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Subject: EDPS prior check Opinion on anti-harassment procedures and the selection of confidential counsellors at F4E

Dear Mr Jahreiss,

By letter of 22 March 2013 (reference F4E_D_262AXN), Fusion for Energy's (F4E) Data Protection Officer (DPO) Ms Bardenhewer-Rating submitted to the EDPS one notification concerning "data processing operations in the context of selecting and appointing Confidential Counsellors" and the "data processing within the informal procedure defined in the Fusion for Energy Policy protecting the Dignity of the Person and preventing Psychological Harassment and Sexual Harassment", for prior checking under Article 27 of Regulation (EC) 45/2001 (the Regulation).

Given that informal anti-harassment procedures have already been the subject of EDPS Guidelines¹, this prior check Opinion will only focus on those aspects that diverge from the Guidelines and/or are not compliant with the Regulation.

1 Proceedings

The notification from F4E's data protection officer (DPO) was received on 22 March 2013. In line with Article 27(4) of the Regulation, the EDPS shall issue his Opinion within two months of being notified. In case the EDPS requires additional information, this deadline is suspended until he receives the requested information. On 27 March 2013, the EDPS requested additional information, which was provided on 22 April 2013; on 29 May 2013 and 8 August

¹ available on the website of the EDPS.

2013, the EDPS asked for additional clarifications, which were provided on 6 August and 8 October 2013, including updated documentation. On 14 October 2013, the draft Opinion was sent to the DPO for comments. On 15 November 2013, F4E confirmed that there were no comments. Therefore, the EDPS shall issue his Opinion by the 25 November 2013. In total, the case has been suspended for 188 days.

2 The facts

F4E will not only process the usual identification data of persons concerned by the informal procedure (name, office address and professional contact information), but, as indicated by the notification, also private contact information and information on the next of kin.

Apart from the internal confidential counsellors, F4E has also appointed an external service provider (psychologist) to provide counselling. These services are solicited via the same framework contract as F4E's external medical advisor.² This person acts according to the same procedures as internal confidential counsellors. Alleged victims have the choice of whether to talk to an internal counsellor or the external service provider.³

The opening and closure forms are stored for five years from the start of the procedure if the alleged victim consents. Together with the closure form, any "items/documents from the files which could usefully be retained" will be stored, provided the victim has consented to the further storage of documents that contain her/his personal data or that she/he has submitted (p. 12 of the Manual of procedures for the implementation of Fusion for Energy Policy protecting the Dignity of the Person and preventing Psychological Harassment and Sexual Harassment (the Manual)).⁴ The HR unit also maintains a register of cases which is based on the opening and closure forms and contains some of the data fields included in the forms. Upon closure of a case, a statistical form meant to collect information about the case in an anonymous way is filled in. It contains the following information: name of the counsellor/external psychologist who dealt with the case, the type of problem (psychological or sexual harassment, conflict and other), gender, department, contract status and category.

Data subjects may obtain access to data they submitted themselves as well as to the opening and closure forms; access to their personal data contained in documents submitted by other parties to the procedure will only be given if they do not contain personal data on other persons, or confidential statements, or if there is no risk that transmission would impact negatively on persons involved, the smooth running of the procedure and future relations between the parties. Alleged harassers will not have access to their personal data contained in documents submitted by alleged victims.

The declaration of confidentiality to be signed by the confidential counsellors and other persons involved in the administration of the informal procedure refers to them as "processors".

The privacy statement mentions the legal basis as Articles 1d, 5, 10, 12a, 24, 86 and 90 of the Staff Regulations (as well as Article 6 of Council Decision 2007/198/Euratom and Article 10 of the annexed statutes, providing for the applicability of the Staff Regulations) and the grounds for lawfulness as Articles 5(a), (b) and (c) of the Regulation.

The list of possible recipients in the privacy statement includes recipients who would only receive data in the context of specific investigations (such as the European Ombudsman). It also includes F4E's security officers and medical service (in case of urgent measures when the

² See cases 2011-1088 to -1091.

³ For the sake of simplicity, this Opinion will only refer to "confidential counsellors". Any such reference is to be read as also including the external psychologist.

⁴ The pagination of references to the Manual follows the numbering of the updated version submitted to the EDPS on 6 August 2013.

health and security of the alleged victim is in danger and is not able to act independently). The statement is available on the F4E intranet; information on the procedure will be provided to alleged victims and alleged harassers following their first contacts with the confidential counsellors.

For the confidential counsellors, the applications of the selected candidates are kept for 6 years. The reason given is the length of the mandate as confidential counsellor (2 years, renewable once) plus 2 additional years to be prepared for possible litigation.

3 Legal analysis

This prior check notification contains two aspects: (1) the selection of the confidential counsellors and (2) their working procedure in the context of the informal procedure. At the time of submission, the counsellors had already been selected but had not started their work yet. As regards this second aspect, this has been regarded as a true prior check.

3.1 Lawfulness of the processing

The processing is lawful under Article 5(a) of the Regulation. In line with recital 27 of the Regulation, the EDPS considers that this Article also covers processing that is necessary for the functioning of the Union institution or body in question. Given that Article 12a of the Staff Regulations⁵ specifically forbids sexual and other harassment, anti-harassment procedures and the selection of confidential counsellors, which also contribute to the creation and maintenance of a good working atmosphere, fall under this interpretation.

The notification mentions several grounds for lawfulness of the present processing operations, i.e. Article 5(a), (b), (c) and (d). In line with his Guidelines, the EDPS considers Article 5(a) to be the main ground for lawfulness.⁶ As several of the supporting documents emphasise the data subject's consent, it is worth pointing out that this consent serves as an additional safeguard to protect the data subject (e.g. before confidential counsellors take any action), but can only be a complementary ground for lawfulness.

The EDPS considers that Article 5(b) (legal obligation) only applies in cases where the Treaties or legal acts based on them explicitly oblige the controller to take specific actions with no room for manoeuvre.⁷ This is not the case here. In the understanding of the EDPS, Article 5(c) is only relevant for the billing of the external psychological advisor.

Not all of the legal bases mentioned in the privacy statement are pertinent. Articles 5 and 10 of the Staff Regulations do not seem to be relevant here. Articles 24, 86 and 90 of the Staff Regulations relate to the formal procedure (administrative investigations, disciplinary proceedings) and not the informal procedure at stake here. **The irrelevant legal bases should be removed.**

3.2 Controllershship/processors

The notification refers to "internal" and "external" processors of personal data in the context of the informal anti-harassment procedure. The EDPS would like to stress that he is not in favour of using the term "internal processor"; the term "processor" should be reserved to situations referred to in Article 23 of the Regulation, i.e. the outsourcing of processing operations to external entities, such as the external psychologist who may be involved in the procedure.

⁵ In line with Article 11 of the Conditions of Employment for other servants of the EU, this Article also applies by analogy to temporary, contract and auxiliary staff.

⁶ See pages 3 and 4 of the Guidelines.

⁷ An example is the publication of legislative acts in the OJ under Article 297 TFEU.

Similarly, the confidentiality declaration contained in annex III of the Manual refers to the persons signing it as "processors". This would only be an accurate description for the external psychologist. **The declaration should be amended to clarify this**, e.g. by replacing the phrase "as a processor of personal data" with wording along the lines of "in carrying out the tasks entrusted to me in the framework of the informal anti-harassment procedure".

Given that F4E has decided to also use an external contractor in the course of the informal procedure, the requirements of Article 23 of the Regulation have to be complied with in the contract binding the processor to the controller. The services of the external contractor are solicited using the framework service contract concluded between F4E and an external provider for medical services; this framework contract complies with the requirements of Article 23.⁸

3.3 Conservation period

In line with Article 4(1)(e) of the Regulation, personal data are to be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed".

For the further purposes following closure, i.e. policy evaluation, detection of recurrent cases etc., the opening and closure forms are sufficient and there seems to be no need for continuing storage of other files. The procedures, however, foresee a possibility for continuing storage of other documents with the consent of the data subject. Since these documents would not be necessary for these purposes (policy evaluation etc.) their storage would not be lawful under Article 5(a). Under Article 5(d), further storage can be lawful with the consent of the data subject. It should however be noted that this means the consent of the data subjects whose personal data are included in the documents, not simply the consent of the party which submitted or created them. As it is highly likely that such documents would contain personal data on both the alleged victim and the alleged harasser (as well as possibly witnesses), basing further storage on consent is difficult.

Therefore, **only the opening and closure forms should be stored after the closure of a case**. Documents submitted by the parties or drawn up by the counsellors should be destroyed after the closure of the case they relate to.

Regarding the conservation of the application files of selected candidates for the role of confidential counsellor, the **conservation period should be linked to the actual length of the mandate**. A formulation such as "2 years following the end of the mandate" would ensure this link.

3.4 Information to the data subject

Articles 11 and 12 of the Regulation set out the requirements for information to the data subject. The provided specific privacy statement contains the information required.

The privacy statement mentions that after the conservation period has elapsed, F4E may continue to store some data for statistical purposes. For this aspect please see section 3.7 below.

Alleged victims and alleged harassers receive information about the procedure either following the first interview (alleged victims) or when they are contacted to reach a solution (alleged harassers). For alleged victims, specific mention of the information available on the intranet as well as of the Manual (the privacy statement is published on the intranet and annexed to the Manual), while for alleged harassers, this was not specifically mentioned. F4E

⁸ See also the follow-up given by F4E to the EDPS Opinion in cases 2011-1088 to -1091.

clarified that alleged harassers in fact do receive a copy of the statement when they are contacted for the first time. Finally, other persons -notably witnesses- might have their personal data processed in the procedure as well. **F4E should take appropriate steps to also inform this category of data subjects about the processing in line with Article 12 of the Regulation.**

3.5 Recipients

Transfers to the external psychologist fall under Article 8. Transfers to this person are necessary for her/him to fulfil her/his tasks and there seems to be no prejudice to the legitimate interests of the data subject. These transfers thus comply with the conditions in Article 8(b).

The list of possible recipients includes persons (such as security officers and the medical service) who would only receive data in the context of specific investigations or on an ad hoc basis when the health and security of an alleged victim is at risk and the alleged victim cannot act independently.

If such ad hoc transfers follow a request from the recipient, then both the controller and the recipient shall bear the responsibility for the legitimacy of this transfer in accordance with Article 7 (2). The controller should verify the competence of the recipient and evaluate the necessity for the transfer of the data. If doubts arise as to the necessity, the controller should seek further information from the recipient to satisfy himself that there are valid reasons for the transfer. In all cases, **Article 7 has to be complied with.**

Where any such ad hoc transfers are considered necessary to recipients not subject to the Regulation, F4E should **ensure that Articles 8 and 9, as applicable, are complied with.** Information on the next of kin is collected in order to inform this person in case emergency measures are taken (e.g. admission to a hospital); this also complies with Article 8. The notification also details rules on how transfers to other recipients which are not subject to national legislation implementing Directive 95/46/EC would be carried out, should they be necessary. The EDPS understands that these would only be exceptional cases.

3.6 Data subject rights

Articles 13 to 19 of the Regulation give data subjects the rights to access, rectification, blocking, erasure and objection. Restrictions are possible in line with Article 20.

Article 20 sets out the criteria which can be used to restrict data subjects' rights. Among these, Article 20(1)(c) - the protection of the data subject and the rights and freedoms of others, is the most relevant. Any denial of a request of access must be based on one of the exemptions in Article 20.

Access will be granted for documents the data subject submitted him/herself as well as to the opening and closing forms. Access to personal data contained in other documents will only be given if they do not contain personal data relating to other persons or confidential statements, and if there is no risk that the transmission might negatively affect one of the parties involved in the case, or the smooth running of the procedure or future relations between the parties.

Page 11 of the Manual states that alleged harassers will never receive access to any file produced by the confidential counsellor or received from the alleged victim. The EDPS reminds F4E of the requirements of Article 20(1): **a blanket denial is not possible and requests will need to be assessed on a case-by-case basis.**

3.7 Further statistical and historical use of data

Article 4(1)(e) of the Regulation establishes that personal data shall be kept in a form that permits identification of the data subject for no longer than necessary for the purpose for which they were collected. For further processing for historical, statistical or scientific purposes, the Union institution or body shall lay down that they shall only be processed in a form that does not permit identification.⁹

Regarding the statistical form, the EDPS points out that simply not including the names of the persons concerned is not enough to make re-identifying the data subjects impossible. In the procedure, F4E provided an updated statistical form that removed several data categories that could have allowed re-identification (nationality, age group). The form also contains the name of the confidential counsellor who dealt with the case. The purpose of including this information is not clear and it should be removed.

4 Recommendations

To summarise, there is no reason to believe that there is a breach of the Regulation provided that the recommendations listed below are taken into account:

- the information on the legal bases in the privacy statement should be corrected;
- the declaration of confidentiality should be clarified regarding the term "processor";
- only the opening and closure forms should be stored after the closure of a case;
- The conservation period for data related to selected applicants for the role of confidential counsellor should be linked to the actual length of the mandate;
- appropriate steps to inform data subjects other than alleged victims and alleged harassers (e.g. witnesses) should be taken in line with Article 12 of the Regulation;
- for ad hoc transfers, it has to be ensured that Articles 7 to 9, as applicable, are complied with;
- there should be no blanket denial of data subject access requests; denial must be justified using one of the restrictions in Article 20(1);
- the name of the confidential counsellor should be removed from the statistical form.

Please inform the EDPS of the measures taken based on the recommendations of this Opinion within a period of 3 months.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Ms. Angela Bardenhewer-Rating, Data Protection Officer, F4E

⁹ If this is not possible, then the identity of the data subjects shall be encrypted. This possibility is only practically feasible for electronic records.