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Subject: EACI notification for prior-checking on ex-post audits

Dear Ms Fierro Sedano,

I am writing to you concerning the notification "Notification for prior check of the EACI on ex post audits", which you notified to the EDPS for ex post prior checking on 8 July 2013 under Article 27(2)(a) of Regulation (EC) No 45/2001 ("the Regulation").

After examining the data processing operations described in the prior checking notification, on the basis of the information submitted in the notification, the EDPS considers that **there is no basis under Article 27 of Regulation (EC) No 45/2001 to subject the processing at stake to prior checking.**

Article 27(1) of the Regulation subjects to prior checking by the EDPS "*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)(a) notably subjects to prior checking those processing operations that relate to suspected offences. Article 27(2)(b) subjects to prior-checking processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct. For the reasons described below, the EDPS has concluded that the notified processing done by EACI in respect to ex post audits does not meet the criteria of Article 27(2)(a) and (b).

The notified processing operation relates to data in the framework of audits of the use made of EU funds by the beneficiaries of grant agreements managed by the EACI. These audits are carried out by external contractors by virtue of their framework contracts to which the EACI

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is part to. Every time EACI needs an audit it signs a specific contract with the contractor giving a mandate to perform the control. The purpose of the ex post control function of the EACI is to contribute to sound management of financial resources of the agency. To that end, ex post control function assists the director and the management in assessing the regularity and legality of financial transactions under EU programmes that the agency implements and contributes to the director's annual declaration of assurance as part of the annual activity report. Another purpose is to improve the internal control of both the agency and the beneficiaries with a view to reducing the error rates in future payments. Checks and financial controls of grant agreements or service contracts aim at verifying beneficiary's or contractors' compliance with contractual provisions in order to check that the projects have been properly implemented. It also aims at assessing the legality and regularity of transactions underlying the implementation of the EU budget.

Having regard to Article 27(2)(b), the EDPS notes that, according to the information provided by EACI, the main purpose of the processing is to ensure the regularity of financial transactions, namely by verifying that the costs incurred on projects funded by grant agreements have been claimed in compliance with the financial provisions defined in each specific agreement under audit. The type of check is mainly document based, as spelt out in the Indicative Model Audit Programme annexed to the contract (Appendix 10) and do not target individual conduct of data subjects. It is true that in order to reach the final purpose and the appropriate conclusions of an audit, as a prior element, personal data of funds recipients are collected, analysed and stored by EACI. This nonetheless does not mean focused evaluation of individual performances as the purpose of the processing operation. As a consequence, the EDPS considers that the data processing activities performed by EACI in respect of ex post audits do not fall under the scope of Article 27(2)(b) because their main purpose is to examine and verify the regularity of financial transactions carried out in implementation of the project funded rather than aiming at assessing the particular individual conduct of the fund recipients¹.

Having regard to Article 27(2)(a), on the basis of the information provided, detection of fraud and/or other criminal offences do not appear to be the primary purpose of the processing operations at stake. In this respect, it should be noted the audit opinion template annexed to the notification states that the auditor's work "*is not designed specifically to identify incidences of fraud. Accordingly, fraud may occur and not be detected*". On the other hand, the audit report may indeed provide EACI with information that raises suspicion of possible financial irregularities by beneficiaries. These suspicions should, however, not be linked at this stage to a particular individual since EACI ex post audits are not directed at verifying individual fraud or irregularity cases but fraud or irregularities at beneficiary level. Pursuant to the division of responsibilities between the Commission services, the Executive Agencies and OLAF on the investigations of financial irregularities in respect of EU funding programmes, OLAF is responsible for investigating individual fraud or irregularity cases and is therefore the competent body in charge of dealing with suspicions about individuals in this field. The processing done by OLAF of the information contained in audit reports may lead to raising and investigating suspicions of offences in respect of individuals, and therefore falls under Article 27(2)(a) of the Regulation. In this respect, the EDPS notes that OLAF investigative procedures were notified to the EDPS for prior checking (see case 2011-1127 and others).

¹ This reasoning is in line with EDPS position in cases 2006-0298 concerning Internal Audit Process at DG IAS (Commission)", letter of 31 October 2006; 2007-0370 concerning the "Audit of the European Regional Development Fund (ERDF), the Cohesion Fund and the Instrument for Structural Policies for Pre-Accession (ISPR), letter of 19 October 2007; 2009-0680 concerning Clearance of Audit Trail System (CATS database) and additional information, letter of 9 February 2010.

The EDPS concludes therefore that the case is not subject to prior checking under Article 27(2)(a) and 27(2)(b) of the Regulation. However, if you believe that there are other factors justifying prior checking, we are of course prepared to review our position.

The EDPS would, however, like to outline a few issues concerning the privacy statement submitted together with the notification. In particular, the privacy statement should be completed in respect to the following elements: 1) it does not mention the consequences of a failure to reply to questions as provided by Article 11(1)(d) of the Regulation; 2) it does not mention OLAF and other possible external recipients of the personal data collected in the course of the audit.

In view of the foregoing, we hereby invite you to report back to us within three months of receipt of this letter on the measures put in place by EACI to implement the above mentioned EDPS recommendation.

I remain at your disposal should you have any questions concerning this matter.

Yours sincerely,

Giovanni BUTTARELLI