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Dear Mr Goudou,

We have analysed the documents you have provided to the EDPS concerning the 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 Aviation Safety Agency ("EASA") in the light of the EDPS Guidelines on AI&DP ("the EDPS Guidelines").

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 applicable in the present case of **EASA**.

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

1) Internal transfer of data

EASA prepared declarations of confidentiality to be signed by the investigators and the members of the disciplinary board. This declaration satisfies the principle of Article 7(3) of the Regulation.

The EDPS recommends that **EASA** ensures that similar declarations are also signed by all the internal recipients of administrative and disciplinary related data within **EASA** and between the agency and other EU institutions/bodies, in the light of the EDPS Guidelines and of the EDPS Joint Opinion.

2) Right of access

As it was highlighted in the EDPS Guidelines, in the course of an AI&DP, data subjects are granted full access to the documents in their disciplinary file, as well as to the copies of the final

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

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 has been underlined by **EASA** in the data protection notice.

Furthermore, as pointed out in the EDPS Guidelines, special attention should also be paid to other possible data subjects, apart from the persons being investigated; namely, to other persons indirectly involved in an AI&DP such as whistleblowers, informants or witnesses. In this regard, the EDPS recommends that **EASA** adds in the data protection notice that any exceptions to the right of access of data subjects should be strictly applied in light of the necessity of such a restriction and they should be balanced in relation to the right of defence. In particular, **EASA** 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.

3) Right of rectification

EASA should specify in the data protection notice 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 a recourse or appeal decision in their files. **EASA** should also indicate the conditions under which data subjects may further ask that a decision is replaced or removed from the file.

4) Information to be given to the data subject

In the light of the EDPS Guidelines, **EASA** should complete the second sentence under the title "the data subject's rights and rectification" in the data protection notice on the basis of 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.

5) Security

With regard to the adoption of security measures in the context of AI&DP, **EASA** indicated in the notification "*please check all points of Article 22 of the Regulation*". This information is not sufficient and does not meet the requirements of Article 22. The EDPS therefore recommends that **EASA** evaluates by risk assessment its existing general security policy and develops, where necessary, specific security measures, in particular on the access control policy, to be implemented in the context of an AI&DP. These security measures should be documented and a copy of the relevant document should be provided to the EDPS.

6) Traffic data and confidentiality of electronic communications

Traffic data

EASA has not provided any information as to whether it processes data relating to Internet connections and the use of e-mail or the telephone in the course of an AI&DP. Should this be the case, such processing should be carried out in accordance with Article 37 of the Regulation applying any restrictions provided for in Article 20 of the Regulation in a restrictive manner and on a case by case basis. Furthermore, **EASA** should add in the draft implementing rules that traffic data will only be collected in exceptional circumstances where no other less invasive method could be used and after having consulted the DPO on the matter, in the light of the EDPS Guidelines.

Confidentiality of electronic communications

The issue of confidentiality of communications has not been raised by **EASA**. Should the need arise to gain access to electronic communications in the course of an AI&DP, the principles mentioned in the EDPS Guidelines must be respected rigorously. The EDPS therefore considers that all the actors involved in an AI&DP should be aware of these principles and recommends that **EASA** includes these principles in its draft implementing rules or in a note addressed to all potential actors.

As it was pointed out in the EDPS Guidelines, the EDPS will provide further guidance regarding the legal basis of interception of electronic communications in the near future. Nevertheless, **EASA** should -prior to any initiative- inform the EDPS whether, in the framework of an AI&DP, it may intercept telephone calls or other communications in order to obtain the information required for the investigation. If it is the case, the EDPS recommends that **EASA** -in addition to that prior information- indicates this possibility in their draft implementing rules and sets up in advance a procedure with particular emphasis to the legal basis of the tapping of a voice communication or e-mail and to the possibility of doing this without a judicial warrant or authorisation.

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)

Giovanni BUTTARELLI

Cc : Ms Francesca PAVESI, Data Protection Officer
Mr Andrea LORENZET, Head of Personnel