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Subject: Prior-check Opinion on FRA's whistleblowing rules (case 2016-0737)

Dear [...],

On 16 August 2016, 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 whistleblowing rules at the European Union Agency for Fundamental Rights (FRA) from the Data Protection Officer (DPO) of FRA.²

The EDPS has issued Guidelines on how to process personal information within a whistleblowing procedure ('the Guidelines').³ Therefore, the description of the facts and of the legal analysis will only mention those aspects which differ from these Guidelines or otherwise need improvement. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for whistleblowing at FRA.

EDPS recommendations and reminders are highlighted in bold below.

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. The case has been pending the reply of FRA in relation to questions about security measures. On 29 January 2018 we informed FRA by email that, in order to proceed with the case, we will include a recommendation about the security for this processing activity in the Opinion. On 2 February 2018 FRA provided additional information.

³ Guidelines on processing personal information within a whistleblowing procedure, available at: https://edps.europa.eu/sites/edp/files/publication/16-07-18_whistleblowing_guidelines_en.pdf

Description and assessment

1. Transfer information on a case-by-case basis

Whistleblowing procedures are intended to provide safe channels for anyone who becomes aware of and reports potential fraud, corruption, or other serious wrongdoings and irregularities. FRA has adopted the European Commission's whistleblowing guidelines until the formal adoption of FRA's own whistleblowing rules. The adopted guidelines mentions under point 2 on internal whistleblowing, that the recipient of the information is obliged to transmit the information received without delay to OLAF. It is furthermore mentioned that while the staff member concerned has a choice of reporting channels, the information should ultimately reach OLAF in a short period of time.

In light of the above, the EDPS points out that OLAF is the competent body to investigate fraud against the EU budget and alleged serious misconduct. Since the scope of the whistleblowing procedure also covers other serious wrongdoings, there is a possibility that FRA may receive information that it is not within the competence of OLAF. In accordance with Article 7(1) of the Regulation, the transfer of personal information should only take place when necessary for the legitimate performance of tasks covered by the competence of the recipient. Therefore, **FRA should assess, on a case-by-case basis, the requirements for transferring the personal information to OLAF and adapt the internal procedures accordingly.**

2. Ensure confidentiality of all persons implicated in a whistleblowing report

The EDPS welcomes the fact that FRA ensures the protection of the whistleblower's identity but **reminds FRA that the accused person should be protected in the same manner as the whistleblower.** The reason is due to a possible risk of stigmatisation and victimisation of that person within the organisation to which they belong. The accused persons will be exposed to such risks even before they are aware that they have been incriminated and before the alleged facts have been investigated to determine whether they are substantiated.

3. Security measures

[...]

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In light of the accountability principle, the EDPS trusts that FRA will ensure that these considerations and recommendations are fully implemented. The EDPS has therefore decided to **close case 2016-0737.**

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: [...], DPO, FRA