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ASSISTANT SUPERVISOR

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Brussels, 28 January 2010
GB/IC/ktl D (2009) 117 C 2009-0666

Dear Mr Godinho,

We are contacting you concerning the notification for prior-checking submitted to the EDPS under Article 27(2) of Regulation (EC) No 45/2001 ("the Regulation") concerning the appointment of middle management staff at the Community Plant Variety Office (CPVO).

The processing operation under examination is subject to prior-checking pursuant to Article 27(2)(b) of the Regulation since it involves an evaluation of the applicants' ability to perform the functions of middle management for which the selection and recruitment procedure has been organised. The evaluation carried out in the selection phase may be followed by a management appraisal procedure in cases where the person must serve a management trial period. The EDPS notes that the CPVO recruitment procedure has already been notified for prior checking to the EDPS (case 2006-351). Furthermore, the processing operation might also involve data related to health (pre-employment medical check-up), the processing of which was already notified to the EDPS for prior checking (case 2006-351). The EDPS outlines that the recommendations he made in these two prior checking cases remain applicable.

The procedure related to the appointment of middle management staff, as well as the data protection practices as presented in the notification, reveal some similarities to other processing operations regarding staff recruitment by EU institutions/bodies/agencies. In this regard, we recommend that you read thoroughly the EDPS Guidelines on staff recruitment¹ as well as the EDPS Joint Opinion on "*Staff recruitment procedures carried out by some Community agencies*"². Both documents concern, *inter alia* the category of middle management staff and they examine all data protection principles in the light of the provisions of Regulation (EC) No 45/2001. It follows that the principles laid down in both the EDPS

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

² EDPS Opinion issued on 7 May 2009 (case 2009-0287).

Guidelines and the EDPS Joint Opinion on staff recruitment are applicable in the case of middle management staff's recruitment carried out by the CPVO.

The EDPS thereby wishes to underline the CPVO's practices which do not seem to be in conformity with the principles of Regulation (EC) No 45/2001 and with the EDPS Guidelines and to provide the CPVO with relevant recommendations.

1. Processing of special categories of data

Facts: Article 10.1 of the Regulation provides 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."* According to the information received by the CPVO - and apart from health-related data the processing of which was already prior checked by the EDPS - no other special categories of data in the sense of Article 10.1 of the Regulation are collected in the context of the selection of candidates for senior positions.

(ii) The application form mentions that *"short listed candidates who are invited to come for an interview should provide a criminal record or a similar official document issued in accordance with their respective law."*

Recommendations:

(i) While it is not the purpose of the processing to collect special categories of data, the EDPS considers that in the context of selecting candidates, applicants may reveal information on their disability or other types of special categories of data. If this occurs, it should be considered that candidates have given their consent to the processing of that data, thus the condition of Article 10(2) would be met. In addition, this consent is given in the context of staff recruitment in order to enable the employer to comply with his specific obligations in the field of recruitment in accordance with Article 10(2)(b) of the Regulation.

(ii) The EDPS underlines that the collection of data relating to offences, criminal convictions or security measures may only be carried out as provided in Article 10.5 of the Regulation: *"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"*. While the EDPS considers that Articles 28 of the Staff Regulations and 12(2) of the Conditions of Employment provide a legal basis to process such data, the EDPS however recommends that an analysis of the content of the national police record/criminal record/certificate of good conduct is carried out on a case-by-case basis so that only relevant data are processed in the light of the Staff Regulation's requirements. Furthermore, as stated in the Guidelines, the EDPS recommends that the criminal record should not be kept and should be returned to the person immediately after the selection and possible recruitment. The data controller may only record in a standard form/spreadsheet the fact that the person is suitable for the performance of his duties and enjoys his full rights of citizen.

2. Conservation of data

Facts: The notification indicates that data of unsuccessful candidates will be destroyed after 2 years from the date of the decision appointing the successful candidates and/or after the end of validity of the reserve list for those candidates placed on a reserve list. Data of successful candidates will be kept in the personal files and destroyed after a period of 10 years from the date of the end of the contract of the staff member.

Recommendation: To conform to the CPVO's practice mentioned above, the EDPS recommends modifying the CPVO's application form which currently states that "*data will be destroyed after 24 months*". The application form should mention that data "*of unsuccessful applicants*" will be deleted after 24 months from the date of the decision appointing the successful candidates. The privacy notice should also be amended to specify that data of candidates placed on a reserve list will be kept for 24 months after the end of validity of the reserve list.

3. Rights of access and rectification

Facts:

(i) With respect to the right of access, the notification indicates that in case of access to conclusions of the pre-selection and/or final interview panels, only a re-transcription of the conclusions will be provided as the original minutes/evaluations could contain comparative elements involving other candidates.

(ii) As to the right to rectification, the notification indicates that after the deadline for submitting the applications, the candidates can modify only data related to their identification. All other data concerning merits and skills collected to determine if the candidate is eligible or not to the position cannot be modified, to respect the principles of transparency and equality between all the candidates.

(iii) The notification does not contain any information as regards the exercise by managers who serve a management trial period of their right of access and rectification to their appraisal data.

Recommendations:

(i) The EDPS recalls that as a principle candidates should be able to have access to their entire file, including the assessment notes/conclusions concerning them drafted by the pre-selection and/or final interview panels. The EDPS notes that the right of access may be limited under Article 20(1)(c) of the Regulation in order to protect the rights and freedoms of other candidates. In cases where comparative data is involved, the CPVO may assess on case by case basis whether full access to the data should be granted to the data subjects or whether certain restrictions should be applied in order to protect the rights and interests of others. The EDPS reminds the CPVO that limitations to the right of access should only be applied when strictly necessary to protect the rights and freedoms of others. In accordance with Article 20(3) of the Regulation, data subjects should be informed of this possible restriction and of the principal reasons for it.

(ii) The right of rectification, on the other hand, can obviously apply only to factual data. The EDPS notes that restrictions to the right of rectification of candidates' data concerning their merits and skills, after the deadline for the sending of documents regarding a given position, may be necessary to ensure objective, certain and stable conditions for the competition, essential to the fairness of the processing. Indeed, this restriction 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. Pursuant to Article 20(3) of the Regulation, the EDPS however recommends adding in the data protection notice a note indicating the principal reasons on which the application of the restriction is based.

(iii) The EDPS further recommends that data subjects who serve a management trial period are granted a right to access to their appraisal report and to the opinion of the Joint Evaluation Committee, if any, and a right to modify factual data and to submit their views before a final decision is reached.

4. Information to data subjects

Facts: A draft privacy statement was provided to the EDPS for information. The EDPS understands that the CPVO will publish the privacy statement on the CPVO's website together with the call for applications and will add it to the Vademecum.

Recommendations: The EDPS is satisfied that the privacy statement contains all the information required under Article 11 of the Regulation. The EDPS however recommends modifying the privacy statement to indicate that criminal records of short listed candidates will be collected and to specify the modalities of collection and conservation of such data. The EDPS further recommends that the comments made in sections 2 and 3 of this letter concerning data retention and the exercise of the rights of access and rectification are fully integrated in the privacy statement. The EDPS encourages the CPVO to take all arrangements to modify the privacy statement and to make it available as soon as possible.

The EDPS recommends that you should adopt specific and concrete measures to implement these recommendations regarding the appointment of middle management staff at the CPVO. To facilitate our follow-up, we would appreciate if you could provide the EDPS with all relevant documents within 3 months of the date of this letter which prove that the recommendations have been implemented.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Martin Ekvad, Legal adviser at the CPVO (DPO by interim)