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Brussels, 19 October 2010
GB/IC/kd D(2010)1590 C 2010-0466

Subject: Prior-checking notification, case 2010-0466

Dear Ms Pavesi,

We reviewed the documents you have provided the EDPS with concerning the notification for prior-checking under Article 27(2) of Regulation (EC) No 45/2001 (the Regulation) on the processing "EASA recruitment procedure and e-Recruitment application tool" at the European Aviation Safety Agency (EASA). 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 criminal record), which 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 (the Guidelines) 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 the Guidelines. In the present case, the notification has been submitted after 29 October 2009 and therefore, the EDPS will first underline, in the light of the EASA cover letter, the EASA 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

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).

recommendations made in the Guidelines apply to the processing operations put in place in the frame of the selection and recruitment of staff at the EASA.

1. Processing of special categories of data

Facts: EASA recruitment application form includes a question related to previous criminal offences whereby the applicant is asked if he/she has ever been found guilty of a criminal offence and, in the affirmative, to provide clarifications. Having considered the EDPS Guidelines, EASA proposes to reformulate the question to focus on the present criminal offences of the applicant.

Reminder: The EDPS underlines that pursuant to Article 10(5) of the Regulation, the collection by EASA of data relating to offences, criminal convictions or security measures for the purpose of recruitment will be lawful only if carried out in the frame of Article 28 of the Staff Regulations and Article 12(2) of the Conditions of Employment. The question that is currently being asked by EASA to applicants about any previous criminal offences is clearly excessive and goes beyond what is necessary to verify that a person *"enjoys his full rights as a citizen"* and that *"he produces the appropriate character references as to his suitability for the performance of his duties"*. The proposal made by EASA to narrow the question to present criminal offences does not resolve this issue, as the mere fact of asking such a question may lead to revealing data that is unnecessary for the purpose of the recruitment. The EDPS therefore reiterates, as stated in the Guidelines, that the question about criminal convictions should be removed from the recruitment application form.

As to the collection of criminal records, the EDPS considers that these should only be collected from persons who have actually been selected for recruitment. The relevant documents should not be requested from candidates during the selection process but only at the end of the selection procedure. This would ensure that only those candidates who have been selected for a position would need to provide their current criminal record.

2. Data quality

Facts: In its recruitment application form, EASA collects data concerning the data subject's private sphere (leisure activities and sport) and reasons for leaving a previous post. There are no indications in the printed form that was communicated to the EDPS that these questions are optional.

Reminder: As outlined in the Guidelines, and without prejudice to the principle of relevance, the EDPS recommends that the questions about interests and skills not related to work as well as reasons for leaving be made optional in the recruitment application form since they are not primarily relevant for the purpose of the application. The EDPS also stresses that EASA should ensure that applicants not answering optional questions are not put in a disadvantaged position.

3. Data retention

Facts: At the moment all recruitment files from the end of 2003 onwards are kept. EASA is in the process of drafting a records management policy, which will also define the period of storage of the documents connected to the selection procedure.

Recommendations: The EDPS reminds EASA on the need to define appropriate data retention periods. Article 4(e) of the Regulation states that data shall be kept in a form which permits identification *"for no longer than is necessary for the purposes for which the data were collected or for which they are further processed."* The EDPS Guidelines emphasise the need to differentiate

between data subjects and situations (recruited, non-recruited, non-recruited on a reserve list) in order to determine appropriate data retention periods, and EASA should take full account of this.

Furthermore, the EDPS wishes to highlight the following in relation to the retention of criminal records. After examination of the record, if EASA considers that the candidate fulfills the requirements of the Statute, whether the criminal record is clean or not, the document may only be kept if the part containing information about the criminal offence or the absence thereof is rendered illegible. This process must make it impossible to distinguish between clean criminal records and others. The data controller should determine the practicalities of such a process. For example, one solution would be to return the original document to the data subject and to only keep a certificate similar to the one used in the context of pre-recruitment medical examinations (fit/not fit).

On the other hand, if after examination of a record which is not clean EASA considers that the candidate does not fulfill the requirements of the Statute, the original document may be kept as is for as long as necessary for the purpose of the processing (e.g. in order for EASA to justify its decision in case of a claim or complaint). In such cases however, the criminal record should be retained for no longer than 5 years. At the end of the retention period, all documents in paper and electronic format containing information about criminal records should be destroyed.

The EDPS reminds EASA to carefully apply the EDPS recommendations, as expressed in the Guidelines and above, when defining data retention periods in relation to the selection procedure and to keep him informed of the measures adopted.

4. Right of access and rectification

Facts: EASA is in the process of drafting Implementing Rules which will include a section on the Data Subject's rights and on how to exercise them.

Recommendation: The EDPS should be consulted on EASA Implementing Rules, in accordance with Article 28(1) of the Regulation.

5. Information to be given to the data subject

Facts: EASA has adopted a data protection information notice. There is however no indication as to how this notice is communicated to applicants. Furthermore, the notice does not indicate any retention periods. It mentions that data are provided on a voluntary basis although failure to provide data will automatically exclude candidates from the recruitment process.

Recommendations:

(i) As to the communication of the data protection notice, the EDPS outlines that the data protection notice should be made readily available to data subjects at the point of collection of their data.

(ii) With respect to the content of the data protection notice, once appropriate data retention periods have been adopted (see point 3 above) the EDPS recommends that the specific time-limits for storing the data are clearly indicated in the notice as requested in Articles 11 and 12 of the Regulation. Furthermore, it should be made clear in the form itself as well as in the data protection notice which fields are mandatory and which are truly voluntary (see in this respect the reminder in point 2 above).

6. Conclusion

The EDPS recommends that EASA adopts specific and concrete measures to implement these recommendations regarding the selection and recruitment procedure and e-Recruitment application tool at EASA. 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 all recommendations and reminders have been implemented.

Kind regards,

(signed)

Giovanni BUTTARELLI

Cc: Mr Patrick Goudou, EASA Executive Director
Mrs Andrea Lorenzet, Head of Personnel