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WW/BR/sn/D(2017)0374 C 2013-0809
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Subject: Non prior-checking Opinion regarding the Industry Portal at Fusion for Energy (EDPS case 2013-0809)

Dear [...],

On 2 July 2013, the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27 of Regulation (EC) No 45/2001¹ (the Regulation) on the Industry Portal from the Data Protection Officer (DPO) of Fusion for Energy (F4E)². On 18 December 2015, F4E sent an updated notification.

Having analysed the notification and its supporting documentation as well as the further clarifications provided by F4E (see Section 1. Summary of facts), the EDPS considers that the data processing operations covered by the notification are **not subject to prior checking** (see Section 2. Need for prior checking). Nonetheless, we have some recommendations on the Industry Portal (see Section 3. Recommendations).

1. Summary of relevant facts

The Industry Portal (the 'Portal') is an IT platform that supports the following sets of data processing operations.

¹ OJ L 8, 12.1.2001, p. 1.

² As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

1) Creation and management of users' accounts

Individuals and companies can register as users by providing general information and contact details. The registration allows them to be informed about F4E activities, including its calls for tenders and grants.

2) Pre-qualification of companies

Companies that wish to promote themselves toward F4E and the European fusion sector can ask for a pre-qualification by F4E. To this end, they must submit data concerning their financial capabilities (latest financial records), quality records, delivery references, as well as any other relevant document describing the company and its activities. Company contacts include contact details of individuals; the contact details are available to other companies registered in the Portal only if the contact is marked as public. F4E assessment is made by F4E on company-related data only.

After review and approval of these data, the company is granted the 'approved' status, which is visible to the other companies registered in the Portal.

This process does not give any right to companies to pretend to any advantage in any F4E tender³.

3) Assessment of the contractor's performance

This process, which is strictly internal (no information in this respect is made available on the public interface of the Portal) is meant to retrieve basic internal information and feedback related to F4E contractors (i.e. companies that are beneficiaries of a grant or successful tenderers) with respect to their technical performance and ability to comply with their contractual obligations. Such assessment is based on facts reported by F4E technical officers and quality officers and does not involve any evaluation of individuals' performance. F4E has declared its intention to drop the use of the internal platform of the Portal for the assessment of its contractors⁴.

2. Need for prior checking

Article 27 of the Regulation subjects a number of processing operations *'likely to present specific risks to the rights and freedoms of data subjects'* to prior checking by the EDPS. Article 27(2) lists processing operations likely to do so. F4E notified the Industry Portal under the following ground for prior checking: (b) processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.

First, the EDPS would like to stress that the Portal cannot be subject to prior checking. Indeed, the Portal is a supporting tool used by F4E to manage data and is not intended, as such, to evaluate individuals. Personal data are collected and processed through the Portal as a result of data processing operations pursuing various purposes (cf. the three sets described above). These processing operations, and not the supporting tool, may need to be prior-checked if the conditions of Article 27(2) of the Regulation are fulfilled.

³ The tender process is covered by a separate notification: EDPS case 2013-0759 and -1018 (EDPS Opinion of 15 April 2014).

⁴ cf. email from F4E of 20 December 2016.

According to the information provided to the EDPS, none of the processing operations mentioned above enshrine the evaluation of personal aspects of individuals. Moreover, none of the other criteria triggering a need for prior checking under Article 27 appear to apply either. Therefore, the processing operations made through the Industry Portal is **not subject to prior checking**.

Nevertheless, the EDPS would like to draw F4E's attention to the fact that any assessment of the contractors that would actually involve the evaluation of individuals would then trigger the need for a prior checking notification under Article 27(2)(b) of the Regulation. If so, this could be done through an update of the notification 2013-1018 (Public procurement and grants).

3. Recommendations

The EDPS has recommendations to make in order to ensure that the processing operations at stake comply with the Regulation. The analysis below does not cover all aspects of the Regulation, but only those which require improvements or otherwise give rise to comments.

3.1. Notification

The notification (under Article 25 of the notification) should:

- refer to personal data only (the processing of mere company data is not subject to the Regulation);
- not include in the 'categories of data subjects' section individuals who are not data subjects of the processing, but who are only recipients of the data available on the Portal; these individuals should only appear in the 'recipients' section of the notification.

3.2. Information of individuals

Individuals that create a user account have to scroll down the 'Conditions of use of the Industry Portal' and ticks a box to confirm approval. These conditions of use include a section on data protection⁵.

As regards the **user account and pre-qualification process**, the data protection section should be revised in order to comply with all requirements of Article 11 of the Regulation and make a clear distinction between each set of processing (the purposes, the categories of personal data, the recipients, etc. are not the same when creating a user account and when asking for a pre-qualification). Also, as mentioned above, the information requirements of the Regulation only apply to personal data and not to company data.

The **assessment of contractors' performance** is disconnected from the other processing operations undergone using the Portal, as it is purely internal and occurs after the procurement/grant procedure. Moreover, according to the information provided, this phase does not involve any processing of personal data, except for incidental processing of the companies' contact persons' details. Against this background, we are of the opinion that the information to data subjects (contact persons) is sufficiently ensured by means of the data protection notice

⁵ Section 9.

used in the context of the procedure on public procurement and grants⁶. Therefore, the data protection section of the Conditions of use should not include any reference to this assessment.

3.3. Transfer to third countries

As far as transfers to third countries are concerned, we understand that it concerns access only by ITER domestic Agencies to the Portal (data on registered users and companies) that is granted by F4E on a case-by-case basis following a request by these agencies. We draw F4E's attention to the requirements of Article 9 of the Regulation and to the Guidelines has issued in this respect⁷.

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In light of the accountability principle, the EDPS expects F4E to implement the above recommendations accordingly and has therefore decided to **close the case**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc.: Mr [...], Administration - Contracts & Procurement Unit, Fusion for Energy

⁶ Case 2013-1018.

⁷ See: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf