpose is the processing of sensitive data. The mere possibility of the presence of sensitive data in a data processing operation does not automatically make it a case for prior checking. The data processing operations CHAP and EU Pilot do not aim, as their main purpose, to process sensitive data. Furthermore, the presence of such data in both CHAP and EU Project is neither systematic nor necessary in every case. Finally, the databases are not designed structurally to process such sensitive data.

Article 27(2)(b) of the Regulation states that specific risk is present in processing operations which intend to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Thus, the data processing operation itself should aim at evaluating individual aspects.

The processing operation related to CHAP itself is aimed at handling complaints and enquiries submitted by the data subjects. The "EU pilot" will be used to request complementary information from Member States' authorities. In some cases in order to resolve a complaint/inquiry and assess whether an infringement of EU law exists, it may be necessary to carry out an evaluation of the correspondent behaviour (e.i. to assess his/her actions). However, the main purpose of the processing is not to evaluate the personal aspects of the individual, including his/her behaviour. Instead, the main purpose of the processing is to draw a conclusion as to whether an infringement of Community law was committed by a Member State.

Therefore, the EDPS does not consider neither Article 27(2)(a) nor Article 27(2)(b) applicable for the two databases.

Finally, the EDPS has found no reason to think that the specific risk necessary for a prior check under Article 27(1) of the Regulation might be present in the two databases.

3. Compliance with Regulation (EC) No 45/2001 and Recommendations

Even if the two processing operations do not fall under the data processing operations subject to prior checking by the EDPS *ex Art 27*, the obligations under Regulation (EC) No 45/2001

imposed upon data controllers towards ensuring the protection of personal data processed in the context of both databases are fully applicable.

The EDPS realises that data protection concerns have been considered both in the overall Commission's organization scheme and procedures for complaints/inquiry handling, as well as in the design of the relevant databases. Indeed, the EDPS welcomes the fact that the two systems take into account the principle of "privacy by design," which applies to the overall design of the databases and the implementation of privacy friendly procedures. For example, in EU Pilot it is positive that the confidentiality of individuals is set up by default, which means that Member State authorities will not see the identity of the correspondent unless he/she has explicitly agreed to it. Moreover, the original complaint/inquiry sent by the correspondent (which may reveal sensitive data about the correspondent) is only visible for the Commission staff, who are also advised within the database not to include personal data of the correspondent in the communication with the Member State. Another especially positive feature in the CHAP database is that the complainant will receive the text of the privacy notice together with the acknowledgment of receipt. This individualised form of informing data subjects about their rights is a user friendly and effective solution to enhance privacy protection by the European Commission. In addition, the homepage of CHAP provides a useful set of information about the procedure to complainants having in mind the specific features of the procedure and the database. Moreover, in both databases a specific access control policy is already in place, defining access rights for the Commission and Member State users, whereas a log file is available, showing all modifications made by the users.

Despite these positive features, the EDPS considers that the data controllers could take additional steps to ensure full compliance with Regulation (EC) No 45/2001. In particular, taking into account that both data processing operations may entail the processing of very sensitive data whose disclosure may be particularly harmful for individuals, the EDPS urges the Commission to do its utmost to ensure compliance with the Regulation. To assist the Commission in carrying out this task, the EDPS makes the recommendations described below.

3.1 Storage policy

The data conservation principle set out in Article 4(1)(e) of Regulation (EC) No 45/2001 is that 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. The Community institution or body shall lay down that personal data which are to be stored for historical, statistical or scientific use should be kept either only in anonymous form or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data must not be used for any purpose other than historical, statistical or scientific purposes

The notification regarding the CHAP database states that: The Commission keeps the details of all complaints indefinitely for historical and information purposes. Personal data allowing a person to be identified will be erased after 3 years. The complaint file will then remain without personal data allowing the complainant to be traced. No data will be erased in respect of complainants which are legal entities.

The notification of "EU pilot" specifies the storage period in these terms: "*Personal data of database users are kept in the application for as long as they have the status of central contact point. Files are kept for two years after the closure of case as stated in the CCL (Common Conservation List) approved by the EDPS.*"

Based on the exchange of information during the meeting of 24 September 2008, the EDPS suggests that the storage periods are reconsidered for both databases by taking into regard the following:

3.1.1. The life cycle of a complaint:/enquiry

If complementary information is needed in a complaint/inquiry, CHAP database will transfer the case details further to the EU Pilot and the status of the complaint in CHAP will appear as "closed". When the communication with Member States results in a finding that an infringement procedure should be launched, the complaint will be sent to "NIF" database, and the status in "EU pilot" will appear as closed. However, even if a case receives the status of "closed" in the CHAP or in the EU pilot database, *de facto* the complaint will not be closed if the Commission intends or has launched an infringement procedure before the ECJ.

Taking into account that in the above cases all the information related to a complaint/inquiry is further transferred from CHAP and EU Pilot into NIF, the need for archiving/storing all information in the databases used in the previous phase of the procedure (i.e. CHAP and/or EU Pilot respectively) might be questioned. It will need more reflection from the controllers whether the archiving function, i.e. keeping personal data directly in CHAP and EU Pilot is necessary for those cases where the information is transferred to the NIF database.

Further, the controller should consider a time limit for the cases of direct treatment of a complaint (for example rejecting it). In these cases the life cycle is much shorter. It needs further considerations for what purposes and for how long the keeping of personal information making a complainant/person making an enquiry identifiable should be necessary.

3.1.2. The EDPS comments on the draft Common Conservation List (CCL) of 7 May 2007 (available at: <http://www.edps.europa.eu/EDPSWEB/edps/site/mySite/pid/77>) explains the general principles related to Article 4(1)(e) in more detail.

3.1.3. Anonymisation could be considered as a possible future solution for keeping the case files in both databases longer than the end of the processing period. Although this is a difficult task, probably requiring disproportionate effort for the existing case files, it could be considered for the new case files in CHAP and EU-pilot, where the correspondent's identification information is kept in a structured way in the database fields. In addition, the complainants can be advised via the WEB site, not to include any unnecessary personal information, so that, to the maximum extent possible, the only personal data registered are those kept in the database identification fields (this is already available for the Commission staff within the EU-pilot database).

Understanding that the usefulness of personal data in the databases will be proven by the experiences gained, the EDPS recommends that in a 5 year period after the deployment of the two databases, the controllers provide appropriate feedback to the EDPS and send their revised storage policy for comments.

3.2. Notification of the data processing operations to correspondents

Pursuant to the information received, correspondents will be first notified that their data will be entered into CHAP. If applicable, in addition, they will be notified with an acknowledgment of receipt of the registration of the complaint/inquiry and the need to contact Member State authorities, including the uploading of their data in EU Pilot. In addition, they will receive a privacy statement concerning the EU Pilot.

The EDPS suggests that Commission services send the acknowledgement of receipt and the privacy statement regarding the EU Pilot **together** in order to avoid confusing correspondents about what is exactly happening with their data.

In addition, the EDPS suggests introducing various changes in both the "acknowledgement of receipt" and privacy statement as described below:

3.2.1. The reference in the acknowledgement of receipt to the EU Pilot should specify that it entails an exchange of information with Member State authorities *by electronic means*. It should probably include a link or reference to the privacy statement to facilitate correspondents understanding that the privacy statement refers to the processing of their data that occurs through the EU Pilot.

3.2.2. In the privacy statement, the following should be considered: (a) Section 6 "Your identity is only disclosed if you have your agreement..." It appears that "given" is missing. (b) Section 7 should be clarified. Correspondents will be told that the file is closed, for example after a solution is reached under EU Pilot. Yet, according to the last sentence "the identity of the complainant cannot be erased". (c) Under section 8 the reference to "as long as the file is not closed" is ambiguous. The right of access exists independently of whether the case is closed or not. If the information is still retained, even if the case is closed, correspondents still have the right of access. Therefore, we suggest deleting this sentence.

I would appreciate if you could share these considerations with the data controller.

We remain of course available for any further consultation on the matter.

Yours sincerely,

(signed)

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