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C 2012-0057/58/59/60/61/63/65/66/67
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**Subject: Prior checking notifications, cases 2012-0057/58/59/60/61/63/65/66/67
(Selection and recruitment of contract and temporary agent, seconded
Commission officials, interim staff, internal recruitment, administration of
spontaneous applications)**

Dear Mr De Meyere,

We reviewed the documents the Research Executive Agency (REA) has provided to the EDPS concerning the notifications for prior checking under Article 27(2) of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the selection and recruitment procedures at the REA.

The EDPS issued Guidelines on staff recruitment¹. REA indicates in its cover letter that the processing operations relating to the selection and recruitment of staff are compliant with the Guidelines. Therefore, in light of REA's cover letter and notifications, the EDPS will first identify the REA practices which do not seem to be in conformity with the principles of the Regulation and with the EDPS Guidelines and will then focus his legal analysis on those practices. It is clear that all the relevant recommendations made in the Guidelines should apply to the processing operations put in place in the frame of the selection and recruitment of staff at the REA.

The nine notifications -temporary agents, contract agents, trainees, spontaneous applications, SNE, internal recruitment and interim staff- relate to the selection and recruitment of staff. This is the reason why the EDPS decided to analyse them jointly.

¹ The EDPS Guidelines can be found on the EDPS website under the title "Thematic Guidelines".

It has to be noted that the scope of this Opinion is limited to the selection and recruitment of staff. The processing operations relating to: (i) the management of the personal file; (ii) the management of the individual rights and; (iii) the management of the documentation relevant to the career of the recruited staff are not subject to prior checking² and hence they fall outside the scope of this Opinion.

Proceedings:

On 18 January 2012, the EDPS received the notifications for prior checking from the DPO of REA. On 31 January 2012, the EDPS informed the agency's DPO that the cover letter highlighting the specific aspects vis-à-vis the EDPS Guidelines was missing. The cover letter was received on 13 August 2012, accompanied with 9 new notifications replacing the ones received in January. The 1st September was therefore considered as the official notification date for these cases. The cases were suspended on 19 October 2012 in order to obtain further information. Information was received on 3 August 2014. The draft Opinion was sent for comments to REA DPO on 27 November 2014. As these processing operations were notified ex post, i.e. when they were already operational, the two-month deadline for the EDPS to issue his Opinion does not apply.

1. Prior Checking

The processing operations under examination are subject to prior-checking in conformity with Article 27(2)(b) of the Regulation, since they involve an evaluation of the applicants' ability to perform the functions of the post for which the selection and recruitment procedure has been organised. The processing operations in the present case might also involve data related to health (collection of medical certificate or disability data) and to criminal offences (collection of criminal record), which constitute an additional ground for prior-checking in light of Article 27(2)(a) of the Regulation.

On the other hand, the selection and recruitment procedures are not intended to exclude individuals from a right, a benefit or a contract (Article 27(2)(d)). On the contrary, the aim is to recruit the best candidate following the rules and to establish properly his/her rights. The setting up of a black list of people would typically qualify for an Article 27(2)(d). References to Article 27(2) (d) should therefore be removed from the nine notifications.

2. Data Quality

Facts:

(i) A photograph is collected through the Europass Curriculum Vitae. This should be based on consent of the data subject. In accordance with Article 2(h) 'the data subject's consent' shall mean any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed.

(ii) The notification about the recruitment of temporary agents mentions that an "original recent certificate of good conduct issued for a public administration by the police or by a relevant administration" is collected.

² See on EDPS website:

<http://www.edps.europa.eu/EDPSWEB/edps/cache/bypass/Supervision/priorchecking/NonPC>.

Recommendations:

(i) This means that the data subject must be informed³ that the provision of a photograph is voluntary.

(ii) Only an extract of criminal records delivered by the competent authority of the relevant country can be collected. Therefore, documents like "certificate of good conduct" or similar should not be collected, except where a national criminal record does not exist in that country. To ensure that the appropriate document is requested and collected, a list of so-called "extracts of criminal records" for all the Member States in the languages of origin must be prepared and communicated to all the candidates for the recruitment. Given the numbers of foreign nationals involved, the candidates should also be informed whether the extract of the criminal records will come from their country of current and/or past residence, and/or their country of nationality.

3. Data retention

Facts:

The notification about the internal recruitment mentions that data from non-eligible candidates, candidates not invited to an interview, as well as of candidates invited to an interview but not selected are kept for ten years as for the termination of the employment.

Recommendation:

The EDPS questions the necessity to keep these data for ten years as from the termination of the employment. REA should provide a proper justification for this period or reduce it to an appropriate length.

4. Right of access

Facts:

Candidates are informed via the privacy notices of the point of contact to which they may submit their request to access their data. The notifications (selection of temporary, contract agents, seconded Commission officials) also mention that data subject have access upon request to the criteria according to which candidates were evaluated as well as the results they received with respect to each criterion. On the other hand, the evaluation forms completed by the selection committee are not disclosed to the candidates. The notifications state that "these documents, which facilitate comparative assessments of the tested candidates, belong to the deliberation process of the Selection Committee; the secrecy inherent in the Selection Committee proceedings precludes their communication".

Reminder:

The right of access deserves a special attention. The EDPS would like to remind the rules developed in the Guidelines.

The EDPS has always recommended in his Opinions that data subjects should be given access to their evaluation results regarding all stages of the selection procedure (pre-selection, interview and written tests), unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations is applied. This exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the Selection Committee if such access would undermine the rights of others applicants or the freedom of

³ See Article 11(1)(d) of the Regulation.

members of the selection Committee. Nevertheless, data subjects should be provided with aggregated results.

Therefore, it should be clearly established that:

- the objective of any confidentiality requirement is to ensure that the Selection Committee is able to maintain its impartiality and independence and is not under undue influence from the controller, the candidates, or any other factor and
- any restriction on access rights must not exceed what is necessary to achieve this objective;
- on the basis of Article 20.3, if a restriction provided for by Article 20.1 is imposed, the data subject should be informed of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the EDPS (see point 2 here below).

5. Information to be given to the data subject

Facts: A specific privacy statement is available for each notified procedure. The wording concerning the rights to access and rectification differs slightly between the different statements: the specific privacy statement for the recruitment and administration of interim staff does not provide specific information on how to exercise the right to rectification. The statement on the selection of temporary agents states that after the closing date of the call for expressions of interest, information provided by candidates can no longer be changed, while also stating that identification and/or contact details can be updated by contacting REA via e-mail. All specific privacy statements mention a number of possible recipients (e.g. OLAF, European Ombudsman, Civil Service Tribunal, EDPS) who would only receive information in the framework of specific inquiries or investigations.

Recommendations:

- (i) The specific privacy statement for the recruitment and administration of interim staff should also specifically provide information on how to exercise the right of rectification.⁴
- (ii) The specific privacy statement for selection of temporary agents should be clarified as regards the possibility of updating identification data after the closing date.⁵

Reminder:

(i) According to Article 2(g) of the Regulation, authorities which "may receive personal data in the framework of a particular inquiry" are not regarded as recipients. This is to be understood as an exemption from the information obligations in Articles 11 and 12 of the Regulation. REA should therefore not indicate the above-mentioned authorities in the section "who has access to your information and to whom is it disclosed" of the privacy statements.

6. Processing of personal data on behalf of controllers

Facts: An external contractor (temping agency) collects and processes data on behalf of the REA to select the best suitable interim staff. The EDPS did not receive a copy of the "Contract HR/R3/PR/2011/023/3" between the REA and the temping agency.

Reminder:

⁴ The privacy statement for the administration of spontaneous applications uses better wording.

⁵ The privacy statement for the selection of seconded Commission officials uses better wording.

Article 23 of the Regulation foresees that the legal act binding the processor to the controller should stipulate in particular that: "the processor shall act only on instructions from the controller", meaning in this case only on instructions from REA.

Following Article 23(2)(b), the obligations under Articles 21 and 22 are also incumbent on the processor unless the latter is already subject to the same obligations by virtue of the national law of a Member State. In the case in point, the temping agency is subject to Belgian national law. Therefore, confidentiality and security obligations established by virtue of Belgian law are applicable to the temping agency.

Recommendation:

The EDPS recommends that REA send the relevant data protection contractual clause of the contract in order to verify the compliance with Article 23 of the Regulation.

7. Conclusion

The EDPS recommends that REA adopt specific and concrete measures to implement these recommendations regarding the selection and recruitment procedures at REA. As concerns the reminders mentioned in this note, the EDPS would like to be informed about the situation regarding the compliance with the Guidelines. To facilitate our follow-up, it would therefore be appreciated if you could provide the EDPS with all relevant documents within 3 months of the date of this letter which prove that all recommendations and reminders have been implemented.

Sincerely Yours,

(signed)

Giovanni BUTTARELLI

Cc: Mr Evangelos TSAVALOPOULOS, Data Protection Officer, REA