**Report on legal investigation requested by EA EX on how to deal with security issues vs EA liability towards EA evaluators**

AI\_5.4 EAGA(18)11-6 Report on Security Issues 28August2018

1. Questions to EA Secretariat from the EX and MAC TFG

*The EA Secretariat is advised to seek answers to the following questions by taking legal advice where necessary:*

1. *As individuals are working on behalf of the EA (and ABs of TLs are actually financially compensated by EA for their time) does EA hold any legal responsibility for the safety/security of the team?*
2. *If an individual is killed or injured whilst undertaking an evaluation in a region known to be a security risk, is EA liable in any way?*
3. *Please confirm whether insurance cover is provided by the EA or that the expectation is that it will be provided by the individuals AB (has this been clearly communicated)?*
4. *If individuals are detained by local authorities during times of civil or political unrest, e.g. on allegations such as spying, what responsibility/liability does EA hold?*
5. *If an emergency situation arises, and as individuals are representing EA, should they contact EA for assistance or will this be the responsibility of the individuals AB?*
6. History of the investigation

2.1 Stage 1

At the beginning, the **scope** of the investigation was formulated as follows:

“*The mission considered concerns the analysis of the potential responsibilities respectively for EA and the Abs, about the TL and other “individuals working on behalf of EA” within the frame of PE and for the risks envisaged (integrity and security of persons further to an accident, natural disasters, political  unrest or arbitrary arrest), as well as their coverage (protection) by the insurance policies taken for those different assigned persons*.”

The proposed approach was extensive and intended to be based on the analysis of

* legal documents governing relations between EA and its NAB
* EA RoP
* legal status and compensation rules applying to mandated persons in the EA NABs, including EA applicable insurance policy
* NAB replies to advisor’s questions about their legal status and compensation rules applicable to their staff as well as relevant insurance policy in force in the NAB

Consultation of a legal expert in insurance policies was recommended to support the analysis, in addition to the consultation of EA insurance policy broker for relevant questions.

**Deliverables (1)**

Distribution of responsibility between EA and its NABs, insurance policy to be implemented for the identified risks, general recommendations focusing on drafting a document governing relations between EA and its NABs with their respective responsibilities.

The cost for this extensive study, covering EA and all EA NABs, amounted to 16.800 Euro.

The following issues should be addressed:

* Diagnosis will be carried based on the analysis of the rules governing EA and its relations with the NABs, including documents and forms used in the relevant EA processes.
* Practical recommendations will be issued concerning revision of the documents and forms.

EA will consult a legal expert in insurance in parallel.

**Deliverables (2)**

* Analysis of the documentation and conclusion with regards to the questions raised in relation to responsibility
* Practical recommendations

The documentation consisted of

* 23 forms used in the processes (Evaluator management, mandate and RfP, PE assignment),
* The EA professional indemnity insurance policy
* Other relevant publications (RoP, AoA, EA-2/02, etc.)

Note that the legal advisor had run a similar project for a multinational company.

1. Legal investigation

The investigation developed in 2 stages.

* 1. First stage - Outcome (See document “EA note 1”)

1. In the light of the main Regulation recitals and provisions concerning peer evaluation, (i) the peer evaluation is to be operated by the NABs, and (ii) the role and responsibilities of EA are to provide NABs with peer evaluation services, i.e. mainly organisation, coordination and administrative support.

**Comment**

From a logical point of view, the notion of "peer" evaluation implies that it is to be operated by the NABs themselves.

1. In the light of EA main rules of procedure concerning peer evaluation, EA is not the employer of the members of the team. This is supported by the fact that no documents refer to any employment relationship; RoP state it clearly that team members are employees of the NABs and payment by evaluator/team member is always by their NABs - compensation through mandates and RfPs is to the NABs effectively.
2. Based on the above, in case of damage, evaluators would put their claim to their NABs.

**Comment**

It must be clear that, in case of a considerable damage/accident, insurers will tend to call for liability and involve companies at all possible levels, the objective being to share the responsibility and the costs to victims.   
The legal advisor proposes to address this risk by demonstrating a proactive and anticipative action of EA and its NABs. This is the approach taken in big companies.

The Stage 1 report helped answer the original questions:

1. *As individuals are working on behalf of the EA (and ABs of TLs are actually financially compensated by EA for their time) does EA hold any legal responsibility for the safety/security of the team?*

Response is: in principle and based on EA rules and procedures, no, because EA is not the employer.

However, in case of a major accident, EA could not dismiss entirely any kind of responsibility. See comment above.

1. *If an individual is killed or injured whilst undertaking an evaluation in a region known to be a security risk, is EA liable in any way?*

Same response as for 1).

1. *Please confirm whether insurance cover is provided by the EA or that the expectation is that it will be provided by the individuals AB (has this been clearly communicated)?*

Because of the employment relationship between the evaluator and the NAB, it is first a responsibility of the NAB and it is expected that the NAB insurance policy shall cover such risks when a NAB employee is assigned for a PE for EA (or ILAC or IAF).

EA insurance covers its employees, including if they were to act as an EA evaluator.

EA will check the point in its current policy and review any need to extend/improve coverage in case of such damage**. Action Secretariat**

1. *If individuals are detained by local authorities during times of civil or political unrest, e.g. on allegations such as spying, what responsibility/liability does EA hold?*

EA not being the employer would not have the employer’s responsibility.

This point has not been touched specifically. It is proposed that it is discussed with the insurance companies.

1. *If an emergency situation arises, and as individuals are representing EA, should they contact EA for assistance or will this be the responsibility of the individuals AB?*

In the early stage of the project, it appeared it would be very time consuming, very complex and very expensive to carry out the comprehensive analysis of each possible cases against all EU/EFTA legal framework and according to each specific set of rules in force in the individual NABs. Then, the agreed approach to dealing with the issue and potential risk is to develop a system for EA to help manage such critical situations (terrorist attack for instance) with the NABs concerned. The Employer responsibility will remain on the NAB employing the evaluator. EA may have the role to coordinate actions to manage the situation.

**Stage 1 - Conclusion - Recommendation 1**

None of EA rules and documents contain any provisions relating to the legal relationships between the evaluators and EA, to EA and NABs liability, and to a potential request for indemnity by an EA evaluator. Some paragraphs could be added in EA rules and documents (i) further explaining the role of EA, (ii) emphasising that EA is not the employer of the evaluators and that each NAB remains the sole employer of the evaluators it provides for peer evaluations, and (iii) preventing claims from the evaluators qualified by EA and from the NABs.

* 1. Second and final stage - May 2018 (See 1805 note ea2)

Based on the conclusions that

1. EA cannot be considered as the Employer of the team member
2. EA responsibility could be called in the event of a major accident
3. It is very important to demonstrate that the risks have been identified and taken into account by EA
4. EA, consequently, clarified the issues with its members and set up a system for dealing with such situations in close cooperation with its members

A set of practical recommendations are proposed by the legal advisor.

The suggested wording is aimed at (i) further explaining the role of EA, (ii) emphasising that EA is not the employer/principal of the evaluators and that each NAB remains the sole employer of the evaluators it provides for peer evaluations, and (iii) preventing claims from the evaluators and from the NABs against EA.

In addition, a crisis management plan could be developed describing in detail the respective role/responsibilities of the NAB under peer evaluation, of the NABs employer of the peer evaluation team members, and of EA, as well as providing standard operating procedures in case of adverse event (if appropriate).

1. EA-1/17 A: 2017 - EA Rules of Procedure :

* **Point 2.11 could read as follows :**

Current wording

Peer evaluating Full and Associate Members and bodies seeking to establish Bilateral Agreements with EA.

Proposed new wording

"*Managing the peer evaluation system operated by NABs, and providing EA members with peer evaluation services;"*

**Under Point 5 Obligations** (of EA members)

* **Point 5 i) could read as follows :**

Current wording

To provide Evaluators to be used by EA in its peer evaluations according to the rules established by the MAC in charge of the operation of the MLA;

Proposed new wording

*"To operate the peer evaluation system under EA management and in cooperation with other NABs; to provide NAB employees as peer evaluators, according to the rules established by the MAC in charge of the operation of the Multilateral Agreement (MLA) ; to process any request for payment by NAB employees provided as peer evaluators, and to settle any claim whatsoever with respect to NAB employees provided as peer evaluators, holding EA harmless ;"*

* **New point 5 j) could read as follows :**

*"To regularly undergo peer evaluation organised by EA ; to ensure safety and security of all members of the peer evaluation team, in cooperation with other concerned NABs and under EA coordination ; in case of adverse event, to process any request for payment by peer evaluators and to settle any claim whatsoever with respect to peer evaluators, holding EA harmless ;"*

* **Former point 5 j) could become 5 k).**

1. EA-2/02 M:2016 - EA Procedure for the evaluation of a NAB:

* **The following paragraphs could be added at the beginning of 1.1. Scope :**

*"According to Regulation (EC) n° 765/2008 of 9 July 2008 on accreditation and EA rules, EA manages the peer evaluation system operated by national accreditation bodies ("NABs") and provides EA members with peer evaluation services."*

* . **New paragraph/section 2. could read as follows :**

"**Section 2. SAFETY/SECURITY RULES LINKED TO THE PEER EVALUATION PROCESS**

*The NAB under peer evaluation shall ensure safety and security of all members of the peer evaluation team, in cooperation with other concerned NABs and under EA coordination. In case of adverse event, it shall process any request for payment by peer evaluators and settle any claim whatsoever with respect to peer evaluators, holding EA harmless;"*

* **Former paragraph 2. could become Section 3.**

1. EA-2/02 S1:2016 - Supplement 1 to EA-2/02 - Selection, Training and Monitoring of Evaluators :

* The supplement has been withdrawn and is now covered in Annex I of 2/02. The section 1.1 of the previous supplement does not exist anymore. The following paragraphs could be added at the beginning of previous **1.1. Scope :**

*"According to Regulation (EC) n° 765/2008 of 9 July 2008 on accreditation and EA rules, EA manages the peer evaluation system operated by national accreditation bodies ("NABs") and provides EA members with peer evaluation services."*

1. Forms used in the PE process

* **EASEC-F-AssignLetterTFG :**

The following paragraph could be added before the last sentence (*"We are looking forward …*"):

*"You are reminded that EA is not and will not be your employer or principal, and that your request for any payment or claim whatsoever shall be submitted to your employer (national accreditation body) only."*

* **EASEC-F-AssignLetterTL :**

The following paragraph could be added before the last sentence (*"Please do not hesitate …*")

*"You are reminded that EA is not and will not be your employer or principal, and that your request for any payment or claim whatsoever shall be submitted to your employer (national accreditation body) only."*

* **EASEC-F-AssignLetterTM :**

The following paragraph could be added before the last sentence (*"Please do not hesitate …*")

*"You are reminded that EA is not and will not be your employer or principal, and that your request for any payment or claim whatsoever shall be submitted to your employer (national accreditation body) only."*

* **EASEC-F-AssignLetterTrainee :**

The following paragraph could be added before the last sentence (*"Please do not hesitate …*")

*You are reminded that EA is not and will not be your employer or principal, and that your request for any payment or claim whatsoever shall be submitted to your employer (national accreditation body) only."*

* **EASEC-F-MembershipAgrsheet :**

The following paragraph could be added after the sentence: To offer representatives, whenever appropriate and feasible, to attend EA meetings and support EA technical work;

*"to provide NAB employees as peer evaluators, remaining their sole employer or principal”*

* The next sentence could read as follows :

To contribute to the efficient resolution of any complaints received by EA in circumstances where our organisation is involved;

*as well as to process any request for payment by NAB employees provided as peer evaluators and to settle any claim whatsoever with respect to our employees provided as peer evaluators, holding EA harmless* ;"

* **EASEC-F-Qualification letter :**

The following paragraph could be added before the last sentence (*"The trainers thank you)*

*"You are reminded that EA is not and will not be your employer or principal, and that your request for any payment or claim whatsoever shall be submitted to your employer (national accreditation body) only."*

End of report

**Recommendations for review and decision by EX**

Based on the conclusions of the investigation that

* EA cannot be considered as the employer of the evaluator provided by the NAB
* NAB have a duty to provide evaluators under Regulation

it is recommended by the legal advisor to implement the proposed changes in the relevant documents.

A **communication campaign** to raise NAB awareness on the issues and the system to be developed and implemented could be developed to encourage NAB members to take action on their side.

The **ILAC and IAF Secretariats** will be kept informed.

**Further investigation with Insurance expert** will take place to consider the issues, conclusions and recommendations reported in this paper and to verify EA current insurance policies for its employees and with regards to Professional liability.

As suggested by the advisor, a **crisis management plan** including external and coordinated communications with involvement of EA NAB representatives could be elaborated.

Finally, a **workshop for EA members** with presentation of NAB’s legal advisors could be organised; it would be the opportunity to share practices, rules and experience in several countries on those issues.