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ASSISTANT SUPERVISOR

Mr Ilkka LAITINEN  
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Management of Operational  
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Borders (FRONTEX)  
Rondo Onz 1  
00-124 Warsaw  
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Brussels, 22 June 2011  
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Dear Mr Laitinen,

Please find enclosed the Opinion of the European Data Protection Supervisor (EDPS) concerning the notification submitted for prior checking pursuant to Article 27 of Regulation (EC) 45/2001 ("the Regulation") on the "***processing of administrative inquiries and disciplinary proceedings***" (the "***AI&DP***") carried out by **FRONTEX**.

This Joint Opinion covers the processing operations in this field by five agencies and it is the result of a horizontal analysis of data protection practices in various fields within the agencies. The next step is the concrete implementation of the EDPS recommendations by each agency concerned.

Following a thorough analysis in the Joint Opinion, the EDPS recommends that **FRONTEX**,

**1) Lawfulness of the processing**

- takes into consideration all the EDPS recommendations and provides the EDPS with a copy of its draft implementing rules revised accordingly;

**2) Processing of special categories of data**

- makes explicit reference in its draft rules to both exceptions for processing sensitive data under Articles 10(4) and 10(5) of the Regulation, as they have been analysed in the EDPS Guidelines;

**3) Quality of data**

- adds in Article 22 of its draft rules that the principles of necessity and proportionality should be applied to the reports on AI&DP as well as to the Disciplinary reports (Article 15 of Annex IX to the Staff Regulations;

#### **4) Conservation of data**

- provides more clarifications about the retention of disciplinary related data in the personal files; the agency could specify in Article 28(3) of its draft rules, in line with the EDPS Guidelines, that a copy of the administrative or disciplinary decision will be stored in the personal file taking into account the provisions of Article 27 of Annex IX to the Staff Regulations concerning the request of deletion of such data;

#### **5) Transfer of data**

- prepares an internal note or a declaration to be signed by all the internal recipients in the framework of an AI&DP; the note or declaration should explicitly remind them of their obligation not to use the data received for any other purpose than the one for which they were transmitted;

#### **6) Right of access**

- underlines in Article 26 of its draft rules that any exceptions to the right of access of data subjects should be strictly applied in light of necessity and they should be balanced in relation to the right of defence. In particular, it should add that:
  - in the case of **whistleblowers, informants or witnesses**, any restriction to the right of access of these persons should be in line with Article 20 of the Regulation;
  - the identity of whistleblowers should be kept confidential in as much as this would not contravene national rules regarding judicial proceedings;

#### **7) Information to be given to the data subject**

- adds in Article 27 of its draft rules that
  - the right to information can be restricted in certain cases if it is necessary in light of Article 20 (1) (a-e) and
  - the controller should inform the data subject of the principal reasons on which the application of the restriction is based as well as of his/her right to have recourse to the EDPS under Article 20 (3). Any decision for any deferral to this provision should be taken strictly on a case by case basis;

#### **8) Traffic data and confidentiality of electronic communications**

- indicates in its draft rules that before approval of the Director, the DPO of the agency should first be consulted on the necessity of processing traffic data at a specific situation;
- informs the EDPS-prior to any initiative-whether in the framework of an AI&DP it may intercept telephone calls or e-mails in order to obtain the information required for the investigation. If it is the case, the EDPS recommends that **FRONTEX**-in addition to that prior information- should indicate this possibility in its draft rules and set up a procedure with particular emphasis to the legal basis of the tapping of a voice communication or e-mail and to the possibility of doing this without a judicial warrant or authorisation.

In the context of the follow-up procedure, please inform the EDPS of the concrete measures adopted by your agency based on the above specific recommendations of this opinion addressed to **FRONTEX** within a period of 3 months.

Yours sincerely,

Giovanni BUTTARELLI

Annex :       Opinion

Cc :           Mr Sakari VUORENSOLA, Data Protection Officer  
              Mr Jose CARREIRA, Administration Division Director