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Dear Mr Ekvad,

We have analysed the documents you have provided to the EDPS concerning the notification for prior checking under Article 27(3) of Regulation 45/2001 ("the Regulation") on the processing of administrative inquiries and disciplinary proceedings ("the AI&DP") at the Community Plant Variety Office ("CPVO") in 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") may also be relevant in the present case and the agency is therefore invited to consider them thoroughly.

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

1) Reasons for prior-checking

The EDPS notes that the notification indicates that the processing operations under analysis justify prior-checking since they present specific risks on the basis of Articles 27(2)(a), 27(2)(b) and 27(2)(d) of the Regulation.

The processing operations are indeed subject to prior-checking on two different legal grounds: they may concern data relating to suspected offences, criminal convictions or security measures within the meaning of Article 27(2)(a) of the Regulation. Furthermore, an AI&DP involves the processing of personal data intended to evaluate personal aspects relating to data subjects, including in particular their conduct in light of Article 27(2)(b) of the Regulation.

¹ Joint Opinion issued on 22 June 2011 (case 2010-0752).

Nevertheless, the purpose of carrying out an AI or DP is not the exclusion of data subjects from a right, benefit or contract, within the meaning of Article 27(2)(d) of the Regulation. The purpose of such an investigation, whether administrative or disciplinary, is to establish facts and evaluate data related to the conduct of a data subject, possibly related also to offences, criminal convictions or security measures on the basis of the Staff Regulations and Implementing rules. Although it might be the case that some disciplinary actions might be taken following an administrative inquiry or disciplinary procedure, the purpose is not to exclude a priori -as blacklists would do- a data subject from a right, benefit or contract. The AI & DP are not therefore likely to present specific risks in light of Article 27(2)(d) of the Regulation. The EDPS recommends that reference to this provision is erased from the notification.

2) Processing of special categories of data

In conformity with the EDPS Guidelines, the EDPS recommends that CPVO adds a sentence, in the internal memo addressed to the investigators and members of the Disciplinary Board, which states that those responsible for an AI&DP should avoid processing any sensitive data unless the processing falls under one of the exceptions provided in Article 10 (2), (4) or (5) of the Regulation.

3) Data Quality

Adequacy, relevance and proportionality

The EDPS recommends that CPVO explicitly makes reference to Article 4(1)(c) of the Regulation; the agency should namely mention in the memo to the investigators that the latter are instructed to collect only necessary and proportionate data to the purpose of the investigation. It should also be pointed out that, the principles of necessity and proportionality should not only be applicable to the reports on administrative or disciplinary inquiries, but also to the Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations).

4) Conservation of data

Disciplinary data in personal files

In line with the EDPS Guidelines, the EDPS recommends that CPVO specifies in both the privacy statement and the President's Decision on retention policy, the following two elements:

- the agency will take into account the provisions of Article 27 of Annex IX to the Staff Regulations concerning the request of deletion of such data, when a copy of the administrative or disciplinary decision is stored in the personal file and;
- on the basis of Article 22 of Annex IX to the Staff Regulations, when the Appointing Authority decides to close the case without imposing any disciplinary penalty, there will be no traces of the acquittal decision in the personal file, unless the staff member requests so.

5) External transfer of data

Article 8

In the cases where there is a possible transfer of data to national authorities, the EDPS recommends that CPVO adopts specific guidance and sets up a justified and documented procedure in light of the EDPS Guidelines. In particular, when the recipients are subject to Directive 95/46/EC, the necessity test should be established under Article 8 of the Regulation:

- if data are transferred at the request of a national authority, the latter should establish the "necessity" for the transfer;

- if data are transferred on the sole initiative of the agencies concerned, it will be for the latter to establish the "necessity" for the transfer in a reasoned decision.

Article 9

Moreover, CPVO should take into account in its guidance and procedure that, in cases where AI&DP data are transferred to recipients in countries that have not implemented a comprehensive data protection framework for judicial activities, Article 9 should apply. In such cases, the Council of Europe Convention 108 is applicable to judicial authorities, which may be considered as an adequate legal instrument for intra EU transfers in the field of judicial activities.

6) Right of access

CPVO should not make reference to the restrictions of the right of access merely under Article 20(1) of the Regulation. The right of access may be limited in the light of the restrictions established under any of the five paragraphs of Article 20 of the Regulation. This principle should be underlined by CPVO in the data protection statement. It should be also pointed out that any exceptions to the right of access of all possible 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.

7) Right of rectification

CPVO should specify in the data protection statement 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. CPVO should also indicate the conditions under which data subjects may further ask that a decision is replaced or removed from the file.

8) Information to be given to the data subject

In the light of the EDPS Guidelines, CPVO should complete the information related to the privacy statement on the basis of the following principles:

- 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;
- 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.

9) Processing data on behalf of controllers

According to Article 7(2) of the Implementing rules, there should be at least one external member of the Disciplinary Board. An external member might also be part of the Investigation Panel. These external experts are considered as processors, since they will process data on behalf of the agency in view of giving their independent view about an AI&DP. CPVO should therefore guarantee that Article 23 of the Regulation is respected. This means that the agency should prepare an act which binds each processor to CPVO, the controller. This act should stipulate the following two elements:

- the processor shall act only on instructions from the controller (Article 23(2)(a)) and
- the obligations set out in Article 21 (related to confidentiality of the processing) and Article 22 (related to the security of the processing) of the Regulation should be incumbent on the processor, unless the processor is already subject to a national law of one of the Member States; in such case the processor should be bound by the obligations

with regard to confidentiality and security by virtue of Article 16 or Article 17(3), second indent of the Directive 95/46/EC (Article 23(2)(b)).

Consequently, the EDPS recommends that CPVO prepares draft templates of a legal act for their processors-external experts, in conformity with the requirements of Article 23 of the Regulation.

10) Traffic data and confidentiality of electronic communications

Traffic data

CPVO 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, in the light of the EDPS Guidelines.


Confidentiality of electronic communications

The issue of confidentiality of communications has not been raised by CPVO either. 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 CPVO includes these principles in a note addressed to all potential actors.

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,

Giovanni BUTTARELLI



Cc : Ms Véronique Doreau, Data Protection Officer
Mr Carlos Godinho, Vice-President of the CPVO, the controller