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Dear Ms Mannheim,

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 Centre for Disease Prevention and Control ("**ECDC**") 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 **ECDC** case.

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

Firstly, as the **ECDC** Implementing Rule has already been adopted and signed off, the processing operation would be classed as ex-post, even though no disciplinary measure or administrative inquiry has been performed yet at **ECDC**. The fact that no investigation has been conducted is indeed a mere coincidence given that the rules were fully operational.

1) Internal and external transfer of data

In the case of AI&DP, internal **ECDC** recipients will be asked to sign a declaration of confidentiality. This should specify that the recipient shall process the personal data only for the purposes for which they were transmitted, in order to satisfy the principle of Article 7(3) of the Regulation.

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

The EDPS also recommends that **ECDC** ensures that similar declarations are signed by all external recipients of administrative and disciplinary related data from **ECDC**, including other EU institutions/bodies, in the light of the EDPS Guidelines and Joint Opinion. This requirement should also be applied to members of the Disciplinary Board and any third parties such as external investigators. In addition, as stated in Article 23 of the Regulation, any third party processors should provide sufficient security guarantees as required by Article 22, and the processing operation should be governed by a contract or legal act containing specific stipulations.

2) Right of access

In the course of AI&DP at **ECDC**, data subjects shall be kept informed of the status of any investigation involving them, provided that information does not hinder the enquiry.

As highlighted in the EDPS Guidelines, 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 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. In this regard, the EDPS recommends that **ECDC** adds in the Data Protection Notice that any exceptions to data subjects' right of access 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.

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; specifically, to other persons indirectly involved in AI&DP such as whistleblowers, informants or witnesses.

3) Rights of rectification, blocking and erasure

The EDPS recommends that **ECDC** sets relevant time limits on rectification, blocking and erasure so that data subjects are fully aware of their rights. Any such limits should be specified in the Data Protection Notice.

4) Information to be given to the data subject

In the light of the EDPS Guidelines, **ECDC** should amend 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) Data retention

According to the **ECDC** Implementing Rule, if no charge is brought against a staff member following AI&DP, the staff member may request that the decision be placed on his/ her personal file. The EDPS Guidelines underline that in cases where no disciplinary charges are imposed on the staff member concerned, there should be no traces of this decision in the personal file unless the staff member requests so. The EDPS recommends that this latter point is clarified within Article 4 of the Implementing Rule.

6) Processing of special categories of data

The EDPS Guidelines state that the controller should ensure that the investigators responsible for AI&DP are made aware of the restrictive rules which apply to special categories of data listed under Article 10(1) of the Regulation, and avoid the inclusion of these data unless one of the circumstances foreseen in Article 10(2) is present, or Article 10(4) can be applied. As recommended in the EDPS Joint Opinion, **ECDC** should add a sentence in its Implementing Rule which states that the investigators responsible for AI&DP shall avoid processing any sensitive data unless it is strictly authorised by any of the exceptions provided in Article 10(2), (4) or (5) of the Regulation.

7) Traffic data and confidentiality of electronic communications

ECDC has confirmed that traffic data may be collected in some exceptional AI&DP cases. This type of 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, **ECDC** should add in the Implementing Rule 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. **ECDC** should be able to document that it carried out this assessment at the time of accessing the data.

The issue of confidentiality of communications has not been addressed by **ECDC** in its Implementing Rule. As 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. However, should the need arise to gain access to electronic communications in the course of 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 requirements and recommends that **ECDC** includes the relevant principles in its Implementing Rule or in a note addressed to all potential actors.

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

Yours sincerely

(signed)

Giovanni BUTTARELLI

Cc : Ms Rebecca Trott, Data Protection Officer
Ms Eleni Barla, Interim Legal Assistant