



Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Parliament on the processing of personal data in the hearings of the Commissioners-designate

Brussels, 3 July 2009 (Case 2009-0332)

1. Proceedings

On 2 April 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Parliament (EP) an informal consultation as to the need for prior checking of the processing of personal data in the hearings of the Commissioners-designate. On 6 May 2009, the EDPS invited the DPO to submit the processing operation for prior check.

On 7 May 2009, the EDPS received from the DPO of the EP notification for prior checking regarding the data processing operations that take place in the context of the hearings of the Commissioners-designate at the EP (the Notification) on the basis of Article 27 of Regulation (EC) No 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (Regulation (EC) No 45/2001).

On 23 June 2009, the EDPS sent the draft Opinion to EP for comments. The EP's Data Protection Officer responded on 1st July 2009.

2. The facts

This prior check analyses the data processing operations carried out by the EP in the frame of the hearings of the Commissioners-designate. The data processing operations start with the collection of any information relevant in the context of these hearings to be able to take a decision on their aptitude. They continue with the hearing of the Commissioners-designate and finalize with the assessment by the relevant committees as to whether the candidates are qualified to be members of the College and to carry out the particular duties they have been assigned. Taking this into account, this Opinion will assess the extent to which the processing of personal data involved in the procedure relating to the hearings of Commissioners-designate are in line with Regulation (EC) No 45/2001. This Opinion will not address data processing operations that go beyond this scope such as the procedure at the Council, nor deal with the evaluation of Commissioners-designate as such which is at the heart of the EP's institutional and political role in this case.

The *purpose* of the data processing operations is to provide MEPs with information on the background and experience of the Commissioners-designate in the context of the hearings of designated Members of the European Commission prior to appointment.

The *procedure* surrounding the hearings of Commissioners designate according to Annex XVI of the EP Rules of Procedure is the following:

The President of the EP shall, after consulting the President-elect of the Commission, request the nominees proposed by the President-elect of the Commission and the Council for the various posts of Commissioners to appear before the appropriate committees according to their prospective fields of responsibility¹. These hearings shall be held in public.

The committees shall submit written questions to the Commissioners-designate in good time before the hearings. The number of substantive written questions shall be limited to five per committee responsible.

During the hearings, the appropriate committee or committees shall invite the Commissioner-designate to make a statement and answer questions. According to Annex XVI of the EP Rules of procedure, the "conduct of the hearings shall aim to develop a pluralistic political dialogue between the Commissioners-designate and the Members". The hearings shall be organised in such a way as to enable Commissioners-designate to disclose to Parliament all relevant information. All hearings will be web-streamed on the website of the EP.

An indexed video recording of the hearings shall be made available for the public record within twenty-four hours.

The committees shall meet in camera without delay after the hearing to evaluate the individual Commissioners-designate. The committees shall be invited to state whether, in their opinion, the Commissioners-designate are qualified both to be members of the College and to carry out the particular duties they have been assigned. The committees' statements of evaluation shall be made public and presented at a joint meeting of the Conference of Presidents and the Conference of Committee Chairs, which shall be held in camera.

The *categories of data* collected and further processed include all data necessary to evaluate the Commissioners-designate on the basis of their general competence, European commitment and personal independence. The EP shall expect full disclosure of information relating to their financial interests. All CVs and additional documents will be part of the meeting documents of the committee and published on the EP website and available in the meeting room.

The period of conservation of the data, according to the Notification, is five years. The data are subsequently transmitted to the central archives (CARDOC) for indefinite conservation subject to Regulation (EC) 1700/2003.

Recipients. The data collected by the committee secretariat is made known to the MEPs and their assistants and to staff in the political groups and to any other persons present during the committee meeting (open to the public) and may be published on the EP internet site.

As far as the *right to information* is concerned, the following electronic information is sent systematically to the Commissioners designate before the hearing: "Your presence in front of the European Parliament may require DG IPOL to record your personal data -as contained in your CV- in a file, which may be communicated to Members of the competent Committee and may be retained for a maximum of 5 years. Should you require further information or wish to exercise your rights (e.g. to access or rectify data) please contact [name and address of data

¹ Each Commissioner-designate is invited to appear before the appropriate committee or committees for a single hearing.

controller] European Parliament, rue Wiertz, B-1047 Brussels: you are informed that you have a right of recourse to the European Data Protection Supervisor".

As far as **access rights and rectification** are concerned, as described in the privacy statement above, the application of such rights is recognized and individuals are informed that these rights can be exercised by contacting the data controller.

[...]

3. Legal Aspects

3.1. Prior checking

Applicability of the Regulation. Regulation (EC) No 45/2001 applies to the "*processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system*" and to the processing "*by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law*"². For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the hearings of the Commissioners-designate entail the collection and further processing of personal data as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, personal data necessary to evaluate the Commissioners-designate on the basis of their general competence, European commitment and personal independence are collected and further processed along with data relating to their financial interests. Second, to the extent that the CVs and other documents are transmitted electronically to the EP, the personal data collected undergo "automatic processing" operations, as defined under Article 2(b) of the Regulation (EC) No 45/2001 as well as manual data processing operations. Finally, the processing is carried out by a Community institution, in this case by the EP, in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001).

Grounds for Prior Checking. Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*processing operations 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. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of the hearings of the Commissioners-designate aim at evaluating the capacity of each candidate for a particular position. Indeed, the committees are invited to state whether, in their opinion, the Commissioners-designate are qualified to be both members of the College and to carry out the particular duties to be assigned. Clearly the data processing operations fall within Article 27(2)(b) and must therefore be prior checked by the EDPS.

Prior Checking. 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. Any recommendations made by the EDPS must be fully taken into account prior to the collection and subsequent processing of personal data.

² See Article 3 of Regulation (EC) No 45/2001.

Notification and Due Date for the EDPS Opinion. The Notification was received on 7 May 2009. The period within which the EDPS must deliver an opinion was suspended for a total of 7 days to allow for comments on the draft EDPS Opinion. The Opinion must therefore be adopted no later than 14 July 2009.

3.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. The grounds that justify the processing operation are based on 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"*.

In order to determine whether the processing operations comply with Article 5(a), two elements must be taken into account: first, whether either the Treaty or another legal instrument adopted on the basis thereof foresee a public task in this context, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

Article 214(2) of the EC Treaty provides:

"The Council, meeting in the composition of Heads of State or Government and acting by a qualified majority, shall nominate the person it intends to appoint as President of the Commission; the nomination shall be approved by the European Parliament.

The Council, acting by a qualified majority and by common accord with the nominee for President, shall adopt the list of the other persons whom it intends to appoint as Members of the Commission, drawn up in accordance with the proposals made by each Member State.

The President and the other Members of the Commission thus nominated shall be subject as a body to a vote of approval by the European Parliament. After approval by the European Parliament, the President and the other Members of the Commission shall be appointed by the Council, acting by a qualified majority."

The provision therefore clearly entrusts the EP with a public task of approving the designation of the members of the Commission proposed by the Council. Annex XVI of the EP Rules of procedure further develop the guidelines for the approval of the Commission notably specifying that "the Parliament may seek any information relevant to its reaching a decision on the aptitude of the Commissioners-designate". The collection and processing of personal data by the respective committees for the purpose of the hearings can be considered as necessary for the performance of this task.

The personal data collected in the frame of the procedure is made public due to the fact that the Committee sessions are open to the public and that committee documents are made available during the sessions and on the internet website of the EP. Furthermore, the hearings are streamlined live on the EP website. This approach implies a balance of the interests at stake: on the one hand, the need to inform the public and, on the other, the protection of the persons concerned. In this particular case there is an obvious public interest in the transparency of the procedure required to assess the qualifications of designated candidates for high public office and the privacy of the individuals concerned is in so far not at stake or clearly outweighed. Making the data available to public access can therefore be considered as lawful, provided that other applicable safeguards are respected. The same approach applies to the possible publication of the data on the website of the EP.

The EDPS therefore takes the approach that the processing by the European Parliament of personal data in the context of the hearings of the Commissioners-designate can be considered as lawful in accordance with Article 5 of Regulation (EC) 45/2001.

3.3. Processing of Special Categories of Data

Article 10.1 of Regulation 45/2001 establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited*". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject ex Article 10(2)(a) and where data have manifestly been made public by the persons concerned ex Article 10(2)(d).

The EDPS considers that in the context of assessing the Commissioners-designate, the persons concerned may reveal information on their political opinions, religious or philosophical beliefs or other types of special categories of data such as disability where relevant. If this occurs, it should be considered that candidates have given their express consent to the processing of that data, so that the condition of Article 10(2) (a) would be met. In addition, such data could be considered as having manifestly been made public by the persons concerned.

3.4. 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 they are collected and/or further processed*".

According to Annex XVI of the EP Rules of Procedure, the EP shall evaluate Commissioners-designate on the basis of their general competence, European commitment and personal independence. It shall assess knowledge of their prospective portfolio and their communication skills. To this effect, the EP may seek any information relevant to its reaching a decision on the aptitude of the Commissioners-designate. It shall expect full disclosure of information relating to their financial interests.

In the context of this case, it is therefore not easy to define *a priori* the exact data which will be collected and further processed by the committees of the EP concerning the Commissioners-designate. The EDPS would like to underline the respect of the principle of adequacy and proportionality which must be respected at all stages of the procedure in the light of the purpose of processing designed to assess the aptitude of the designated candidates. In principle, most of the data will be provided by the candidates themselves and therefore the principle of data adequacy will be respected. Any further information requested by the committees notably during the hearings, must also comply with this principle. The members of the EP Committees involved must be reminded that no further data than that necessary to assess the aptitude for the performance of their tasks should be collected and further processed.

Article 4(1)(d) provides that personal data must be "*accurate and, where necessary, kept up to date*". To the extent that the Commissioners-designate provide the information themselves, the procedure itself ensures that the data are accurate and kept up to date as much of the personal data supplied during the recruitment process is provided by the data subject. In this regard, as further developed below, it is important that appropriate security measures ensure the integrity of the data (see Section 3.9). It is also important for the candidate to be able to

exercise the right of access and rectification insofar as it enables individuals to control whether the data held about them is accurate (see Section 3.7).

Fairness and Lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analyzed above (see Section 3.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 3.8.

3.5. Conservation of Data

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

According to the information received, the EP keeps the data for the duration of the mandate of the Commissioner designated i.e. for a period of five years. The EDPS considers this period as adequate and not excessive as concerns individuals who are effectively appointed as part of the College. The period of conservation of the data is also considered as appropriate as concerns candidates who are not approved by the EP for the purpose of transparency of the procedure and possible recourse.

The data are subsequently transmitted to the central archives (CARDOC) for indefinite conservation in accordance with Council Regulation (EC) 1700/2003 concerning the opening up of the historical archives of the European Community and the European Atomic Energy Community. According to this Regulation, "*documents of historical or administrative value are to be preserved*" and to this end each institution of the European Community "*shall establish its historical archives*" (Article 1). "*Each institution shall transfer to its historical archives all documents contained in their current archives no later than 15 years after their date of creation. According to criteria laid down by each institution pursuant to Article 9, there shall be an initial sorting process with the purpose of separating documents that are to be preserved from those that have no administrative or historical value*" (Article 7).

On the basis of this Regulation the EDPS considers that there is a legal basis justifying the conservation of certain data for historical purposes. There should however be a selection and verification process on the basis of criteria determined at an institutional level so as to only retain data of historical value. In accordance with Article 4(1)(b), appropriate safeguards must be put into place to ensure that the data kept on the basis of their historical value are not processed for any other purposes or used in support of measures or decisions regarding a particular individual. Furthermore, the notification form should reflect this conservation period and data subjects should be informed accordingly of the conservation of certain data for historical purposes.

As for data which, after selection, are not considered as of historical value, according to article 4(1)(e) of Regulation (EC) 45/2001 they may only be stored for longer than the initial 5 year period of retention, if they are made anonymous or, if this is not possible, with the identity of the data subjects encrypted.

3.6. Transfers of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules applicable to transfers to Community institutions or bodies (based on Article 7) apply in this case. Article 7.1 establishes that data shall only be transferred if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The EDPS considers that the transfers of information to the recipients described in the Notification for the purposes stated seem to comply with the Article 7.1. Indeed, all the recipients are supposed to have the competences to perform the task for which the data is transferred, i.e. to assess the qualities of the Commissioners-designate. As to the necessity of the data being transferred, provided the principle of data quality is respected (see above 3.4), this condition is respected.

Article 7(3) states that "*The recipient shall process the personal data only for the purposes for which they are transmitted*". The EDPS underlines that at all stages of the procedure, the recipients to whom the data are transferred must be reminded that they can only process the data for the purposes of the assessment of Commissioners-designate.

The communication to the public in general due to the fact that the Committee sessions are open to the public can be considered as lawful as well as the publication of the data on the Internet, which does not qualify as a transfer³ (see point 3.2.).

3.7. Right of Access and Rectification

According to Article 13 of Regulation (EC) 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source.

The Notification refers to the general rights of the data subjects according to the Bureau decision of 22 June 2005 (Articles 8-13). The EDPS considers that the right of access and rectification are therefore recognized.

3.8. Information to the Data Subject

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed unless the data subject already has this information. Individuals are further entitled to be informed of, inter alia, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

As mentioned in the facts, electronic information on the processing of personal data is sent systematically to the Commissioners-designate before the hearing. This statement refers to the communication of the data to the Members of the competent Committee, the data conservation period, the existence of the right to access and rectify data, the identity of the controller and the possibility to have recourse at any time to the EDPS. The EDPS is satisfied that information is provided to the Commissioners-designate prior to the hearing.

Although the Commissioners-designate are probably aware of the public nature of the data provided and the fact that the hearings will be made public notably through web-streaming, in

³ Lindqvist case, Judgement of the European Court of Justice, 6 November 2003 (C-101/01)

order to ensure fairness of the processing further information could be provided on this in the Privacy statement.

3.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the appropriate technical and organizational 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. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing. The EP acknowledges that it has adopted the security measures required under Article 22 of the Regulation.

[...]

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations in this Opinion are fully taken into account. In particular, the EP must:

- provide information in the Privacy statement on the public nature of the hearings, notably through web-streaming;
- ensure that the integrity of the data transmitted from the Council is respected;
- develop further measures in accordance with section 3.5 on the conservation of data for historical purposes and ensure compliance with information requirements and modification of the notification form accordingly.

Done at Brussels, 3 July 2009

(signed)

Peter HUSTINX
European Data Protection Supervisor