

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Central Bank on "Recruitment procedure"

Brussels, 4 June 2007 (Case 2007-3)

1. Proceedings

On 3 January 2007, the European Data Protection Supervisor (EDPS) received by regular mail a prior checking notification for the already existing processing operation "Recruitment Procedure" from the Data Protection Officer (DPO) of the European Central Bank (ECB).

The following documents were attached to the prior checking notification form received in an electronic form: 1) Extract of the E-recruitment website: Working for European Central Bank, Section: Information on data protection; 2) Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the ECB (ECB/2004/2); 3) Administrative Circular 05/2004 of 18 May 2004 Rules for Recruitment.

On 8 February 2007, the EDPS requested further information, to which he received the responses and additional documentation on 16 March 2007. In relation to the responses received, on 20 March 2007, the EDPS made another information request. The documents arrived to the EDPS offices on 10 April 2007.

On 26 April 2007, the EDPS sent the draft opinion for comments to the DPO of the ECB with a request to provide any further information if necessary, and consequently suspended the procedure for a period of 8 days. On 2 May 2007, the EDPS extended the deadline for comments for one more week at the request of the DPO of the ECB.

On 11 May 2007, the EDPS received the comments on the draft opinion from the DPO of the ECB. The comments included updated information as to the structure of the ECB (change of entity name in the human resources sector) and as to practices and made additional corrections of statements previously made by the ECB in the course the prior checking procedure.

In relation to the corrected information on the use of search firms, on 14 May 2007, the EDPS made another information request to the ECB and suspended the procedure accordingly. On 24 May 2007, the EDPS received the requested information and a contract from 2003, which serves as an example of using a search firm. As a consequence of the newly received information, on the very same day, the EDPS extended the deadline to issue the opinion for 12 days due to the complexity of the matter.

2. Examination of the matter

2.1. The facts

Object of the opinion and purposes of the processing operation:

The object of the present opinion concerns the data processing operations in the recruitment procedure at the European Central Bank (ECB), where an e-recruitment system has been put in place. Recruitment is defined as filling a vacant position, which can occur at any point in time during the year.¹ The Rules of Procedures of the European Central Bank² require that all members of the ECB staff are selected and appointed (...) with due regard to the principles of professional qualification, publicity, transparency, equal access and non-discrimination. The rules and procedures for recruitment are laid down in Administrative Circular 05/2004 of 18 May 2004 (hereinafter as "Administrative Circular"). The Administrative Circular is currently being revised, though major changes of the procedures which could have an impact on the processing of personal data are not expected from the revision.

The purpose of data processing operations is the management of application(s) submitted in response to vacancy announcements in view of possible pre-selection (short-listing) for interview and subsequent selection process (interviews, tests or other selection tools) for final recruitment. Thus, any applicant that has submitted his/her final application becomes a data subject: non-interviewed, interviewed and selected individual. They can be members of the staff of the ECB (including short-term contract employees) and external people.

General description of the recruitment procedure:

The ECB's recruitment philosophy is geared towards fostering internal mobility as a tool for staff development. Vacancies are generally advertised internally in the first instance and, where possible, filled through an ECB-wide competition. Thus, vacancies are advertised externally - as a rule on the ECB website and in addition sometimes in the press - only where it has not been possible to fill the position with a suitable internal candidate. In some cases (an exception has to be agreed upon by the Directorate General Human Resources, Budget and Organisation, hereinafter DG-H³), vacancies can be advertised simultaneously both internally and externally.

The e-recruitment tool "Working for Europe" web site dealing with vacancies at the ECB can be accessed either from the intranet to view jobs advertised internally only or from the ECB web to view jobs advertised simultaneously.

It can also happen that externally published vacancy notices are advertised simultaneously in selected media and/or engage search firms or similar recruitment agencies or to present vacancies at appropriate recruitment fora.⁴

Vacancy notices describe the organisational unit in which the position is located. They set out the main responsibilities of the position and general description of the educational and other qualifications and experience required. Vacancy notices set also the deadlines for completing the application. Applications should be made in an electronic form via the e-recruitment tool of the ECB.

¹ Article 3.1 of 05/2004 Administrative Circular

² Article 20.2 of the Decision of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2)

³ The Directorate Human Resources does not exist any longer. The Directorate General Human Resources, Budget and Organisation comprises four divisions, two of them dealing with Human Resources related issues.

⁴ Article 4.5 of Administrative Circular

The Administrative Circular lays down the general principles of the selection process⁵, including the requirement that the ECB should make reasonable arrangements within the working environment to accommodate the employment of disabled staff, as appropriate⁶.

As soon as the business area has submitted a vacancy notice for publication, a Selection Committee is formed for each selection procedure (in practice Selection Committees are formed also for positions mentioned as exceptions in Article 7.1 of the Administrative Circular⁷). As a general principle, it is composed of one/more representatives of the business area where the vacancy occurs, a representative of another business area and a representative of DG-H. The Selection Committee should agree on the selection of applicants to be invited for further participation in the selection procedure and on the conduct of the selection procedure, and on the recommendation for final selection.

The selection procedure includes interviews, which are conducted by the Selection Committee.

The selection process contains an assessment against criteria outlined in the vacancy note and an assessment of candidates' performance. Selections shall be based upon the qualification and experience-related requirements as set out in the vacancy notice. Tests and other selection tools, as appropriate, may form part of the selection procedure, in agreement with the DG-H. The DG-H shall inform candidates invited for the selection procedure in advance of the test(s) and/or other selection tools to be used. In principle the selection procedure may involve the following stages: 1) initial screening and selection on the basis of the applicants' file (online application and any supporting document requested); 2) interview in Frankfurt am Main with the Members of the Selection Committee and other experts (as appropriate); 3) a job-related written exercise and/or oral presentation deemed necessary.⁸

After completion of the interviews, the Selection Committee seeks the endorsement of the Senior Management of the business area in which the vacancy has arisen (for a vacant post for a Head of Division and above, it should be the endorsement of the Executive Board).

The Selection Committee shall subsequently inform the DG-H in writing of the result of the selection process and the reasons for selecting successful candidates and for rejecting unsuccessful candidates in the form of a selection memorandum. The memorandum shall indicate the number of applicants and the number of those invited for an interview, and it shall contain a reasoned assessment of all the candidates interviewed ranked in order of suitability.

Following the interview(s), a candidate may be selected to fill the position, rejected or put on a reserve list. On the basis of the Selection Committee's recommendation, a candidate placed on a reserve list may be appointed to a position similar to that for which he/she was interviewed, within the same recruiting area. Reserve lists are valid for a period of 6 months.⁹

⁵ Article 5 of the Administrative Circular

⁶ Article 5.5 of the Administrative Circular

⁷ Directors General, Deputy Directors General, Directors or candidates for positions at the same bands in the salary structure (Article 7.1 of Administrative Circular)

⁸ Available at:

https://gs6.globalsuccessor.com/fe/tpl_ecb01SSL.asp?s=xaLdJXpSxSEsZ&key=9533552&c=128741614814&pagemstamp=dbjmyqzqpkqewjrgeb

⁹ Second sentence of Article 7.9 of the Administrative Circular.

If no suitable candidates have been identified, additional candidates (that were put on hold at the short-listing stage) may be invited for an interview or the vacancy note may be re-advertised.

The Administrative Circular lays down specific conditions for external recruitment.¹⁰ A candidate may be recruited as a member of staff only on condition that:

- he/she is a national of one of the Member States, and enjoys his/her full rights as a citizen. The Executive Board may in exceptional circumstances recruit a national from other countries.
- he/she produces, upon request, the appropriate evidence and references as to his/her suitability to perform the duties required, including the originals of relevant degrees and other certificates,
- he/she is physically fit to perform his/her duties. This shall be certified by the ECB's Medical Adviser prior to the start of employment. For that purpose, the successful candidate shall undergo a medical examination on the basis of a medical questionnaire provided by the ECB. For specific functions this may imply a fitness test.¹¹
- he/she has a thorough knowledge of English and a satisfactory knowledge of a second official Community language.

The Administrative Circular allows exceptions: the Executive Board may decide on different rules and/procedures if the application of the provisions of the Administrative Circular would not be conducive to the achievement of the aims of the Circular.¹²

The on-line application and the application form:

To be considered for an advertised position, interested individuals should fill in the on-line application form, which is available on the "Working for Europe" site of the ECB. Applications in paper format are not accepted. If a paper application is received within the closing date, the candidate is contacted and advised to apply online. Applications should be submitted online before the deadline and only for advertised positions, as unsolicited applications will not be processed.

While applying for a particular position, applicants may be asked to answer a couple of screening questions, depending on the position, before reaching the online applicant registration form. For example: Do you have 5 years of experience in field X? Have you been in your current position for more than one year?¹³ Are you a national of a Member State of the European Union? etc. If the candidate responds "No", he/she receives a note that he/she is unable to continue with the application.

By clicking on "Yes" the next page appears, and the candidate can proceed with the application by opening an applicant's account. For that the candidate must give a valid email address, password, title (Mr, Mrs) first name, surname and date of birth. The applicant account can be updated and used for several advertised positions.

¹⁰ Article 8 of the Administrative Circular

¹¹ The European Data Protection Supervisor had already prior checked the handling of medical information prior to the appointment. See Opinion of 20 October 2006 on a notification for prior checking on medical files kept by the ECB's medical adviser and recording of medical information in the personal file (Cases 2006-240/241). Available at: www.edps.europa.eu

¹² Article 9 of the Administrative Circular

¹³ Point 2.1 of Applicants' Guide to the e-Recruitments System. Version of July 2005. Available at: https://gs6.globalsuccessor.com/docs/images/119/6/1/ApplicantsGuidelines_20.07.05.pdf

At different stages during registration and application the individuals will receive confirmation emails at the email address provided by them upon registration.

The application form is split into different sections and fields marked with (*) are mandatory to fill in. All sections need to be filled in and saved before the application can be submitted.

The different data entry pages in the on-line application form common for external and internal applications are the following:

- Personal details:

Title, first name, surname, date of birth, home phone number, work phone number, mobile phone (at least one phone number is required to be given), address (town/city, country, postal code), nationality with an optional specification if the candidate has dual nationality, "Where did you hear about this vacancy?", "if you are related to an employee of the ECB, than please enter his/her name and surname" (this latter question is relevant to ensure neutrality¹⁴ in the course of the selection procedure).

- Work experience:

Past and present work experiences (start/end date, job title, company and its city and country, type of business). The applicant should add in a field a brief description of responsibilities, experience and knowledge gained and the reasons for leaving (this latter is also mandatory). At the stage of submitting the on-line application form, the applicants should not attach copies of work certificates. Only candidates invited to the interview should provide evidence of the listed work experience by submitting copies of work certificates or other relevant documents on the day of the interview.

- Education and training (no mandatory fields):

Candidates should list all degrees, diplomas or certificate and/or titles that have been/will be awarded.

- Courses:

Full details of any relevant courses the applicants have attended or are currently attending: course title, institution, city, country, end date. A course description can be provided optionally.

- Personal skills and competences:

- Languages: for each listed language, the candidate should indicate reading, writing and speaking skills and the respective level (poor, fair, good, fluent, mother tongue).
- Listing and commenting on computer skills.
- Include in a separate field any other information that may be relevant, for example contact persons, references, memberships, stays abroad, etc.

- Additional documents:

Attaching supporting documentation is not mandatory unless specifically requested within the vacancy announcement. The candidate should attach any relevant documents, e.g. list of publications.

- Motivational questions:

The questions vary with the type of vacancy (i.e. for internal campaigns, there are additional questions).

¹⁴ Articles 5.6 , 5.7 and 7.4 of the Administrative Circular 05/2004

Questions which are mandatory to respond:

- Please explain the motivation underlying your application for this particular position.
- Based on your current and most recent work experience, please elaborate on the specific skills and competences you could bring to this particular position.
- If you were to be selected, when you would be able to take up appointment (for freelance positions, please enter Not applicable)?
- Do you suffer from any recognised disability that would make you eligible for extra time in case you were invited for interviews and were to take part in a written test and/or oral presentation? (The question on disability is requested only to support extra-time or to provide specific IT equipment for the tests.)

● Diversity:

As part of the ECB's equal opportunities monitoring, the ECB requests that several sections be completed. In addition, since September 2006, the ECB introduced a diversity policy, which also includes the gathering of accurate information from the applicants, to report on diversity elements (gender, nationality(ies), marital status, age, etc). Diversity fields so far are optional. These data will only be used for statistical purposes, inter alia for the annual recruitment report¹⁵, in an anonymous form, without any link to the data subject.

- Before the final submission of the application form, a "Declaration of honour" should be read and clicked on. It is formulated in these terms:

"I declare on my word of honour that the information provided in this application form is true and complete to the best of my knowledge and belief.

I understand that any misrepresentation or material omission made in this application form or other document requested by the ECB may provide grounds for the withdrawal of any offer or appointment or render me liable for termination or dismissal, if employed.

I undertake to provide on request all the necessary documents to support this application and accept that failure to do so would invalidate it.

In submitting my application, I authorise the ECB to retain this information in accordance with 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 Community institutions and bodies and on the free movement of such data. I reserve the right to have access to this information and to rectify it where necessary."

- Only *selected candidates* at the stage of concluding the contract have to respond the following two questions on criminal convictions:

1) Have you ever been convicted, fined or imprisoned for the violation of any law (excluding minor traffic violations)? If yes, please provide full particulars in separate sheet.

2) Do you have any pending criminal cases and/or are you presently subject to an investigation for a criminal offence? If yes, please provide full particulars in separate sheet.

These two questions are not included in the e-application form (in line with the Europass CV) but are covered in the personal details form issued with the contract.

¹⁵ Article 5.8 of the Administrative Circular states that DG-H shall submit annually to the Executive Board a report on recruitment.

The controller stated that this present practice will be changed upon the implementation of a new procedure based on new security clearance rules on which the ECB expressed that the EDPS will be consulted.

Information provided to data subjects:

Information is provided in various sources:

- 1) Information on data protection: A "*Privacy statement according to Article 11 of Regulation (EC) No 45/2001*" is provided on the *ECB Working for Europe* website, and it contains information on the purpose of processing, on who can have access to the data, to whom data can be disclosed; on security and confidentiality of processing; on the procedures and deadline to access, verify, modify or delete information; right to recourse to the EDPS, reference to Regulation (EC) 45/2001 and a link to the text of the Regulation; storage period of data (see below), identification and contact information of the controller.
- 2) The rules of recruitment are defined in the Administrative Circular 05/2004 and are available on the *ECB Working for Europe* website.
- 3) The *Applicants' Guide to the e-Recruitment System*¹⁶ (*Applicants' Guide*) describes the main data fields of the application form and the procedure to apply. It is available on the *ECB Working for Europe* website. It has to be noted that it is a version of July 2005 and it does not reflect updated practices since that date (for example: questions on criminal convictions are presently not asked in the on-line application form as the Guide states, but in the later phase of the selection procedure). As the ECB noted in the final phase of the prior checking procedure, the review of the Applicant's Guide is foreseen to take place in due course.

Who can access to information and to whom it is disclosed:

The Privacy Statement specifies that: "*Part of the data you submit (identity, address, education and qualification awarded, work experience, spoken languages and IT skills) will be accessed by the Member of the Selection Committee established for each recruitment procedure. Information regarding gender, disabilities, declaration related to criminal records, etc will only be viewed and processed by the Directorate Human Resources. The data will not be communicated to third parties or recipients other than the data processor acting on behalf of the ECB in accordance with Article 23 of Regulation (EC) No 45/2001.*"

Selection Committee members also have access to short-listing memorandum, tests, selection memorandum.

Processors:

The e-recruitment system does not belong to the ECB. The ECB concluded a contract with a U.K. based company which provides the *software platform* which the ECB uses as a client. According to the contract, the ECB has the right of inspection of the technical security aspects of the e-recruitment system and the compliance with the data protection standards. The company can employ sub-contractors with the prior written consent of the ECB. The contractual clause on confidentiality and data protection requires that the company complies with national legislation on data protection and with Regulation (EC) No 45/2001. "*The Company shall in particular be responsible for ensuring that all data submitted by third parties (i.e. the applicants) to the e-Recruitment System is handled strictly in accordance with the aforementioned legislation and shall ensure strict compliance with the technical and*

¹⁶ Version of July 2005. Available:

https://gs6.globalsuccessor.com/docs/images/119/6/1/ApplicantsGuidelines_20.07.05.pdf

organisational security measures required by Article 22 thereof." The obligation not to disclose confidential information survives the termination of the contract.

For management positions the ECB uses an external consultant based in Germany to assess the managerial skills of candidates as an additional step in the recruitment procedure. This information is communicated on the e-recruitment website to all candidates and confirmed to interviewed candidates when invited for the recruitment process.

In addition, it is possible for the ECB to use *search firms*. The use of search firms is actually complementary to a normal recruitment procedure, not a separate recruitment process¹⁷. As the EDPS was informed by the ECB, the recourse to search firms (traditional head-hunters) is very rare indeed and is often triggered by the fact that the ECB fails sometimes to attract (via traditional campaign methods) suitable candidates for very specific and specialised profiles (e.g banknotes or IT domain). In these rare cases where the ECB has used head-hunters, the ECB received, reviewed and signed the head-hunters' standard contract. The ECB does not have a template for such contracts but could use the Service Agreement.¹⁸ The EDPS assumes that the extent to which a search firm takes part in a recruitment procedure always depends on the particular assignment agreed with the ECB in the contract.

Procedures to grant the rights of data subjects:

The Privacy Statement specifies the rights of data subjects in the course of the application phase of the recruitment process: "*As an applicant you have the right to access and update or correct data online. Please note that for practical reasons there is no possibility to update and correct data after the deadline of the competition. You can of course update data if you decide to participate as a candidate in another competition at the ECB. You have a right to recourse at any time to the European Data Protection Supervisor*".

This is to say, that applicants can fill in the application form and as long as the deadline for the competition has not expired, they can change the information given, with certain exceptions. For example, once replies to motivation questions are submitted, those are frozen for that given campaign and corrections are no longer possible. Should the candidate have made a formal mistake and approach the ECB with a written confirmation on the new data entry, this will be uploaded in the system, with the copy of the communication from the candidate for the purpose of audit trails.

If the candidate wants to apply for a new position he/she can activate his profile as submitted in the past and can update it as he/she wishes for the purpose of the new campaign. Motivation questions are different from one campaign to another.

The Applicants' Guide explains that applicants have the facility to update their personal details in their account should a change occur. They can access their own account and update the information before submitting another application, or at any point in time when their details change.

Applicants are able to see the list of the positions, the status of all of their applications and the dates of submission, and they are able to see a summary of the details they submitted for each application.

¹⁷ ECB corrected its previous statement in the last phase of the prior checking procedure.

¹⁸ A contract has been presented for the review of the EDPS showing the use of a search firm for an IT-related search assignment back in 2003.

The prior checking notification form further specifies that all interviewed candidates have access - upon request - to the part of the selection proposal that refers to their individual performance at interviews and test(s). In that context they do not have a right to modify their data.

Storage of data:

Article 7.9 of the Administrative Circular specifies that the business area where the vacancy occurs may indicate that it wishes to keep a candidate on hold for a similar vacancy in the future. Applications may be kept on hold for a maximum period of six months.

Article 7.12 of the Administrative Circular stipulates that DG-H shall keep the relevant documentation with regard to the selection of candidates for a period of one year from the date of completion of the selection procedure. The applications and the exchange of correspondence with applicants shall form part of the documentation. In contrast to the storage periods specified in the Administrative Circular, the prior checking notification form states different storage periods: after the final closure of the campaign, *applications* are kept on a CD-ROM for a period of 24 months. Data of candidates are automatically erased from the system two years after the closure of the given recruitment campaign to which candidates have submitted their application.

The Administrative Circular allows for the storage of the *vacancy notice and the assessment of candidates* who participated in the selection procedure and the *recommendation for selection* for a period of five years. Such documentation shall not be used or referred to in the selection process for other vacancies, with one exception: where a similar vacancy was advertised (internally or externally) within the past six months and a qualified candidate identified as part of that previous procedure is proposed for recruitment.¹⁹ In contrast to the storage periods specified in the Administrative Circular, the prior checking notification form states that *documents (memoranda, tests)* are auto-archived in the e-recruitment tool after 24 months, and are kept for the normal ECB storage period for as long as a person is employed with the ECB and for a reasonable period after. Memoranda and test results are not included in the personal file. The justification given for this storage period is that tests and selection memoranda may need to be kept, because of the possible challenge by a non-selected applicant.

To the question of the EDPS asking for the reason to have longer data storage period in practice than as it is stipulated in the Administrative Circular, the ECB responded that the Administrative Circular was drafted prior to the introduction of the e-recruitment system and the ECB did not have long enough experience with e-recruitment processes, and what type of claims they may be receiving from applicants. Thus, the ECB opted for a longer storage period of the electronic applications (24 months instead of 12 months).

Additionally, the ECB has introduced a new recruitment policy by which initial appointments are on a three or five year fixed term contract basis. It was considered appropriate to have longer storage period to be able to conduct retrospective analysis of the quality of applications received. The defined storage periods are required for statistical purposes (annual report on recruitment) and mid-term review of the quality of applications.

¹⁹ Second indent of Article 3.2 as referred in Article 7.12 of the Administrative Circular.

Hard copies of applications are not kept in DG-H. Candidates are advised to apply for advertised positions only, as unsolicited applications will not be processed.²⁰

According to the notification form, there are no rules or procedures in place permitting longer storage periods for historical, statistical or scientific purposes. Within the normal storage period, Article 5.8 of 05/2004 Administrative Circular requires DG-H to submit annually to the Executive Board a report on recruitment, which also includes inter alia the use of discretionary powers. As it was confirmed to the EDPS, this report is prepared on an anonymous basis.

Automated/manual processing and the security of processing:

Both automated and manual processing operations are performed. After the closing date of the campaign, the recruiting business area may print hard copies of the applications. The management assistant to the recruitment initiator provides copies (if needed) of the applications to all Selection Committee members. After the short listing meeting, a memorandum is produced to (1) explain the reasons for short-listing (or not) of candidates, (2) to explain the envisaged selection process. The short-listing memorandum is signed (on hard copy/electronically) by all Selection Committee members and stored electronically in the E-recruitment tool.

After the selection meeting, a memorandum is produced to explain the reasons for selection (or not) of the candidate(s). Electronic copies of the individual tests are kept within the e-recruitment system under "secure notes" that only DG-H can access. The selection memorandum is signed (on hard copy/electronically) by all Selection Committee members and stored electronically in the e-recruitment tool. The original version of the selection memorandum is kept together with the documents related to the salary offer within the Recruitment and Compensation Division within DG-H.

[...]

2.2. Legal aspects

2.2.1. Prior checking

The notification received by regular mail on 3 January 2007 relates to processing of personal data ("any information related to an identified or identifiable natural person"- Article 2(a) of Regulation (EC) No 45/2001 (hereinafter: "the Regulation")) by the European Central Bank, a Community body, in the exercise of activities within the scope of Community law (Article 3.1 of the Regulation).

Personal data are mainly processed and stored in the e-recruitment tool, thus Article 3.2 of the Regulation applies.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all processing operations which are "*likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks, notably the processing of data relating to health, and data related to criminal convictions

²⁰ Information provided on the Working for Europe site: Recruitment & selection procedure. Available at: https://gs6.globalsuccessor.com/fe/tpl_ecb01SSL.asp?s=mpAsYMeHmHThO&key=9626124&c=720236659915&pagestamp=dblqjlfvmkucdrkxqe

(Article 27(2)(a)), and processing operations which are intended to evaluate personal aspects relating to the data subject, including his/her ability, efficiency and conduct (Article 27(2)(b) of the Regulation).

The collection of applications and a selection procedure to assess a candidate's profile, competencies and performance on various tests/interviews typically qualifies for prior checking under Article 27(2)(b) of the Regulation. The processing of criminal records and data on disability add two other grounds under Article 27(2)(a) for prior checking.

It has to be noted that the data processing operations in pre-recruitment medical examinations²¹ and the "assessment of management skills"²² were already prior checked by the EDPS in two separate opinions.

Article 27(2)(d) of the Regulation is referred to as a possible ground for prior checking with the justification that personal data are used to exclude some applicants. For example non EU citizens are rejected based on nationality because they are not eligible to apply. The EDPS however considers that this reason does not add Article 27(2)(d) as ground for prior checking, because excluding individuals from a right, benefit or contract is in no way the purpose of the processing operation.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. This is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received by regular mail on 3 January 2007. According to Article 27(4) the present opinion must be delivered within a period of two months, that is no later than 4 March 2007. The four information requests suspended the procedure for a period of 36+ 21+15+10 days. A further extension of the deadline for 12 more days thus makes the opinion to be delivered no later than 6 June 2007.

2.2.2. Lawfulness of the processing

Personal data may only be processed if grounds can be found in Article 5 of the Regulation. Article 5(a) constitutes the main ground for the present processing operation. It stipulates that "personal data may be processed if the processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution (...)". Recital 27 of the Regulation makes it also clear that the "*processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies.*" A recruitment procedure is necessary for the management and functioning of the ECB. It is necessary for the performance of tasks carried out in the public interest.

²¹ Opinion of 20 October 2006 on a notification for prior checking on medical files kept by the ECB's medical adviser and recording of medical information in the personal file (Cases 2006-240/241). Available at: www.edps.europa.eu.

²² Opinion of 7 March 2006 on a notification for prior checking on "Assessment of management skills" (Case 2004-273). Available at: www.edps.europa.eu.

The legal basis of the processing operation can additionally be found in the Administrative Circular 05/2004 Rules for Recruitment implementing Article 20.2 of the Rules of Procedures of the ECB (Selection, appointment and promotion of Staff). This supports that the processing falls under Article 5(a) of the Regulation.

As to the lawfulness of special categories of data, see below in part 2.2.3.

2.2.3. Processing of special categories of data

The recruitment procedure involves the processing of three types of "special data": 1) health related concerning disability; 2) criminal records; and 3) trade union membership may occur as a response to the question on memberships in professional societies and activities in civic, public and/or international affairs.

Under Article 10(1) of the Regulation: "*the processing of personal data revealing (...) trade union membership and of data concerning health (...) are prohibited*". The prohibition is lifted where the data subjects has given his/her express consent to the processing (Article 10(2)(a)) and where the processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof, or as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards (Article 10(2)(b) of the Regulation).

When an applicant reveals information on his/her disability, it should be considered as giving his/her consent to the processing of that data, thus the condition of Article 10(2)(a) is met. In addition, this consent is given in the context of staff management (recruitment) in order to enable the employer to comply with his specific obligations in the field of employment law to provide for extra time and to provide specific IT equipment for the test (Article 10(2)(b) of the Regulation).

As to the question on "memberships" in the online application form, the EDPS requests the ECB to make it clear in the question that no information on membership of trade unions is required. For example to put in brackets that: ("no information on trade union membership is required"). An explicit exclusion of such information from the possible response is necessary because otherwise the online application form demands full and complete information with negative consequences for the application. Thus, an applicant may feel obliged to provide information on his/her membership in trade unions. If after the explicit indication that no such membership data is required, an applicant still provides such data, processing of that information can be seen as lawful under Article 10(2)(a) because it can be regarded that data subject gave his/her express consent to the processing.

The processing of data relating to offences and criminal convictions (...) may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards (Article 10(5) of the Regulation). The first bullet point of Article 8(1) of the Administrative Circular 05/2004 requires that a candidate may be recruited as a member of the staff only on condition that "he/she is a national of one of the Member States, *and enjoys his/her full rights as a citizen.*" This legal instrument provides the basis to process data related to criminal convictions. However, as to the excessiveness of the criminal conviction (offences) data processed, see part 2.2.4 below.

2.2.4. Data Quality

Data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed (Article 4 (1)(c) of the Regulation).

The application form requires mandatory in the "Work experience" field from the applicant to give "*the reasons for leaving*" the work. The Applicants' Guide (version of July 2005) requires from the applicants in similar terms as to schools/universities/academic and professional qualifications to give short explanations why he/she interrupted the studies or has not completed the studies/PhD, doctorate thesis, or the candidate has to give explanations if there were overlapping periods in the studies. Even if the Guide is an outdated version, the EDPS expresses his doubts as to the relevance of such information in the application form in this phase of the recruitment procedure, because the responses may put the applicant in a negative light in that stage of the procedure where the purpose is to see whether the applicant meets the objective requirements for a vacant post. Therefore, the EDPS recommends the reconsideration of the mandatory character of the reason for leaving the work in the on-line application form, and to ensure that the Applicants' Guide contains the updated guidelines for the applicants.

The present case also involves the processing of personal data related to offences and criminal convictions. Selected candidates at the stage of concluding the contract have to answer the two questions on criminal convictions: 1) Have you ever been convicted, fined or imprisoned for the violation of any law (excluding minor traffic violations)? If yes, please provide full particulars in separate sheet. And, 2) Do you have any pending criminal cases and/or are you presently subject to an investigation for a criminal offence? If yes, please provide full particulars in separate sheet. The controller stated that the present practice as to criminal records will be changed upon the implementation of a new procedure based on new security clearance rules on which the ECB expressed that the EDPS will be consulted. The EDPS is available for the consultation and welcomes the forthcoming request for consultation, but meanwhile expresses his concerns regarding the present practice in the following terms.

The EDPS fails to see any reason why the applicant should give account for convictions which happened long time ago and which are no more included in the criminal record of the data subject. The phrase "*for the violation of any law*" is overbroad, because even if minor traffic violations are excluded, it may be understood as including any breaches of law, including misdemeanours. This is not to dispute the relevance of a criminal record when looking for the appropriate applicant for a position at the ECB. However, the phrasing of the question may result in situations, where applicants feel obliged to reveal data unnecessarily for the recruitment. Accordingly, the EDPS requests the ECB to modify the formulation of the question by not including the broad expressions "have you ever been", and "violation of any law", and requiring "full particulars in separate sheet", but simply asking for a criminal record or similar official document issued in accordance with the respective national law.

The e-recruitment system guarantees the quality of the data, because the standard online application form is filled in by the applicants themselves. This procedure itself guarantees the accuracy of personal data. Therefore Article 4(1)(d) of the Regulation is complied with. In general, the data subject has the right of access and rectification of data (with some exceptions), during the recruitment procedure so that the file can be as complete as possible (see below in part 2.2.7), which also ensures the quality of data.

Personal data must also be processed "*fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing was already examined (see above in part 2.2.2). As regards fairness, this relates to the information given to the data subject (see part 2.2.8).

2.2.5. Conservation of data

Data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are collected and/or further processed (Article 4(1)(e) of the Regulation).

A candidate's application can be kept on hold for a maximum period of six months for future vacancies (in case the business area concerned indicates it).

As stated in the facts part, there is some ambiguity concerning the storage period presented to the EDPS and as it is stipulated in the Administrative Circular. Although the Administrative Circular allows only for a one year long period to keep the relevant documentation as to the selection of candidates, in practice applications are kept on a CD-ROM for a period of 24 months. Data of candidates are automatically erased from the system two years after the closure of the given recruitment campaign to which candidates have submitted their application. The difference originates from the lack of experience with the e-recruitment tool and with the claims the ECB may receive from applicants.

The Administrative Circular allows for the storage of the *vacancy notice and the assessment of candidates* who participated in the selection procedure and the *recommendation for selection* for a period of five years. In contrast, according to the case file, *memoranda and tests* are auto-archived in the e-recruitment tool after 24 months, and are kept for the normal ECB storage period for as long as a person is employed with the ECB and for a reasonable period after. The justification given for this storage period is that tests and selection memoranda may need to be kept, because of the possible challenge by a non-selected applicant. Additionally, the ECB has introduced a new recruitment policy by which initial appointments are on a three or five year fixed term contract basis. It was considered appropriate to have a longer storage period to be able to conduct retrospective analysis of the quality of applications received.

The EDPS recommends that the controller reconsiders the storage periods. Once 4-5 years of experience is gathered as to the use of the new e-tool and the potential claims related to the applications, the ECB should reconsider whether keeping applications and relevant documentations for 24 months is necessary, or a shorter 1 year period would be sufficient. The EDPS is convinced that possible challenges from non-selected candidates can arise only within a pre-established period by law. This in itself does not justify the keeping of memoranda and tests for the specified long period. The EDPS assumes that retrospective analysis of the quality of applications would take place on an anonymous basis, thus it can not justify keeping those documents in a non-anonymous form. Therefore, the EDPS recommends reconsidering the given justification for keeping memoranda and tests until the termination of employment of the data subjects and for a reasonable period after.

Article 5.8 of 05/2004 Administrative Circular requires DG-H to submit annually to the Executive Board a report on recruitment, which also includes inter alia the use of discretionary powers. It was confirmed to the EDPS that this report is prepared on an anonymous basis, just as diversity monitoring data. The ECB also expressed that the storage periods are defined because they are required for statistical purposes (annual report on recruitment) and mid-term review of the quality of applications. The EDPS welcomes the practice by which the controller ensures that any use of the applications for statistical or scientific purpose, including the retrospective analysis of the quality of applications received,

is done in an anonymous form or only with the identity of the data subject encrypted (Article 4(1)(e) of the Regulation).

2.2.6. Transfer of data

The processing should also be scrutinised in the light of Article 7(1) of the Regulation, which covers transfer of data within or to other Community institutions/bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipients.

The recruitment process concerns data transfers within the ECB, involving various representatives from different areas in the selection committee (business area concerned, DG-H). Since the personal data submitted in the course of a selection process is necessary for their legitimate task and is within their competence, the conditions of Article 7(1) are complied with. Nonetheless, it must be made clear that whenever hardcopies are provided from the application documents (this is the case with providing copies (if needed) of the applications to all Selection Committee members) the members of the Selection Committee can not store the data themselves, nor use them for other purpose than in the selection process.

2.2.7. Right of access and rectification

The right of access to data is envisaged in Article 13, and the right to rectify data is laid down in Article 14 of the Regulation.

As was stated in the facts part, applicants have the right to access, update and correct their own data online. Once certain types of data are submitted (e.g. replies to motivation questions), those are frozen for that given campaign and corrections are no longer possible. If the candidate has made a formal mistake and approaches the ECB with a written confirmation on the new data entry, this will be uploaded in the system (together with the copy of the communication from the candidate for the purpose of audit trails). For practical reasons it is not possible to update or correct data after the deadline of the competition. If the candidate wants to apply for a new position, he/she can activate his profile as submitted in the past and can update it as he/she wishes for the purpose of the new campaign.

The EDPS is of the opinion that any limitation, once the deadline to apply expired, on the right to rectification should only concern merits and skills for recruitment (professional experience, education, training, etc). This can be seen as necessary to ensure objective, certain and stable conditions for the competition, and essential to the fairness of processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

Interviewed candidates can have access to the part of the selection proposal that refers to their individual performance on interviews and test(s) however they do not have the right to modify those data. The right to rectify data can obviously apply only to factual data. Marks and scores allocated could not be open for rectification by the data subject. A ground for restriction may be found in Article 20(1)(c) of the Regulation.

It can be concluded that the requirements of Articles 13, 14 and 20(1)(c) are met.

2.2.8. Information to the data subject

Articles 11 and 12 of the Regulation provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides for a

list of information to be given when the data is obtained from the data subject. When the data have not been obtained from the data subject, the listed information must be given when the data are recorded or first disclosed to third parties, unless the data subject already has it (Article 12).

In the recruitment process, the vast majority of data are provided by the candidates themselves. However, the assessment of individual profiles and performances on tests/interviews is given by the Selection Committee members involved in the selection process. Thus, both Articles 11 and 12 of the Regulation apply to the present processing operation.

The Privacy Statement provides information on: the purpose of the processing; categories of data concerned; who has access to information and to whom it is disclosed; security of the processing; the procedures on how to access, verify, modify or erase data online, and on the restriction of the right to update and correct data after the deadline of the competition; the right to recourse to the EDPS; data conservation period; on the identity and contact details of the responsible controller; and gives a reference to Regulation (EC) 45/2001 with a link to it on the website.

The screen shots presented to the EDPS indicate with a mark [*] data fields which are obligatory to fill in. The Applicants' Guide²³ explains that failing to fill in an obligatory field will mean that the applicant can not submit the application form. Only when all application sections are marked as "completed" can the applicant submit the application.

The "Working for Europe" site of the ECB provides a link to the ECB recruitment rules (Administrative Circular 05/2004), which is the main legal basis for the processing operation.

The Privacy Statement presently contains only the main rule of storing personal data (24 months). Fairness towards the data subject requires that the Privacy Statement is revised containing more detailed information as to the storage period of different data categories: tests and memoranda will be kept in the personal file for the entire career of the staff member, and the possibility of keeping an application on file for 6 months.

An updating of the Applicants' Guide would be useful for reason of fairness towards data subjects, because some important information seems to be outdated (by comparing the information the EDPS received and the Guide itself), which could mislead data subjects, as to whether they should provide a specific information or not (e.g. explanation why studies were interrupted, thesis not finished, data on criminal convictions (see above) etc).

Save the point mentioned above, the overall conclusion of the EDPS is that the information required by Articles 11 and 12 of the Regulation is provided.

2.2.9. Automated individual decisions

Article 19 of the Regulation stipulates the data protection requirements with regard to automated individual decisions. Automated individual decisions are defined as: *a decision which produces legal effects concerning the data subject or significantly affects his/her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him/her, such as his/her performance at work, reliability or conduct.* Such a decision should be *expressly authorised* pursuant to national or Community legislation or, if

²³ Point 4 of the Applicants' Guide

necessary, by the *European Data Protection Supervisor*. In either case *measures to safeguard the data subject's legitimate interests*, such as arrangements allowing him/her to put his/her *point of view*, must be taken. Without those above conditions, the data subject shall have the right not to be subject to such an automated individual decision.

The e-recruitment system makes automated individual decisions in the above sense. When someone applies for a particular position, he/she may be asked to answer a couple of screening questions, depending on the position (before reaching the online applicant registration form). These include questions such as: Do you have 5 years of experience in field X? Have you been in your current position for more than one year?²⁴ Are you a national of a Member State of the European Union? etc. If the candidate responds "No", he/she receives a response note that the vacancy criteria are not met, and thus he/she is unable to proceed with the application.

This automated individual decision is not authorised expressly either by national or by Community legislation. The European Data Protection Supervisor may authorise such decisions, if adequate measures are put in place to safeguard the data subject's legitimate interests. In the present case, therefore, appropriate safeguards should be put in place. Either A) by being as precise in the formulation of the question as to exclude any doubts/ambiguities of the applicant concerning the exact meaning of the question, or B) in case of possible complexity of the issue, there should be a procedure enabling applicants, before being discarded automatically from the application procedure, to express their concerns as to their particular situation. For example, in the case of the nationality requirement, variant A) would mean to formulate the question with a degree of precision: "Are you a national of a Member State of the European Union *at the time of the application deadline*?" Variant B) would mean that in case an applicant has applied for the nationality of an EU member state but has not obtained it yet at the time of submitting his/her application on line, he/she has the opportunity to consult the person in charge at the ECB whether he/she could apply for the vacancy due to his/her specific situation. The EDPS recommends to put appropriate safeguards in place.

2.2.10. Processing data on behalf of controllers

Article 23 of the Regulation stipulates the requirements towards the controller and the processor acting on behalf of the controller. The controller should choose a processor who provides sufficient guarantees in respect of technical and organisational security measures as required in Article 22 of the Regulation, and the controller is responsible for ensuring compliance with those measures. The processor should be governed by a contract or a binding legal act, stipulating that the processor acts only on instruction of the controller and that the obligations as to confidentiality and security of the processing are incumbent on it either under the Regulation or subject to national law implementing Article 16 and 17(3) second indent of Directive 95/46/EC.

In a recruitment procedure some processors may act on behalf of the European Central Bank concerning specific tasks.

1) As mentioned in the facts, the ECB concluded a contract with a U.K. based external company to provide the software platform for the recruitment procedure which the ECB uses as a client. The company should be qualified as a "processor" under Article 2 e) of Regulation 45/2001, because it processes personal data of candidates "on behalf of the controller".

²⁴ Point 2.1 of Applicants' Guide to the e-Recruitments System. Version of July 2005. Available at: https://gs6.globalsuccessor.com/docs/images/119/6/1/ApplicantsGuidelines_20.07.05.pdf

In a written format, the Agreement for the establishment and service of an e-recruitment system ("Agreement") provides for the activities of the processor of personal data. The confidentiality requirement and the fact that the processor acts only upon the instructions of the ECB is included in the contract.

The Agreement refers only to Article 22 of Regulation (EC) 45/2001. A specific reference to Article 23 of the Regulation, which particularly addresses the issue of processing of personal data on behalf of the controller would be desirable. The processor is subject to the national law of an EU member state. Therefore the Agreement should include a specific reference to the confidentiality and security requirement of the national law transposing Article 16 and 17(3) second indent of Directive 95/46/EC. This clarification requirement also applies to the content of the agreement in case of sub-contracting.

In addition, the Agreement requires that the "*Company shall comply with the applicable national legislation on data protection and with Regulation (EC) No 45/2001...*".

The EDPS would like to see a stipulation in the Agreement as to the national law on data protection that applies to the UK based company which provides the services for the ECB based in Germany.

2) The EDPS assumes that in most cases, the role of a search firm would be that of a processor, acting and processing candidates' personal data on behalf of the ECB in a specific phase of a recruitment procedure. The contract sent for the review by the EDPS confirms this. If a search firm is subject to national data protection law of an EU Member State, it is subject to the obligations with regard to the confidentiality and security of the data as laid down by that national law. Thus, the contract concluded between the ECB and the search firm should include a specific reference to the confidentiality and security requirement of the national law transposing Article 16 and 17(3) second indent of Directive 95/46/EC. If a search firm happens to be subject to the legislation of a non-Member State, a specific reference to the requirement of Article 21 and 22 of Regulation (EC) No 45/2001 should be included in the contract.

2.2.11. Security measures

The EDPS welcomes the fact that a specific reference is made to the technical and organisational security measures under Article 22 of Regulation (EC) 45/2001 in the Agreement with the external company responsible for the technical implementation of the e-recruitment system.

After careful analysis by the EDPS of the security measures stipulated in the Agreement (and the attached documentation: call for tender, offer, etc) with the external company providing the software platform, the EDPS considers that these measures are adequate. The Agreement dates from 2004. Therefore the EDPS would like to receive feedback as to whether an assessment report of the technical implementation was made.

The EDPS considers that the other technical and organisational security measures described in the facts part are adequate in the light of Article 22 of the Regulation.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing that the above considerations are fully taken into account, in particular:

- the ECB reconsiders the mandatory character of the reason for leaving the work in the on-line application form, and ensures that the Applicants' Guide contains the updated guidelines for the applicants in that regard,
- only a criminal record or similar official document issued in accordance with the respective national law is requested from candidates selected for recruitment,
- once 4-5 years of experience is gathered as to the use of the new e-tool and the potential claims related to the applications, the ECB reconsiders the period to keep applications and relevant documentations,
- the ECB reconsiders the justification for the keeping of memoranda and tests until the termination of employment relation and for a reasonable period after that,
- the members of the Selection Committee can not store the data on hardcopy themselves, nor use them for other purpose than in the selection process,
- the Privacy Statement provides more accurate details on the different storage periods,
- the Applicants Guide is updated with current procedures and instructions as to categories of data required and which are mandatory/obligatory data fields,
- appropriate measures to safeguard the data subject's legitimate interest as to automated individual decisions are put in place,
- the requirements of Article 23 of the Regulation are included in the Agreement with the external company, and the contract further stipulates the national data protection legislation applicable to the processing operation,
- a feedback is provided to the EDPS on whether an assessment report of the technical implementation was made,
- any contract with a search firm that is subject to national data protection law of a Member State includes a specific reference to the confidentiality and security requirement of the national law transposing Article 16 and 17(3) second indent of Directive 95/46/EC. If a search firm is subject to national law of a third country, a reference to Article 21 and 22 of Regulation (EC) 45/2001 is made in the contract.

Done at Brussels, 4 June 2007

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