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Subject: Prior checking notification of the collection and processing of data in the context of conflict of interest framework in place at the Joint Undertaking and the declarations of interest to be filled in by Joint Undertaking staff and other Joint Undertaking actors upon start of their assignment at the JU (Case 2013-1269)

Dear Mr Dautriat,

I refer to the prior checking notification on the above quoted processing operations at the Clean Sky Joint Undertaking (“CSJU”) which you notified to the European Data Protection Supervisor (“EDPS”) on 15 November 2013.

Your notification describes that personal data are collected and managed by the CSJU for the purpose of evaluating certain professional and/or private aspects of staff members that may result in a potential conflict of interest (of direct or indirect nature) with respect to their assignment and functions at the CSJU. The data subjects concerned are the Executive Director, CSJU staff and other CSJU actors (such as contractors, Members providing services to the CSJU, trainees, interim and external experts) who will be subject to a written conflict of interest declaration upon start of their assignment.¹ In case of a conflict of interest, the CSJU shall carry out an assessment and based on its findings, administrative measures may be taken by the Executive Director. According to the notification, the processing is based on Article 22 of Council Regulation No 71/2008 setting up CSJU, the CSJU financial rules, a Decision of

¹ In this context the EDPS underlines that other actors which are not considered “CSJU actors” but covered in some parts of the Draft Decision of the Executive Director (such as CSJU Members participating in calls for proposals, ITD topic managers, etc.) were not assessed in this case as they were not explicitly notified to the EDPS.

the Executive Director (to be adopted), Article 11a of the EU Staff Regulations and Articles 11 and 81 of the CEOS. [...]

In the notification the CSJU indicated that the processing presents certain risks to the rights and freedoms of data subjects within the meaning of Article 27(2)(b) of the Regulation (EC) No 45/2001 (hereinafter "the Regulation"), i.e. that it would entail "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*".

After an in-depth examination of the data processing operations as described in the notification and further information received from the DPO of the CSJU, for the reasons described below, the EDPS considers that the data processing that occurs in this context is **not subject to prior checking** under Article 27 of the Regulation.

First, in the EDPS' view the processing operation does not concern the "evaluation of personal aspects relating to the data subject" but the evaluation of the nature of certain activities or situations and their compatibility with the position of the data subject within the CSJU. The processing thus consists in an **objective assessment of the activities or situation in question**, not the evaluation of staff.² The reference to the evaluation of "personal aspects" of Article 27(2)(b) should be interpreted narrowly in this respect as referring to an assessment of the "personality" of the data subject, in view of the fact, that the original French version (and the German version) is more restrictive referring to "*des aspects de la personnalité*".³

Second, the processing is not "**intended**" to evaluate personal aspects. The purpose of the processing seems to be primarily to guarantee an independent public service (by ensuring the independence of staff members) and not to evaluate the data subject directly.

In this respect, as far as EU staff members are concerned, independence and the avoidance of conflicts of interests is also an obligation pursuant to the Staff Regulations (notably Article 12a and the corresponding articles of the CEOS). Failure to respect this obligation can result in disciplinary actions. However, disciplinary actions are subject to prior checking independently of the sort of violation.⁴ Therefore these disciplinary proceedings in case of failure to comply with the obligations of the Staff Regulations (including the obligations of staff with regard the avoidance of conflicts of interests) is subject to prior check independently in its own right pursuant to Article 27(2)(a) or Article 27(2)(b) of the Regulation.

The notified processing operation is thus not subject to prior checking on the basis of Article 27(2)(b) of the Regulation. However, if you believe that there are other factors justifying prior checking, we are of course prepared to review our position. Similarly, in the event of any modifications to this data processing, we would kindly ask you to reassess the need for submitting this processing to the EDPS for prior checking.

This being said, conflict of interest management seems largely integrated into the recruitment procedure of new CSJU staff. Therefore, the EDPS invites the CSJU to update its existing notification(s) on staff recruitment accordingly.

² See by analogy the EDPS' reasoning for processing of declarations of outside activities in Case 2007-0417 EMEA, EDPS Letter of 16 November 2007. See also Case 2012-0005 Ombudsman, EDPS Letter of 12 January 2012, stating that "*l'article 12ter du Statut des fonctionnaires de l'union européenne vise principalement à une évaluation objective de l'impact potentiel de la nature de (futures) activités externe*".

³ Also the German version refers to the "Persönlichkeit" i.e. the personality of the data subjects to be evaluated.

⁴ Case 2008-0685 European Parliament.

Without prejudice to the above considerations, the EDPS would like to give some recommendations regarding the processing of personal data when managing declarations of interests:

- With regard to the legal basis, the EDPS' assessment is based on the presumption that the Draft Decision of the Executive Director of CSJU will be adopted and be one of the legal bases for the processing. In this regard, when references to the legal basis, notably in the Privacy Statement, there seems to be an inexact reference: the correct reference should be Article 22 not of the Funding Regulation but of the Statutes of the Clean Sky Joint Undertaking which is an Annex to Founding Regulation (EC) No 71/2008. With regard to the reference to the CSJU Financial Rules, a specific article should be indicated.
- With regard to the procedures for data subjects to exercise their rights of access, rectification and others, the CSJU currently provides for that the DPO shall be contacted for any such request (see the indications in the Privacy Statement). However, the controller is the entity to be contacted by the data subject pursuant to the Regulation. In this case the controller is the CSJU, however, given their role within the assessment and the storage of the data, in the EDPS' view the HR unit seems to be the "controller in practice". Therefore, we recommend revising the procedure described in the Privacy Statement for the exercise of the data subject's rights. Access and rectification shall be requested to the controller. The DPO can always be contacted in addition or in case of problems of access with the controller.
- Furthermore, in the Privacy Statement the required information pursuant to Article 11(1)(f)(iii) with regard to the right to have recourse at any time to the EDPS, is missing and should be added.
- The forms for the declaration of interests ask wide questions on direct and indirect interests. The EDPS invites the CSJU to consider if it would not be preferable to define the scope of the information to be provided in a clearer way in line with Article 2.2 (a) and (b) of the Code of Conduct as annexed to the Draft Decision of the Executive Director, i.e. that only financial interests and other interests through work which are in or related to the aeronautical industry need to be declared. The same applies to the question on spouses and household members where the scope of information to be given is not clearly defined. This should make avoid collecting excessive data and that only personal data which is adequate and relevant pursuant to Article 4(1)(c) of the Regulation is collected.
- For the same reason of data quality, with regard to information that needs to be provided for "interests through work carried out for the aeronautical industry", the EDPS would also suggest considering if it is necessary and non excessive pursuant to Article 4(1)(c) of the Regulation, to request such information without any limitation in time. It might be justified to limit the time period to a shorter period, where such work experience would still have a relevance to date for being a potential conflict of interest.
- As also personal data of spouses/partners and household members might be processed, also these data subject need to be informed in accordance with Article 12(1) of the Regulation. This could be done by sending the Privacy Statements also to these persons. Should the provision of such information constitute a disproportionate effort for CSJU pursuant to Article 12(2) of the Regulation, at least a privacy statement could be placed on CSJU website to inform these persons. This could be accompanied by including a statement in the declaration instructing each CSJU actor to inform family members that CSJU will be processing data about them and that further information is available on the CSJU website. Independent from this right to

information, it has to be kept in mind that these data subjects also enjoy all rights pursuant to Chapter II Section 5 of the Regulation, notably the rights of access and rectification.

- Finally, the conservation periods should be clarified and clearly explained in the Privacy Statement (currently stated for a maximum of 5 years in the Statement but according to the notification for the time of employment plus the time necessary for audit or control). The EDPS reminds CSJU that the length of the conservation period needs to be justified by the purpose of the (initial or further) processing to be compliant with Article 4(1)(e) of the Regulation. Therefore CSJU should set adequate conservation periods justified by the purpose of the processing. Based on the limited information available to him, the EDPS is not in a position to examine if this is the case with regard to the conservation periods proposed by the CSJU.
- With regard to possible requests for public access to documents relating to the declarations of interests (based on Regulation EC No 1049/2001), the EDPS generally recommends a pro-active approach. CSJU should thus inform the data subjects at the time of filling in the declaration of interest also of the possibility of access requests to these declarations (notably in the Privacy Statement).⁵ It has to be kept in mind that such disclosure qualifies as a transfer pursuant to Articles 8 or 9 of the Regulation. Therefore, pursuant to Article 8(b) such transfer would involve a balance of interest with the legitimate interests of the data subject. Data subjects should have a right to object to such transfer or disclosure on compelling legitimate grounds based on Article 18(a) of the Regulation.

I would appreciate if you could share this position with the relevant persons in the CSJU and inform us of the follow up measures taken concerning the above recommendations **within three months** of reception of this letter.

We remain at your disposal should you have any questions concerning this matter.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Bruno MASTANTUONO, DPO – Clean Sky JU

⁵ See the EDPS Background Paper „Public access to documents containing personal data after the Bavarian Lager ruling“ of 24 March 2011, available on the EDPS website: https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BacgroundP/11-03-24_Bavarian_Lager_EN.pdf .