

Opinion on notifications for prior checking received from the Data Protection Officers of certain Community agencies concerning the "*Staff recruitment procedures*".

Brussels, 7 May 2009 (Case 2009-287)

1. Procedure

On 4 September 2008, the European Data Protection Supervisor (EDPS) sent a letter to all Community agencies (agencies) announcing the new procedure for ex post prior checking analysis regarding common procedures within the agencies.

On 23 October 2008, the EDPS sent the "*Guidelines concerning the processing operations in the field of staff recruitment*" (EDPS Guidelines) to the agencies. Agencies were requested to submit their notifications on staff recruitment accompanied by a cover letter from the Data Protection Officer (DPO) highlighting the specific aspects vis-à-vis the EDPS Guidelines in this field. The initial deadline for the agencies to submit notifications was 15 January 2009, but very few agencies respected this deadline. It was thus extended until 15 February 2009 by e-mail on 19 January 2009. Nevertheless, the new deadline was not respected by some agencies either which sent their notifications much later than 15 February 2009, namely end of March 2009.

The EDPS received notifications for prior-checking within the meaning of Article 27(3) of Regulation 45/2001 and a cover letter concerning different categories of data subjects for staff recruitment from the DPOs of the following 12 agencies:

- Community Fisheries Control Agency (*CFCA*), temporary, contract agents;
- European Agency for the Management of Operational Cooperation at the External Borders (*FRONTEX*), temporary, contract agents and Seconded National Experts (SNEs);
- European Centre for Disease Prevention and Control (*ECDC*), temporary and contract agents;
- European Centre for the Development of Vocational Training (*CEDEFOP*), permanent staff, temporary agents, contract agents and SNEs;
- European Food Safety Authority (*EFSA*), temporary agents, contract agents, SNEs and trainees;
- European Foundation for the Improvement of Living and Working Conditions (*EUROFOUND*), officials, temporary and contract agents;
- European Network and Information Security Agency (*ENISA*), temporary agents, contract agents, SNEs and trainees;
- European Railway Agency (*ERA*), temporary agents, contract agents and SNEs;
- European Training Foundation (*ETF*), temporary agents, contract agents, SNEs and trainees;

- European Agency for Safety and Health (*EU-OSHA*), temporary agents, contract agents, SNEs and trainees;
- Executive Agency for Competitiveness and Innovation (*EACI*), temporary agents, contract agents and trainees;
- Tran-European Transport Network Executive Agency (*TEN-T EA*), officials, temporary agents and contract agents.

The draft opinion was sent to the 12 DPOs of the agencies concerned for comments on 8 April 2009. The DPO's comments were received on 30 April 2009.

2. Legal aspects

2.1. Prior checking

The processing operations under examination are subject to prior-checking in conformity with Article 27(2)(b) of Regulation 45/2001, since they involve an evaluation of the applicants' ability to perform the job functions for which the selection and recruitment procedures have been organized. Some of these processing operations might also involve the processing of data related to health (collection of medical certificate or disability data) as well as to criminal offences (collection of criminal record), which constitutes an additional ground for prior-checking in the light of Article 27(2)(a) of the Regulation.

In terms of procedure, the EDPS notes that all processing operations concerning the selection and the recruitment of temporary agents and contract agents were notified. However, not all processing operations concerning the selection and the recruitment of officials, SNEs and trainees were notified, either due to the fact that an agency does not offer yet any permanent position¹, a SNE position² or traineeship³ or because the recruitment procedure of these categories was considered by the agencies as very different compared to the recruitment of temporary and contract agents⁴. Therefore, the EDPS invites those agencies which did not notify their processing operations to inform this Authority on their procedures and data protection practices in the light of the Regulation and the EDPS Guidelines.

In terms of substance, the EDPS points out that it is the first time that the EDPS carries out such a challenging exercise in examining 14 notifications, with their cover letters regarding each agency's processing operations, at the same time. The EDPS analysed each agency's practice regarding each principle of data protection stated in the Regulation and evaluated whether each agency followed the EDPS Guidelines or not. In view of the similarities of the procedures, and of some similarities as presented by some agencies in terms of data protection practices, the EDPS decided to examine all notifications in the same context and issue one joint opinion. The EDPS in his joint opinion underlines an agency's practice which does not seem to be in conformity with the principles of the Regulation as well as with the EDPS Guidelines and provides the agency(ies) concerned with a relevant recommendation. Some good practices are also pointed out in the joint opinion.

¹ According to the notifications, only *CEDEFOP*, *EUROFOUND* and *TEN-T EA* recruit officials.

² The DPO of *CFCA* indicated that the procedure for recruiting SNEs has not yet been established, while the DPO of *TEN-T EA* stated that the agency does not foresee to recruit SNEs and trainees for the moment.

³ In the case of *CEDEFOP*, it is important to note however that the selection procedure related to trainees is not under analysis in the present opinion, since the processing operation was already subject to a prior-checking analysis by the EDPS; see EDPS Opinion of 5 December 2008 on "*traineeships by CEDEFOP*", case 2008-196.

⁴ The DPO of *EUROFOUND* informed the EDPS that separate notifications concerning the recruitment of SNEs, trainees and interns will be submitted to the EDPS.

Due to the fact that most of the notifications were submitted to the EDPS on 15 February 2009 and the EDPS' decision to issue a joint opinion, the EDPS considers this date as a date of receipt of notifications. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The two months period was suspended for 22 days to allow comments from the DPOs. Thus the present opinion must be issued no later than the 8 May 2009. The EDPS will also send to each agency individually a letter underlining the necessity to inform the EDPS of the measures taken by the agency based on the recommendations of this opinion within a period of 3 months.

2.2. Lawfulness of the processing

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation 45/2001. The processing operations under examination fall under Article 5 a), pursuant to which data may be processed if the processing is "*necessary for 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 or body or in a third party to whom the data are disclosed*".

It follows that the first issue under Article 5(a) is to determine whether there is a specific legal basis for the processing and the second issue is to verify whether the processing operation is necessary for the performance of a task carried out in the public interest.

Relevant legal grounds in the Treaty or other legal instruments

All agencies indicated

- Title III Chapter 1 (Articles 27-34) of the Staff Regulations of the officials of the European Communities (Staff Regulations) in the case of the permanent staff and
- Articles 12 - 15 and 82 - 84 of the Conditions of Employment of other servants of the European Communities (CEOS) in the case of temporary and contract agents.

Moreover, some agencies, such as **CEDEFOP** and **ETF** adopted internal decisions regarding the procedure of selection of temporary and contract agents. **TEN-T EA** pointed out that it is in process of adoption of internal implementing rules on the use and engagement of temporary agents and contract agents, based on the models provided by DG ADMIN. The EDPS welcomes the adoption of such internal decisions because, although the recruitment of temporary and contract agents is provided in the Staff Regulations, the detailed procedure and conditions of admission and recruitment within each agency is not foreseen in the Staff Regulations. The EDPS therefore encourages the agencies to adopt such internal decisions and those which are in process of drafting them should inform the EDPS as soon as they are adopted.

As concerns the selection procedure regarding the SNEs, an internal specific legal basis should be adopted by each agency which recruits SNEs. **EFSA** was the only agency to adopt its own internal decision. **EU-OSHA** applied so far the relevant rules of the Commission, while it is in process of drafting its own rules which will be available later in 2009. The EDPS therefore recommends that **EU-OSHA** should provide the EDPS with a copy of these rules as soon as they are adopted. Furthermore, the EDPS recommends that **CEDEFOP**, **ENISA** and **EACI** should draft a relevant Decision and send a copy to the EDPS.

In the same line, as concerns the trainees, **ENISA** and **ETF** should also provide the EDPS with their internal Decision on the selection of trainees as soon as they are adopted.

Necessary to perform a task carried out in the public interest

In considering whether the processing operation fulfils the second condition under Article 5, the EDPS notes that each processing operation under analysis is presented by each agency to be necessary for the selection procedure of the best qualified candidates according to the vacancy note's requirements. There is no reason to doubt that these conclusions are justified.

2.3. Processing of special categories of data

Within the framework of the selection and recruitment procedures the processing of certain data belonging to the "*special categories of data*" under Article 10 of Regulation 45/2001 is prohibited unless an exception can be found in the same Article 10 (2) -10 (5).

It must be noted that not all agencies process sensitive data. Some agencies stated that they process particular categories of data, namely criminal records and data related to disability and they indicated that they follow the EDPS Guidelines. **FRONTEX** mentioned that it collects a copy of a criminal record but so far no information on disability was collected. **ETF** collects a criminal record only in the case of recruited candidates and it does not request any data on disability. However, it is not clear from the notification whether **ENISA** collects such sensitive data. If it is the case, they should inform the EDPS and make sure that their processing is carried out in the light of the EDPS Guidelines.

2.4. Data Quality

Adequacy, relevance and proportionality: According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed*". After analysing all data collected in the application forms, the EDPS notes that his Guidelines have been taken into consideration by most of the agencies and that most of the data processed are relevant and necessary for the selection procedure in the light of Article 4(1)(c) of the Regulation.

Nevertheless, the EDPS points out that **EUROFOUND** and **FRONTEX** collect data in the application forms related to the "*reasons for leaving a previous post*". On the basis of the available information, the EDPS insists on the fact that such data seem to be excessive in relation to the recruitment procedure and reiterates his recommendation that this question should not be marked as mandatory in the application form.

Moreover, the EDPS found that **EACI** and **TEN-T EA** collect in the application form information on "*Interests and skills not related to work, including social and sport activities*". As it was explained in the EDPS Guidelines, such data are not fully appropriate with regard to the purpose of the processing operation. The EDPS therefore recommends that **EACI** and **TEN-T EA** should mark the above question only as optional in their application form and they should ensure that applicants who choose not to answer the optional question should not be discriminated against other applicants who choose to provide an answer. In this context, the EDPS welcomes the fact that **EACI** will consult the Commission (DG DIGIT) in order to modify the Europass CV on-line accordingly.

2.5. Conservation of data

Article 4(1)(e) of Regulation 45/2001 outlines the principle that "*personal 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 or for which they are further processed*".

i) Officials, temporary agents, contract agents and SNEs:

Recruited applicants:

The EDPS notes that while the rest of the agencies adopted a retention period for the data of the recruited applicants according to the EDPS Guidelines, **CEDEFOP**, **EFSA**, **ENISA** and **FRONTEX** did not provide such information. The EDPS therefore recommends that these agencies should implement his Guidelines as soon as possible which clearly underline that the data of the recruited applicants should be kept for a period of 10 years as of the termination of employment or as of the last pension payment.

Applicants included on a reserve list or list of suitable candidates but not recruited:

The EDPS considers that in the case of **EFSA**, the retention period of 5 years of the candidates' data following the expiry of the reserve list is excessive in relation to the purpose of their processing. It is therefore recommended that a shorter period is chosen in conformity with Article 4(1)(e) of the Regulation.

CEDEFOP, **ETF** and **ENISA** did not mention in their notifications any specific retention period, namely the precise validity period of the reserve list in the case of applicants included on a reserve list. The EDPS recommends that these agencies adopt a reasonable retention period that can be justified by Article 4(1)(e) of the Regulation.

TEN-T EA has not yet set up a retention period for the data related to applicants who are invited to the interviews. The EDPS recommends **TEN-T EA** to adopt a retention period as soon as possible in conformity with Article 4(1)(e).

Non-recruited applicants:

ENISA did not provide the EDPS with any information on the retention period of the data of non-recruited applicants. The EDPS recommends **ENISA** to adopt a reasonable retention period in the light of the EDPS Guidelines and Article 4(1)(e) of the Regulation.

ii) Trainees:

The EDPS recommends those agencies which carry out the selection procedure of trainees, namely **EFSA**, **ENISA**, **ETF** and **EU-OSHA** to adopt specific retention periods in the case of pre-selected candidates and successful trainees in the light of his Guidelines.

Retention period of the criminal record, police record and certificate of good conduct:

As it was explained in point 2.3, it is not clear whether **ENISA** collects a criminal record. If it is the case, they are recommended to follow the EDPS Guidelines.

FRONTEX and **ETF** which collect a criminal record should also apply the EDPS Guidelines in terms of the retention period of such data.

As concerns the retention period of the criminal record, some agencies, namely **CEDEFOP**⁵ **CFCA** and **EACI** put forward that personal and selection files are audited by the Court of Auditors as well as by the Internal Audit Service of the Commission. The EDPS considers that the issue as to whether a criminal record or a standard form should be kept in the personal file or not is irrelevant to the purpose of the tasks and mission of the auditors who will only check the procedure adopted in order to ensure that the criminal record has effectively been checked by the agency. The EDPS would consequently insist on the recommendation laid down in his Guidelines:

⁵ **CEDEFOP** points out the difficulty in terms of auditing, but it agrees with the EDPS Guidelines.

the criminal record should be returned to the data subject immediately after the selection and possible recruitment and a "standard form" which states that the data subject is suitable for the performance of his/her duties and enjoys his/her full rights of citizen could be stored in the personal file.

Retention period of other special categories of data:

As it was explained in point 2.3, in case *ENISA* and *FRONTEX* process any data on disability, the EDPS recommends that they should both keep sensitive data following the EDPS Guidelines.

2.6. Transfer of data

The processing operation should also be examined in the light of Article 7(1) of Regulation 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The recipients of the processing operations under analysis are both internal and external. In particular:

- ***Internal communication of data within the agency:*** the HR recruitment officers, the internal members of the Selection Committee, the Executive director, the Head of Units, the recruiting managers, the legal advisors, the internal audit of the agency;
- ***Internal transfer to other institutions/bodies:*** internal audit of the Commission, Court of Auditors, OLAF, European Ombudsman, Civil service tribunal, Court of Justice and
- ***External transfer:*** External members of the Selection Committee (*EU-OSHA*, *CEDEFOP*), company for the selection of the Executive Director (*EFSA*) and Deputy Director and lawyers in case of a law suit (*CEDEFOP*), Permanent Representations (*FRONTEX*). Data are transferred within the EU territory.

The EDPS adds that the data under analysis can also be transferred to the EDPS on the basis of Article 33 and 47(2)(a) of Regulation 45/2001.

All the above transfers either within the agency concerned or to other institutions or bodies have a legitimate purpose for the human resources management, the selection procedure of the most appropriate candidates, disciplinary procedure, judicial proceedings, internal audit or the exercise of supervisory tasks and they are therefore presented as necessary. However, each agency should ensure that all recipients receive data which are only relevant and necessary for their role in the selection procedure.

In Article 7(3) of the Regulation, it is also stated that "*the recipient shall process the personal data only for the purposes for which they are transmitted*". According to the notifications, the members of the Selection Committees of *CEDEFOP*, *CFCA*, *EACI*, *EFSA*, *ENISA*, *ETF*, *EUROFOUND* and *EU-OSHA* are bound by the agency's confidentiality policy and data protection practices for non-disclosure of the data they receive as well as for non-use of these data for other purposes for which they are transmitted to them. The EDPS takes note of the established policy of these agencies and recommends that *FRONTEX*, *ERA* and *ECDC* should make sure that the members of their Selection Committee are also bound by the principle of confidentiality so that Article 7(3) is respected. Moreover, the EDPS recommends that each agency informs all other potential internal recipients that they should process the data they receive only for the purposes for which they are transmitted in the light of Article 7(3).

The EDPS notes the good practice put in place by **TEN-T EA** where any duplication of the documents containing personal data is carefully destroyed after the decision on the candidate to be recruited has been taken.

Furthermore, some of the members of the Selection Committee of **EU-OSHA**, **CFCA** are external members. In the case of **CEDEFOP** and **EUROFOUND** an external company is contracted for the selection of the agency's Director and Deputy Director as well as external lawyers in case of a law suit. **ETF** also contracts external consultants for the organisation of written tests. In the framework of SNE's selection procedure, **FRONTEX** and **ERA** exchange letters with the Permanent Representations respectively.

Article 8 of the Regulation provides that personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC. When **FRONTEX** and **ERA** transfer data to the Permanent Representations, Article 8(a) of the Regulation applies according to which "*the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". As concerns the transfer of data to the external consultants/companies for the organisation of tests, Article 8(b) of the Regulation applies since they are considered to be private entities which are contracted by **EU-OSHA**, **CFCA**, **CEDEFOP**, and **EUROFOUND** for a specific task. The transfer of data by these agencies is necessary for setting up the selection procedure and in such cases, the data subject's legitimate interests cannot not be prejudiced because the transfer of data by the above agencies is necessary for the selection of candidates and the organisation of tests (see further on security requirements under Article 23 of the Regulation, point 2.8)

2.7. Rights of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. Article 14 of the Regulation provides that "*the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

The notifications submitted by **EUROFOUND** and **CFCA** do not provide clear information about the right of access to the results obtained by the data subject. The EDPS reminds that access should be granted to the evaluation results regarding all stages of the selection procedure with the following exception: access cannot be granted either to the comparative results of other applicants or to the individual opinions of the members of the Selection Committee.

The EDPS underlines a good practice put in place by **ERA** which gives access to aggregated results concerning other applicants, such as number of applicants, average of results, etc.

2.8. Information to be given to the data subject

Articles 11 and 12 of the Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

In this case, Article 11 (*Information to be supplied where the data have been obtained from the data subject*) applies where data have been provided directly by the data subjects themselves. In the present processing operations application forms, Europass CV and supporting documents are provided by the data subjects themselves.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) applies in this case as well, since information is collected from different participants such as the HR recruitment officers, internal and external members of the Selection Committees, Executive director, Head of Units, Permanent Representations, EPSO, external consultants.

CEDEFOP, ETF, EU-OSHA, ECDC, FRONTEX and **ENISA** indicated in their notifications that they intend to prepare and post a privacy note on their website. The EDPS therefore recommends that a note should be prepared and posted as soon as possible referring clearly to all elements provided in Articles 11 and 12 of the Regulation.

As concerns the note posted by **EFSA**, the EDPS recommends that the note should include the retention period of the data of the different categories of applicants in accordance with Articles 11 and 12 of the Regulation and in the light of the EDPS Guidelines.

TEN-T EA stated that it will post a specific privacy statement on its website as soon as the website is finalised. The EDPS analysed the draft privacy statement and concluded that the legal basis was missing. The EDPS recommends that the legal basis of all processing operations carried out by the agency should be included in the privacy statement.

The EDPS notes that **EUROFOUND** will include a tick box on its webpage with a text linked to a full disclaimer that has to be clicked before enabling the potential candidate to use the online application tool. **EUROFOUND, CFCA** and **ECDC** provide the data subject with a disclaimer notice which is either included in the vacancy notice or in the application form. These disclaimer notices do not inform the data subject on every element provided in Articles 11 and 12. The EDPS recommends the above agencies to

- name the disclaimer notices as "data protection" notices or "privacy statement" and
- complete the notices with all elements provided in Article 11 and 12 of the Regulation.

The privacy policy statements of **EACI** should mention the legal basis of the processing operations that are carried out by the agency for each category of data subjects that is recruited by the agency.

2.9. Processing data on behalf of controllers

Article 2(e) of the Regulation 45/2001 states that "*processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller*". Article 23 of the Regulation stipulates the role of the processor and the obligations of the controller in ensuring sufficient guarantees in respect of the technical and organisational security measures and ensure compliance with those measures.

External processors: According to the facts, there are a few external recipients who process data within the framework of the selection procedures, namely external members of the Selection Committee, an external company for the selection of a Director and Deputy Director and external lawyers in case of a law suit, external consultants for the organisation of written tests and Permanent Representations. These external recipients can qualify as processors since they are engaged by the agency concerned in order to perform tasks on behalf of the agency. In this respect, the EDPS recommends that a confidentiality agreement is signed binding the agency concerned and the external parties in conformity with Article 23 of the Regulation. In particular, **EU-OSHA, CEDEFOP, ETF** and **FRONTEX** should indicate in the agreement that on one hand, the processor shall act only on instructions from the controller and on the other hand they should ensure that the obligations with regard to confidentiality and security laid down in the national law by virtue of Article 17(3), second indent, of Directive 95/46/EC are incumbent on the processor.

2.10. Security

According to Article 22 of Regulation 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected"*.

In the light of the measures as described by the agencies, the EDPS considers that they seem to be appropriate within the meaning of Article 22 of the Regulation 45/2001.

Conclusion

It is evident that the EDPS Guidelines were a useful tool for each agency to reflect on how the data protection principles of Regulation 45/2001 have an impact on their staff recruitment procedures. Moreover, the EDPS Guidelines encouraged them to reconsider their practices in terms of data protection regarding their staff recruitment procedures.

As a result of the similarities of procedures displayed in all notifications submitted to the EDPS by the 12 agencies concerned, the EDPS decided to launch this interesting and challenging exercise in examining the agencies' data protection practices horizontally. The outcome of this first innovative initiative in the framework of the Supervision mission of the EDPS is the present joint opinion and his recommendations as presented throughout the opinion.

The procedure towards this joint opinion seems to have been beneficial to the agencies concerned as well, because on one hand it allowed them to compare data protection practices adopted within each agency and on the other hand it made them reconsider their practices in the light of the EDPS recommendations. Indeed, the EDPS notes that most of the agencies seem to have adopted their data protection practices following the EDPS Guidelines and the provisions of Regulation 45/2001.

In analysing the DPOs' remarks on the draft opinion sent to them for comments, the EDPS finds it necessary however to underline that the mere intention or confirmation stated by the DPO of an agency that a specific data protection practice will be applied in conformity with the EDPS Guidelines and recommendations is not sufficient for the implementation of the EDPS recommendations. Instead, concrete measures are required. According to the EDPS practice, after the EDPS opinion is issued and sent to the controller, the latter should take fully into consideration the EDPS recommendations, adopt concrete measures in implementing them as soon as possible and inform the EDPS of those measures. This part of the procedure is the follow-up of the EDPS recommendations for a processing operation subject to prior-checking. The follow-up should take place within 3 months after issuing the opinion.

Consequently, the controller of each agency concerned is now invited to adopt specific and concrete measures in order to implement the EDPS recommendations regarding staff recruitment procedures carried out by each agency. This implies that in the context of the follow-up each agency should send to the EDPS all relevant documents which can show that the EDPS recommendations were actually implemented.

Done at Brussels, 7 May 2009

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor