

**Opinion on the notification for prior checking received from
the Data Protection Officer (DPO) of the European Investment Bank
concerning procedures for personnel selection by panels**

Brussels, 26 March 2010 (file 2009-679)

1. Procedure

On 26 October 2009, the Data Protection Officer (DPO) of the European Investment Bank, hereinafter referred to as the EIB, sent a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 to the European Data Protection Supervisor (EDPS) concerning procedures for personnel selection by panels.

In an e-mail dated 25 November 2009, a number of questions were put to the DPO of the EIB, who replied by telephone on 9 December 2009. More details were requested on 16 December 2009, and the EIB gave its replies on 11 February 2010. The draft opinion was sent to the DPO for his comments on 5 March 2010. These comments were received on 25 March 2010.

2. The facts

This opinion relates to the procedure adopted by the EIB for the selection of personnel for management posts. This procedure involves the appointment of *ad hoc* selection panels. The processing of personal data is based on Article 11(7) (ex Article 13(7)) of the EIB Statute, on Articles 13 to 20 of the Staff Regulations of the EIB and on a document for internal use entitled *Guidelines for internal mobility and promotions*.

The processing relates specifically to the selection of personnel by panels. External recruitment is the subject of file 2009-254. Internal mobility in the Bank is analysed in file 2009-253.

Posts are open to internal and external candidates. Internal candidates must have completed at least two years' service at the Bank.

A panel comprises at least five members, of whom one is a representative of the Human Resources Directorate, one is from a directorate other than that in which the vacancy is to be filled, and one is a member of COPEC, the Joint Committee for Equal Opportunities. This panel is appointed jointly by the competent Director-General and the representative of the Human Resources Directorate, who must belong to a senior management grade. When they convene, the panel members have copies of the candidates' CVs. An interview is held with each candidate. The panel members mark each candidate on a summarised grid. The copies of the CVs are destroyed after the panel's meetings.

The panel then makes a recommendation to the Senior Staff Committee (SSC), which is responsible for the final decision on the choice of candidate. Minutes are drawn up, recording the comments and deliberations of the panel members. The minutes contain a summary of the assessment of each candidate, the reasons for the final selection and a table showing the marks awarded to each candidate. In addition to these data, the nationality, age and summarised career history of the candidates is appended. In the case of internal candidates, the function, grade and place of employment are also added.

For the candidates who have most impressed the panel and have therefore been shortlisted, the Bank obtains an independent opinion from an assessment centre. These centres are set up by the EIB in collaboration with an external provider – Cubiks, the same provider used for the external recruitment referred to above and for the 360° Leadership Feedback Report tool, which was also notified to the EDPS (2009-215), assesses internal and external candidates, submits its recommendations to the selection panel and provides candidates with feedback. The recommendations of the service provider Cubiks are distributed to the panel members during their meeting and returned to the Human Resources Directorate as soon as the meeting is over.

The minutes and the note transmitted to the SSC are retained for an indeterminate period by the Human Resources Directorate. The EIB is proposing that this period be limited to five years.

3. Legal analysis

3.1 Prior checking

Prior checking relates to the processing of personal data as defined in Article 2 of Regulation (EC) No 45/2001, hereinafter referred to as the Regulation, by the Bank in the context of personnel selection by panels. Processing comprises operations for the consultation, storage, recording, organisation, etc., of data. Data processing is carried out by a body of the European Union – formerly ‘Community body’ – in the exercise of activities within the scope of European law – formerly ‘Community law’ – as stipulated in Article 3(1) of the Regulation. The processing of data relating to the activity of selection panels is performed manually for the purpose of compiling the note addressed to the SSC, and the data contained in that note are structured in accordance with prescribed criteria (by candidate, etc.) and are therefore part of a filing system within the meaning of Article 3(2) of the Regulation. Accordingly, this processing falls within the scope of the Regulation.

Article 27(1) of the Regulation subjects to prior checking by the EDPS all ‘*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)(b) identifies some of these risks, subjecting to prior checking by the EDPS processing operations that are intended to evaluate personal aspects relating to data subjects, such as their ability and efficiency. This is the case in the present instance since the purpose of the processing is the selection of the best candidate on the basis of information regarding his or her ability and experience.

In principle, the checks performed by the EDPS precede the processing. In the case of the processing under examination here, the processing was adopted before the prior check was performed by the EDPS. This does not in any way hinder the implementation of the recommendations made by the EDPS.

The notification addressed to the DPO was received on 21 October 2009. Under Article 27(4), the present opinion must be delivered within two months of receipt of the notification.

Because of the suspension of this period for xxx days pending receipt of further information and comments, the EDPS will deliver its opinion by xxx 2010 at the latest.

3.2 Lawfulness of the processing operation

The lawfulness of processing must be examined in the light of Article 5(a) of the Regulation. That article stipulates that personal data may be processed only if processing is necessary for the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in the relevant body of the European Union.

Processing in this case means the processing by the Bank of the data of candidates for high-ranking posts. The selection procedure fits the description of the performance of a task carried out in the public interest. The main purpose of the task is to ensure that the most able staff are selected for senior posts in the Bank. The use of dedicated panels seems to be necessary for the performance of that task. The processing in the present case is thus lawful.

The legal provision cited by the EIB as the basis of its processing does not deal specifically with selection by panel as such. While the processing of data in connection with selection by panels is lawful, the EDPS would like it to be based on a specific document.

3.3 Data quality

Article 4 of the Regulation enumerates certain requirements regarding the quality of personal data, stating that *‘Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed’* (Article 4(1)(c)).

The quality of the data processed by a panel seems to comply with the Regulation. The data provided in the form of recommendations by Cubiks, however, must be used with all due caution as befits the treatment of what are classed as ‘subjective’ data. These recommendations constitute additional clarification and are by no means the only source of information on which a panel basis its decisions.

Moreover, data must be processed *‘fairly and lawfully’* (Article 4(1)(a)). The lawfulness of processing was analysed in subsection 3.2 above. As for the fairness of processing operations, this relates to the information given to data subjects (see subsection 3.7 below).

Lastly, data must be *‘accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified’* (Article 4(1)(d)). Administrative data come either from the candidates themselves or from the Bank’s human-resources database (Peoplesoft). They take the form of CVs. It is therefore reasonable to assume that the data are accurate. Data relating to assessments, on the other hand, are generated by the panel or by Cubiks; in view of the subjective nature of the exercise, it is not easy to guarantee their accuracy. The rights of access and rectification are a means of ensuring that data subjects are able to verify that their own personal data are accurate and up to date and that their file is complete (see subsection 3.6 below on access and rectification rights).

3.4 Data storage

Under Article 4(1)(e) of the Regulation, 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 were collected or for which they are further processed'*.

As mentioned above, the minutes and the note to the SSC are stored by the Human Resources Directorate for an indeterminate period. The EIB estimates that a period of five years would be reasonable. This time limit seems reasonable in the light of the intended purpose. If such a time limit were adopted and applied, it would be consistent with Article 4(1)(e).

There are no plans to store data for archiving, statistical or research purposes.

3.5 Transfer of data

Under Article 7(1) of the Regulation, transfers of data within or between Community institutions or bodies are permissible only *'if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient'*.

The EDPS considers that the transfer of data – the note to the SSC – may be regarded as necessary for the legitimate performance of the SSC's tasks. Accordingly, the requirements laid down by Article 7(1) of the Regulation seem to be met.

The EDPS wishes to point out that access may also be given to bodies authorised to conduct external checks, such as OLAF or the EDPS itself. Moreover, the EU Civil Service Tribunal and the European Ombudsman may receive copies of items from these files on request in the context of appeals to the Civil Service Tribunal or of petitions to the Ombudsman. Transfers are legitimate in these cases, because they are necessary for the legitimate performance of tasks within the recipients' sphere of competence.

In addition, Article 7(3) of Regulation (EC) No 45/2001 stipulates that *'The recipient shall process the personal data only for the purposes for which they were transmitted'*. It is therefore important to remind all those who receive and process data in connection with the upgrading of officials that they must not use such data for any other purpose.

3.6 Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 gives data subjects a right of access to stored personal data relating to them. Article 14 enshrines the right to obtain the rectification of inaccurate or incomplete personal data.

Data subjects must therefore have a guaranteed right of access to the work of the panel, i.e. the minutes of its meeting and its recommendation to the Senior Staff Committee of the Bank. The right of access may be limited in order to guarantee the secrecy of the selection panel's deliberations. This limitation must be seen in the light of Article 20(1)(c), which states that European bodies may restrict the application of Article 13 where such restriction constitutes a necessary measure to safeguard the protection of the data subject and of the rights and freedoms of others. Accordingly, where the panel's deliberations are covered by the principle of confidentiality, the right of access cannot be granted even though personal data are being processed if those data are covered by the exemption under Article 20(1)(c) for the protection of other people's rights and freedoms. In the present case, it is about the rights of panel members and the need for them to act totally independently. This implies that it is possible for

the Bank, on a case-by-case basis, to exclude information on specific remarks made by panel members from the personal data that may be disclosed on request to a data subject on the basis of his or her right of access.

Article 20(1)(c), moreover, may also be applied to protect the rights of other candidates. If the data in question are comparative, the EIB may assess on a case-by-case basis whether full access should be granted or whether provisions should be made for certain limits on the right of access.

The EDPS would point out that any limitation of the right of access must be applied restrictively and must be an essential measure designed to guarantee the protection of other people's rights and freedoms.

Access and rectification rights must also be granted in respect of Cubiks' assessments. These rights are analysed in the aforementioned opinion dealing with external recruitment.

In the context of selection by panel, the right of rectification is limited to data classed as objective as opposed to subjective data, which derive from the panel's appraisal of a candidate.

3.7 Information to be given to the data subject

Article 11 of Regulation (EC) No 45/2001 enumerates the information to be given to data subjects when data have been collected from them. Article 12 of the same Regulation lists the information to be supplied in cases where the data have not been obtained from the data subject. In the present case, the data are obtained from data subjects as well as from a human-resources database (Peoplesoft) and from the subcontractor, Cubiks. Articles 11 and 12 are therefore applicable to the processing.

The EDPS has not been aware of any information relating specifically to selection by panels. There is a document for internal use entitled *Guidelines for internal mobility and promotions*. It appears, however, that this document relates to procedure, not to the protection of personal data. It is an internal document to which external candidates do not have access.

The EDPS therefore recommends that candidates be duly provided with the information defined in Articles 11 and 12.

3.8 Processing of data on behalf of the data controller

The subcontracting of the assessment of particular candidates to an external service provider, Cubiks, is analysed in the aforementioned opinion dealing with external recruitment.

3.9. Security

Under Article 22 of Regulation (EC) No 45/2001, which deals with the security of processing, *'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'*.

On the basis of the information provided, the EDPS has no reason to believe that the Bank has not implemented the security measures prescribed by Article 22 of the Regulation.

Conclusion

The proposed processing operation does not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. In particular, this means that the Bank:

- should inform the EDPS of the specific legal basis dedicated to selection by panels;
- guarantee the right of access and rectification of data subjects to the deliberations of selection panels recorded in the note to the SSC and the minutes, as outlined in subsection 3.6 above;
- provide data subjects with the specific information on the processing of their personal data enumerated in Articles 11 and 12 of the Regulation.

DONE at Brussels on 26 March 2010

(signed)

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Deputy European Data Protection Supervisor