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**Subject: Prior checking notifications concerning public procurement and grants as well as selection and management of external experts**

Dear Mr Jahreiss,

I refer to the notifications for prior checking concerning public procurement and grants as well as selection and management of external experts submitted to the European Data Protection Supervisor (EDPS) by the Data Protection Officer (DPO) of the EU Joint Undertaking for Fusion for Energy (F4E) on 26 June and 17 September 2013. We also take note of the revised notification concerning the selection and management of experts submitted on 26 January 2014.

We note that the already existing procedures at the F4E are in most aspects in compliance with Regulation (EC) No 45/2001 (the Regulation)<sup>1</sup> as outlined in the related EDPS Guidelines<sup>2</sup> and will therefore only address the existing practices which do not seem to be fully compliant in this respect.

**1. Data transfers.** According to the information provided in the notification, personal data processed in the context of procurement and grant procedures may be transferred to external

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<sup>1</sup> Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

<sup>2</sup> EDPS Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts of 25 June 2013 (2012-501).

experts involved in the evaluation of tenders and/or grant applications, as well as to external members of the Executive Committee or the Governing Board involved in the approval of the award of contracts and grants.

The EDPS observes that the transfers to the external recipients may be considered as necessary for the implementation of pre-contractual measures taken in response to the data subject's request within the meaning of Article 9(6)(b) of the Regulation.

In any case, the tenderers and applicants must be informed about the possible processing of their data by external recipients established outside the EU at the early stage of the procedure. The EDPS thus invites the F4E to include this information in the already existing privacy statement.

**2. Information to data subjects.** The information is provided in specific privacy notices for procurement and grant procedures as well as for the selection and management of the external experts.

We observe that information about the time limits for storing of data within the grant procedures is missing as well as that information about the legal basis of the respective processing is misleading as it refers to the incorrect provision of the F4E Financial Regulation<sup>3</sup>. Therefore, we recommend that the missing information is added and the references to Article 110 is replaced by a reference to Title V (Articles 78ssq.) in case of public procurement and Title VI (Articles 96ssq.) in case of grant procedures as well as Title VII (Articles 111ssq.) in case of selection of external experts.

**3. Processing of data on behalf of the controller.** As already indicated above, external experts may be involved in the processing of personal data within the procurement and grant procedures at the F4E. They have to be considered as processors in terms of Article 2(e) of the Regulation and comply with the obligations set out in Article 23.

The processing of data on behalf of the controller should be governed by a contract or legal act binding the processor to the controller and stipulating that the processor should only act upon instructions of the controller as well as setting out the processor's obligations of confidentiality and security.

The EDPS notes that only the model General Conditions for Service Framework Contracts provided together with the notification refer to the obligation to process personal data "only under the supervision of the F4E data controller", as well as to the confidentiality and security obligations of the contractor. The confidentiality obligation is also mentioned in all model declarations of absence of conflict of interest and of confidentiality also provided together with the notification (for members of the evaluation committee and for external experts involved in operational procurement).

Therefore, we recommend that the missing references are added to the existing contracts with the external experts and the binding legal agreements with the external members of the Executive Committee or the Governing Board.

In conclusion, the EDPS considers that there is no reason to believe that there is a breach of the Regulation provided that the considerations contained in this Opinion are fully taken into account. In particular, the F4E should:

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<sup>3</sup> Decision of the F4E Governing Board of 22 October 2007 adopting the Financial Regulation (as amended).

- include the information about the possible processing of data by external expert established outside of the EU in the existing privacy statement;
- add the information about time limits of storing of data processed within the grant procedures to the already existing privacy statement;
- revise the information about legal basis provided in the privacy statements in a manner indicated above;
- include the obligations of the processor in the existing contracts and/or legal agreements with the external experts and external members of the Executive Committee and the Governing Board.

The EDPS would like to invite the F4E to inform him about the implementation of these recommendations within three months after receipt of this letter.

**(signed)**

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Cc: Angela BARDENHEWER-RATING, Data Protection Officer