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GB/BR/kd D(2013) 968 C 2013-0375
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Dear Ms Bardenhewer-Rating,

I refer to your e-mails of 15 April 2013 by which you submitted to the European Data Protection Supervisor ("EDPS") a consultation pursuant to Article 27(3) of Regulation (EC) No. 45/2001 (the "Regulation") as to the need to prior check the processing operations in the framework of the long term assignment of Fusion for Energy ("F4E") mobile phones, the payment of private phone calls made by F4E staff with long term assigned F4E mobile phones and the management of F4E mobile phones for staff going on mission.

We have examined your e-mails, the draft notification attached hereto as well as the F4E policy on the allocation and the use of mobile phones ("Mobile Phone Policy") and its specific privacy notice on personal data protection in the context of mobile telephone assignment, management and billing (the "Privacy Notice").

We are of the view that **this processing is not subject to prior checking** by the EDPS, **with the reservation mentioned hereinafter**.

The EDPS notes that not all electronic communication systems are necessarily subject to prior checking. The processing of personal data concerning electronic communications (with particular regard to telephone records) is to be considered as subject to prior checking under three main cases:

- if a breach of confidentiality of communication may take place or
- if the processing relates to suspected offences, offences or security measures or
- if it is intended to evaluate personal aspects relating to the data subject.

This conclusion corresponds to an established line of EDPS decisions ¹.

Concerning the payment for private calls made with F4E long term assigned mobile phones, it appears that the personal data in question are processed only to ensure the payment of private phone calls, i.e. for billing purposes. In your second e-mail of 15 April 2013, you expressly mentioned that the processing was not intended for any sort of traffic control. In addition, nothing in the notification indicates that the processing is aimed at processing data relating to offences or at the evaluation of personal aspects. Moreover, the processing does not appear to violate the confidentiality of communications, as certain traffic data are solely processed in order to allow data subjects to identify their private calls with no interference with the content of the communications.

As far as the use of mobile phones for missions is concerned, we understand that there is no refund of private calls made in this context. However, Article 7 of the Mobile Phone Policy provides that heads of department can request details about the consumption per mobile phone for the pool of F4E mobile phones placed under their responsibility. In the light of the tracking of the mobile phone allocation provided by the Mobile Phone Policy, this may lead to an individualisation of the phone calls and to an evaluation of personal aspects, which would then fall under the prior checking requirement, as mentioned above. Therefore, in order to allow us to further assess this question, we kindly ask you to provide us with the categories of data processed in the context of the assignment of mission mobile phones, the triggering of the request for details about the consumption per mobile phone, the procedure followed in such case and the possible consequences for the data subjects.

More generally, we also wish to bring to your attention the fact that telephone records are sometimes used in the framework of specific administrative inquiries or disciplinary investigations, for instance to investigate suspected abuses of telephone systems. The data are only evaluated if a specific procedure is launched to look into an abuse of the telephone system in the context of an administrative investigation. That kind of procedures is not considered by the present processing. If traffic and billing data processed by F4E in relation to the long term or temporary assignment of mobile phones may be used in the context of administrative investigations and disciplinary proceedings, the EDPS recommends specifying the applicable procedures in the context of a specific related notification.

Having regard to the above, the EDPS concludes that the present processing is not subject to prior checking as far as the payment for private calls made with F4E long term assigned mobile phones are concerned and reserves his position regarding the data processing in the context of mission mobile phone assignment.

Without prejudice to the above, on the basis of the draft notification received, we have examined some aspects of the latter and would like to comment on the following issues:

- Legal basis. The draft notification only refers to F4E Mobile Phone Policy. The EDPS recommends adding to the notification mentioned in Article 25 of the Regulation, a reference to the EU Council Decision 2007/198/Euratom of 27 March 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon, as to any other F4E decision relevant to its internal organisation.

¹ See, e.g., EDPS non prior-check letters 29 March 2007, C2006-0507 (ECSC Telephony); 25 April 2007, C2007-0204 (OLAF Service GSMs); 23 May 2007, C2004-0302 (EIB Fixed Telephony), 28 June 2007, C2007-0357. (Commission Gestel, e-Gestel), 11 December 2012, C2012-0917 (Telephone use at the ETF).

- Information to data subjects. The notification specifies that data subjects are informed through the publication of the Mobile Phone Policy on the intranet. It also refers to the Privacy Notice without mentioning how it is made available to the data subjects. The EDPS advises to notify individually F4E staff, for instance by e-mail, with both the Mobile Phone Policy and the Privacy Notice, at least when a F4E mobile phone is allocated to them, either for long term or temporary use.
- Retention policy. The time limit regarding the "information for the declaration of personal calls" (three years after the date of the invoice received by the telephone company), is not in line with Article 37(2) of the Regulation as far as traffic data are concerned. Regarding these data, the EDPS recommends to set a as short a storage period as possible and in any case of no more than six months after collecting the data. A longer retention period is admissible, as mentioned in the draft notification, for data and supporting documents necessary for the discharge of the budget, as long as traffic data are excluded.

In the context of the follow-up procedure, please provide the EDPS with the required information and inform us of the concrete measures adopted based on the specific recommendations of this letter within a period of three months.

Should you have any questions or requests for clarifications, do not hesitate to contact us.

Yours sincerely,

(signed)

Giovanni BUTTARELLI