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**Subject: Consultation on the need for prior-notification of the ENISA Email Policy according to Article 27.3 of Regulation 45/2001**

Dear M. Cooper,

I am writing to you in reference to the e-mail you sent to the EDPS on 20 July 2012 regarding the draft email policy of ENISA. In your e-mail you inquired whether the policy is subject to prior-notification.

First, the EDPS would like to underline that any processing operation that could include personal data and/or have an impact on the confidentiality of communication must be lawful.<sup>1</sup> For an operation to be lawful, the data controller must demonstrate the **necessity** of the processing within Article 5 of Regulation 45/2001.

In this respect, on a previous occasion concerning email monitoring activities, the EDPS emphasized that these activities "should respect the necessity and purpose limitation principles according to which monitoring can only take place when it is absolutely necessary and for specified purposes (see Article 4.1(b) of the Regulation: "*Personal data must be: (...) (b) collected for specified, explicit and legitimate purposes (...)*")"; as well as Article 8.2 of the ECHR as interpreted by the European Court of Human Rights in cases such as the Copland v. UK case"<sup>2</sup>. Further in the same case, the EDPS recommended that, should the necessity be clearly established, a specific policy must be in place in order to define comprehensive and detailed procedures for the conduct of the monitoring activities.

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<sup>1</sup> Article 5 of Regulation 45/2001.

<sup>2</sup> EDPS Comments on the Commission policy on the internal use of email, 1 February 2010.

Therefore, the EDPS invites ENISA to explicitly address the need of engaging in email monitoring activities in specific cases within the agency. If this necessity is indeed established and once the relevant e-monitoring procedures have been elaborated, the EDPS invites ENISA to submit a formal prior-check notification. On the basis of the information provided by you so far, the EDPS considers that the monitoring operation is "*likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes,*"<sup>3</sup> since the monitoring could entail breach of confidentiality of communications and result in access to personal data of employees by third persons on different occasions and for different purposes. Therefore, the monitoring at ENISA would be subject to prior-checking under Article 27(1) of the Regulation 45/2001.

Still, before you send the formal notification, the EDPS advises you to take into consideration the following preliminary observations:

- The EDPS invites ENISA to reconsider the private use of email in the context of the institution's overall email policy. Although it is highly recognised that the use of email by ENISA staff should be primarily of professional nature, a limited use of private nature cannot be excluded, for instance when no other alternatives are offered to the staff for private email communication (e.g. private email accounts). It should also be noted that it is not under the control of employees to avoid receiving emails which may relate to personal matters with or without relationship to professional activities, e.g. by external persons that have obtained knowledge or the professional email address of a staff member. Therefore, we strongly suggest that ENISA addresses the need for a limited use of email by the staff for private purposes in the policy subject to certain restrictions and providing appropriate guidance to the staff (e.g. guidance on the use of separate folders for private and professional email, storage of private email in hard disks, etc.).
- The EDPS notes that the draft policy does not currently address a clear and transparent procedure for the access to e-mail boxes of staff members by non-owners. Although it is stated that access will take place when it is "absolutely necessary and for specified purposes", the criteria for establishing the above-mentioned necessity are not further specified. Moreover, the overall process for accessing a mailbox by a non-owner is not detailed (e.g. who can have access, under which conditions and for what purpose, if and how the consent of the mailbox owner is obtained, what are the technical procedures in place when accessing mailboxes in back-up systems, etc.). Therefore, the EDPS strongly advises ENISA to adopt such a specific procedure and clearly address it in the policy. The procedure should be described in the privacy statement delivered to all staff members.

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<sup>3</sup> Article 27 (1) of Regulation 45/2001

- Last, but not least, please note that the EDPS has already raised a number of issues related to email monitoring<sup>4</sup>, which could be applicable also in your case. Therefore, we advise you to take the relevant EDPS recommendations as a reference to the draft policy. Moreover, in the context of the policy, please pay attention to the confidentiality of communications within the meaning of Article 36 of Regulation 45/2001.

The EDPS is looking forward to your prior-check notification.

Yours Sincerely,

**(signed)**

Giovanni BUTTARELLI

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<sup>4</sup> The EDPS adopted on 18 January 2010 a prior checking Opinion on a procedure to access private drive email at the European Court of Auditors (Case 2009-0620), The EDPS also adopted on 1 February 2010 comments on the European Commission policy on the internal use of email. These documents are available on the EDPS website.