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Subject: Prior checking - Probationary period reports for management - Fusion for Energy

Dear Mr [...],

We refer to the notifications for prior checking filed by the Data Protection Officer of Fusion for Energy ("**F4E**") regarding the management probationary period reports¹.

The following documents were appended to the notification:

- a specific privacy notice on personal data protection in relation to the management of the Director's and middle management probationary period reports (the "**Privacy Notice**") ;
- a note to the Director on middle management trial period assessment dated 29 April 2009;
- the decision of the Governing Board of F4E on the appraisal of the Director of 11 December 2012.

The EDPS issued Guidelines concerning the processing of personal data in the area of staff evaluation (the "**Guidelines**")². We will therefore only address the aspects of the processing

¹ The notification was filed on 27 June 2013.

² https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-07-15_Evaluation_Guidelines_EN.pdf

which do not seem to be fully compliant with Regulation 45/2001³ (the "**Regulation**") as further outlined in the Guidelines.

As this is an **ex-post case**, the deadline of two months for the EDPS to issue his Opinion does not apply⁴.

1. Lawfulness of the processing

The notification refers to Article 5(a) and Article 5(b) of the Regulation as grounds for lawfulness of the processing of probationary reports for managers.

Article 5(b) of the Regulation applies in cases where a legal obligation (i.e. a legal act of a higher order, e.g. the Founding Regulations of an agency or the Staff Regulations) requires the EU institutions to process personal data without leeway in its implementation. This implies that institutions have no choice as to whether or not fulfilling the legal obligation but also that the obligation itself must be sufficiently specific as to the processing of personal data it requires. In this context, neither F4E Founding Regulation, nor Article 44 of the Staff Regulations provides that a report has to be made for management posts⁵.

Recommendation:

- 1) Remove the reference to Article 5(b) of the Regulation from the notification.

2. Rights of data subjects

In the framework of evaluation procedures, the persons concerned are provided with a copy of their reports and are invited to make comments on them, as foreseen notably in Article 34 (probationary period reports for non-managers) and Article 43 (annual appraisal reports)⁶. A similar approach should be followed for the probationary reports for management posts. Therefore, in addition to providing the report to the persons concerned, F4E should also give them the opportunity to comment on it.

Recommendation:

- 2) Provide the data subjects with the possibility to comment on their probationary period report; include this possibility in the notification and in the Privacy Notice.

3. Security

[...]

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³ 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.

⁴ The notification was filed on 27 June 2013. The EDPS sent an acknowledgement of receipt on 18 July 2013. On 1 October 2013, the EDPS asked a question to the DPO who answered on 12 December 2014. The draft Opinion was sent to the DPO for comments on 4 September 2015 and did not receive any comments.

⁵ By contrast, Article 34 of the Staff Regulations (probation for officials appointed to non-management posts) expressly provide that a report must be made at the expiry of the probationary period, which is a legal obligation under Article 5(b) of the Regulation.

⁶ See p. 7 of the Guidelines.

In conclusion, there is no reason to believe that there is a breach of the provisions of the Regulation provided that the above-mentioned recommendations are fully taken into account.

The EDPS expects that F4E implements the recommendations accordingly and will therefore **close** the case.

Yours sincerely,

(signed)

Wojciech RAFAŁ WIEWIÓROWSKI

Cc: Ms[...], Data Protection Officer