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ASSISTANT SUPERVISOR

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WW/XK/cpl/D(2015) 0341 C **2013-0808**
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Dear Mr Bindslev,

We have analysed the documents and further information you have provided to the EDPS concerning the ex-post notification for prior-checking under Article 27(2) of Regulation 45/2001 ("the Regulation") on the processing of administrative inquiries and disciplinary proceedings ("the AI&DP") at the European Joint Undertaking of Fusion for Energy ("**F4E**") in light of the EDPS Guidelines on AI&DP ("the EDPS Guidelines").

As this is an ex-post case, the deadline of two months for the EDPS to issue his Opinion does not apply; this case has been dealt with on a best-effort basis.

The EDPS points out that the analysis and principles laid down in the EDPS Joint Opinion on the "*processing of AI&DP by five agencies*"¹ ("the EDPS Joint Opinion") are also applicable in the present case of **F4E**.

On this basis, the EDPS in this letter will only identify and examine the agency's practices which do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing the **F4E** with relevant recommendations.

¹ It was issued on 22 June 2011 (case 2010-0752).

1) Lawfulness of the processing

i) Articles 5(a) and 5(b)

The updated notification sent by the Data Protection Officer on 30 July 2014, mentions that the lawfulness of the AI&DP can be justified under Articles 5(a)² and 5(b)³ of the Regulation.

Article 5(a) (first sentence)⁴ applies when a task is attributed to an EU institution/body/agency and in order to fulfil it, personal data need to be processed. This provision requires that the processing operation should be necessary and proportionate to achieve the task in the public interest by the EU institution and that the task should be based on the EU Treaty or on other legal instruments. The processing of personal data in the frame of AI&DP, is based on a task to be performed in the public interest as provided for in the Staff Regulations and it is hence necessary for compliance purpose with the Staff Regulations. Therefore the requirements of Article 5(a) are fulfilled.

As to Article 5(b), it applies in cases where a legal obligation requires EU institutions to process personal data without leeway in its implementation. This implies that EU institutions have no choice or discretion as to whether or not fulfilling the legal obligation but also that the obligation itself must be sufficiently specific as to the processing of personal data it requires. For example, a processing is necessary so that an EU institution complies with an obligation resulting from national law in the area of safety at work or occupational risks prevention. Another example would be in cases where the Regulation establishing an EU body foresees the publication of the declarations of interests of the EU body's Director. It follows that Article 5(b) of the Regulation is not the appropriate ground for the lawfulness of the processing operation under analysis.

The EDPS therefore invites the **F4E** to erase Article 5(b) of the Regulation from the notification.

ii) Implementing rules

The agency's Data Protection Officer informed the EDPS that the F4E intends to adopt implementing rules as soon as the Commission provides specific guidance as to the way to proceed under Article 110 of the Staff Regulations and following the Staff Regulations' reform.

The Staff Regulations provide that EU institutions/bodies/agencies may adopt implementing arrangements, if they consider it necessary (Article 30 of Annex IX to the Staff Regulations). Nevertheless, the EDPS underlined that implementing rules not only complement the procedures in this field, but also establish with legal certainty and clarity the data processing undertaken in such cases and the data protection safeguards implemented in this respect.

² Personal data may be processed if the processing is "***necessary for 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, or in a third party to whom the data are disclosed ...***"

³ Personal data may be processed only if "***processing is necessary for compliance with a legal obligation to which the controller is subject***".

⁴ Personal data may be processed if the processing is "***necessary for 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 ...***".

Consequently, the EDPS invites the **F4E** to include to the envisaged implementing rules all data protection principles and recommendations of the present letter and send us a copy of the draft before adoption.

2) Data quality

The EDPS recommends that the **F4E** explicitly makes reference to Article 4(1)(c) of the Regulation in the envisaged implementing rules. In particular, investigators should APPLY principles of necessity and proportionality not only to the reports of an administrative or disciplinary inquiry, but also to the Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations).

3) Information to be given to the data subject

In light of the EDPS Guidelines, **the F4E** should complete the Specific Privacy Note with the following principles: (i) the right of information may be restricted if it is necessary in light of Article 20(1)(a-e) of the Regulation on a case by case basis; (ii) when such a restriction is applied, the data subjects should be informed of the principal reasons of the restriction as well as of their right to have recourse to the EDPS under Article 20 (3) of the Regulation.

As to the information provided to the data subjects on their right of access and rectification, mere citation of the principles is insufficient. The F4E should therefore include more clarifications about the meaning of these rights in the context of an AI&DP as follows:

i) Right of access (Articles 11(1)(e) and 12(1)(e))

Data subjects should be granted full access to the documents in their disciplinary file, as well as to the copies of the final decisions on an AI&DP stored in their personal file. This access may be limited in the light of the restrictions established under Article 20 of the Regulation. This principle should be mentioned by the **F4E** in the Specific Privacy Note.

Furthermore, as pointed out in the EDPS Guidelines, special attention should be paid to all data subjects, not only to the accused person but also to whistleblowers, informants or witnesses. In this regard, the EDPS recommends that the **F4E** adds in the Specific Privacy Note that any exceptions to the right of access of data subjects should be strictly necessary and should be balanced with the right of defence. In particular, the **F4E** should indicate that:

- in the case of **whistleblowers, informants or witnesses**, any restriction to the right of access of these persons should be in line with Article 20 of the Regulation;
- the identity of whistleblowers should be kept confidential in as much as this would not contravene national rules regarding judicial proceedings.

ii) Right of rectification (Articles 11(1)(e) and 12(1)(e))

Furthermore, the **F4E** should specify in the Specific Privacy Note some means of guaranteeing the right of rectification in the context of an AI&DP. In particular, data subjects should be allowed to add their comments and to include recourse or appeal decision in their files. The **F4E** should also indicate the conditions under which data subjects may further ask that a decision is replaced or removed from the file.

4) Retention period

The notification does not mention a maximum retention period of disciplinary files and a retention period in cases of no disciplinary follow-up.

In light of Article 4(1)(e) of the Regulation "*personal data must be kept in a form which permits identification of data subjects **for no longer than is necessary for the purposes for which the data are collected or for which they are further processed***".

The EDPS therefore recommends that the **F4E** adopts a maximum retention period for all data in the disciplinary file related to a procedure on AI&DP (for example 20 years); as to the retention period of data of administrative inquiries without a disciplinary follow-up, the **F4E** should adopt a different maximum retention period (for example 5 years)⁵.

Please inform the EDPS of the concrete measures adopted by your agency based on the above specific recommendations of this letter within a period of 3 months.

Yours sincerely,

(signed)

Wojciech Wiewiórowski

Cc : Ms Angela BARDENHEWER-RATING, Data Protection Officer
Mr Hans JAHREISS, Head of the Administration Department

⁵ See the EDPS Joint Opinion.