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Mr DEBUS
European Chemicals Agency (ECHA)
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Brussels, 27 July 2010
GB/DH/kl D(2010)1195 C 2010-0109

Subject: Prior-checking notification, case 2010-0109

Dear Mr Debus,

We reviewed the documents you have provided the EDPS with concerning the notification for prior-checking under Article 27(2) of Regulation 45/2001 (the Regulation) on the selection and recruitment of temporary and contract agents, Seconded National Experts and Trainees at ECHA. The processing operation under examination is subject to prior-checking in conformity with Article 27(2)(b) of the Regulation, since it involves an evaluation of the applicants' ability to perform the functions of the post for which the selection and recruitment procedure has been organised. The processing operation in the present case might also involve data related to health (collection of medical certificate or disability data) and to criminal offences (collection of police record), which would constitute an additional ground for prior-checking in the light of Article 27(2)(a) of the Regulation.

The procedure related to the selection and recruitment of staff, as well as the data protection practices as presented in the notification reveal some similarities to other processing operations regarding selection and recruitment by EU institutions/bodies/agencies. In this regard, the EDPS issued Guidelines on staff recruitment¹ as well as a Joint Opinion on "*Staff recruitment procedures carried out by some Community agencies*"². On 29 October 2009 the EDPS requested the Union bodies and institutions that had not yet notified their recruitment processing operation to do so in the light of the Guidelines indicating any differences with them. In the present case, the notification has been submitted after 29 October 2009 and therefore, the EDPS will first underline, in the light of ECHA cover letter, ECHA practices which do not seem to be in conformity with the principles of the Regulation and with the EDPS Guidelines and will then restrict his legal analysis to those practices. It is clear that all the relevant recommendations made in the guidelines apply to

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).

the processing operations put in place in the frame of the selection and recruitment of temporary and contract agents, Seconded National Experts and Trainees at ECHA.

1. Data retention

Facts: The data of the recruited candidates are kept for ten years after the end of the contract. The data of candidates put on a reserve list are kept until the end of the validity of the reserve list and the data of those candidates who are not recruited are kept for two years after the closure of the procedure.

Reminders:

i) Retention period of criminal records and of sensitive data are also specific. ECHA should apply the recommendations made in the guidelines.

2. Transfers

Facts: An external contractor is partly in charge of the selection, in particular in providing pre-selection and selection services in the recruitment process of Senior and Middle Managers for ECHA.

Reminder: In this case, an external company covered by the data protection Directive is in charge of carrying out tasks for ECHA. The necessity of the transfer of data to the company should be examined under the conditions provided in Article 8(a), as it is performing an official task on behalf of ECHA. In particular, it must be established whether the data are necessary for the performance of its task. In the case the necessity of such transfer is established, the precise mandate of the recipient should be established in a contract or a legal act. Their respective obligations should also be ensured in the light of the confidentiality and security requirements pointed out in Article 23 of the Regulation.

3. Right of access and rectification

Facts: The candidates are informed via the data protection notices (see below) of the point of contact to which they may submit their request to access and rectify their data.

Reminder:

The rights of access and rectification deserve a special attention. ECHA did not provide the EDPS with comprehensive information as to the implementation of both rights. The EDPS would like to remind the rules developed in the guidelines.

The EDPS has always recommended in his opinions that data subjects should be given access to their evaluation results regarding all stages of the selection procedure (pre-selection, interview and written tests), unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations are applied. This exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the Selection Committee if such access would undermine the rights of others applicants or the freedom of members of the selection Committee. Nevertheless, data subjects should be provided with aggregated results.

Therefore, it should be clearly established that:

- (i) the objective of any confidentiality requirement is to ensure that the Selection Committee is able to maintain its impartiality and independence and is not under undue influence from the controller, the candidates, or any other factor and
- (ii) any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective.

In a particular case, the EDPS recommended that the agency in question should provide access, upon request, to:

- (i) the evaluation sheets drawn by the selection boards,
- (ii) the “*separate assessment and decision documents signed by Chairpersons - on behalf of committees*” documenting the final decision of the selection board made available to candidates and to the
- (iii) the minutes of the selection boards.

Right of rectification: As concerns the right of rectification, the EDPS acknowledges that this right can only apply in the case of factual data processed within the selection procedure. In addition, he points out that any limitation to the right of rectification after the closing date of submitting applications should only apply to data related to the admissibility criteria and not to the identification data that can be rectified at any time during the selection procedure. The EDPS considers this limitation necessary for the fairness of the selection procedure and justified in terms of Article 20(1)(c) of the Regulation. It is however important that all applicants are informed about the scope of this restriction before the beginning of the processing operation (see below “*right of information*”).

4. Information to be given to the data subject

Facts: An automated data protection information notice is available via the application web form and in the guide for applicants. The EDPS has carefully analysed it. The notice contains information related to the purpose of the processing operation and about the right of access and rectification of the data subject. A general data protection notice (not specific to selection and recruitment) is also available on ECHA website.

Recommendations:

i) Content of the information note: As to the content of the data protection note, the EDPS would like to highlight that all elements listed in both Articles 11 and 12 of Regulation 45/2001 should be clearly and thoroughly indicated in the note. The time-limit for storing the data, the different legal basis of the different selection and recruitment procedures and the recipients of the data are not presently indicated.

ii) Information on the right of rectification: As indicated above, it is important that all applicants are informed about the scope of **restriction** of this right before the beginning of the processing operation (see below “*right of access and rectification*”).

5. Processing of personal data on behalf of controllers

Facts: An external contractor (recruitment agency) collects and processes data on behalf of ECHA to select the best suitable candidate for a specific post. The EDPS received a copy of the contract and carefully analysed it.

Recommendation:

The contracts or the legal acts governing the outsourcing of the selection of agents to external contractor should stipulate that the processor shall act only on instructions from the controller and that the obligations set out in Articles 21 and 22 of the Regulation shall also be incumbent on the processor unless the processor is already subject to obligations with regards to confidentiality and security laid down in the national law of a Member State.

The EDPS is satisfied that ECHA introduced clauses on "data protection" and on "security and confidentiality". As to the data protection clause however, the EDPS does have certain reservations. Indeed, the clause only refers to personal data "*included in the contract*" whereas the contract should serve to protect also any personal data processed by the subcontractor in the performance of the contract (data relating to the selection, for example). Furthermore, reference to the rights of the data subject (access, rectification, recourse to the EDPS) mentions the contractor as the beneficiary of these rights, whereas according to the data protection regulation any person concerned by the processing of the data by processor should be entitled to exercise his/her rights. The contract should further specify that the processor should only process personal data on instructions of ECHA. The EDPS therefore invites you to revise the present clause.

6. Conclusion

The EDPS recommends that ECHA adopts specific and concrete measures to implement these *recommendations* regarding the selection and recruitment of temporary and contract agents, Seconded National Experts and Trainees within ECHA. As concerns the *reminders* mentioned in this note, the EDPS would like to be informed about the situation regarding the compliance with the guidelines. To facilitate our follow-up, it would therefore be appreciated 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.

Kind regards,

(signed)

Giovanni BUTTARELLI

Cc: Ms Minna HEIKKILÄ, Data Protection Officer of ECHA
Mr Bo BALDUYCK, Assistant Data Protection Officer of ECHA