

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding "CRIS-Follow up of experts availability in FWC assignment"

Brussels, 23 February 2011 (Case 2010-0465)

1. Proceedings

On 18 June 2010, the European Data Protection Supervisor (EDPS) received a notification for prior checking from the Data Protection Officer (DPO) of the European Commission regarding "CRIS-Follow up of experts availability in FWC assignment" and replacing the notification "CRIS-Follow up of performance of framework contractors and their experts for external aid" (2009-386).

On 13 July 2010, the EDPS requested further information. He received the responses on 11 November 2010. On 7 December 2010 a new set of questions were sent to the DPO. The responses were received on 5 January 2011.

2. The facts

The processing operation is established on the basis of Article 27 of the Financial Regulation (sound financial management, see legal basis below)¹. **The purpose** is to give the possibility to apply a penalty in case experts are unavailable at the start date foreseen in the contract. Indeed, if the Commission decides to look into cases where the expert fails three times to respect his commitment regarding his availability, he may be excluded "from other tender procedures and contracts funded by the EC" for a period of three months. This exclusion decision is subject to a contradictory procedure in which the expert will have the opportunity to express himself on the subjects of the findings. In case the expert again fails to respect his commitment three times, the penalty might be extended to the entire Framework contract for the remaining period of validity of the Framework contract.

Description of the system and procedure: Short term services for external aid are contracted via a multiple Framework contract (FWC). For each specific assignment, the Framework contractors (FWC'rs) in competition send an offer which includes CV of experts together with a statement of exclusivity and availability for each expert. In this statement, the expert commits himself to be available at the start date of his services for the period of execution foreseen. The processing envisaged will record the availability or unavailability of the experts foreseen for the assignment. In case of repetitive absences, the penalty explained above will be applied. Expert's data are encoded in the Common Relex Information System (CRIS). The list of experts for a given assignment appears at the level of the specific contract

¹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 248, 16.9.2002, p. 1).

in CRIS. It indicates whether the experts have participated or not to the execution of the assignment. CRIS users other than the central FWC team have no access to the entire records of the availability /unavailability of experts. This specific application will only contain the field availability/unavailability of the expert, practical modalities as to how the central FWC team in DEVCO will keep track of experts' exclusion is not yet defined. Following the Commission, the Framework contractor who sent the CV of the excluded expert will probably be involved in the procedure.

The data subjects concerned are the experts working for the assignment performed under the framework contract.

The data processed are the names and dates of birth of the experts of the winning offer as well as their participation or non participation in the assignment.

Information to the data subject: The statement of exclusivity and availability signed by the expert will refer to a privacy statement which will be published on the DEVCO website, in the FWC pages.

The privacy statement for experts having participated to framework contract assignments contains information on the identity of the data controller, the purposes of the processing operation, categories of personal data concerned, recipients or categories of recipients, general description of access rights to the database, contact information to make a query about the content of the database and request for modifications, time limits for storing the data, right to have recourse to the Commission Data Protection Officer and to the EDPS.

Procedures to exercise the rights of data subjects:

Access to records in the database: the experts can check any time by addressing the FWC Team in DEVCO through the mail box indicated in the privacy statement whether they are recorded in the database and the data recorded. They can rectify inaccuracies. The right of access applies to the CRIS database in general and to the specific application related to the availability/unavailability of the expert.

Recipients or categories of recipients:

The FWC users encode in CRIS the participation of experts at the level of each specific contract. FWC users who have access to CRIS are European External Action Service and DEVCO DG's (and DGs with sub-delegated external aid credits) and EU Delegations in third countries. All CRIS users have access to the data of each specific contract. For the experts' availability overview and search tool by name, the list of recipients is further limited to the central FWC Team in DEVCO. The internal auditors of the European Commission (IAS), the external auditors (Court of Auditors) and duly authorised investigation authorities are granted access upon request under the exception specified under Article 2(g) of Regulation (EC) No 45/2001.

Conservation of data/retention period: The information on the unavailability of the experts will be kept for the period within which the corresponding framework contract must be kept: 7 years according to Article 25 of the General conditions of Framework contracts.

Security of processing

Access to CRIS is controlled via a unique user-id and password. CRIS users other than DEVCO have no access to the availability/unavailability of experts. The processing operation is fully **automated**.

Legal basis:

The data controller bases the procedure on Article 27 of the Financial Regulation, which states that: "*(1) Budget appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness. (2) The principle of economy requires that the resources used by the institution for the pursuit of its activities shall be made available in due time, in appropriate quantity and quality and at the best price. The principle of efficiency is concerned with the best relationship between resources employed and results achieved. The principle of effectiveness is concerned with attaining the specific objectives set and achieving the intended results*".

More specifically, Framework contract operations are mainly financed out of external aid instruments and of the European Development Fund. Article 96 of Council Regulation (EC) No 215/2008 on the Financial Regulation applicable to the 10th European Development Fund refers to exclusion to participation to tenders and contracts in case that the candidates or tenderers "*(c) have been guilty of grave professional misconduct proven by any means which the contracting authority can justify*". Article 97 states that "*a contract shall not be awarded to candidates or tenderers who, during the procurement procedure for this contract: (...) (c) find themselves in one of the situations of exclusion, referred to in Article 96 (1), for this procurement procedure*".

3. Legal analysis

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The notification received on 18 June 2010 relates to processing of personal data in the terms of Article 2 (b) of Regulation (EC) 45/2001 ("any information relating to an identified or identifiable natural person" - Article 2(a)). Indeed, the registration of a data subject in the Common Relex Information System (CRIS) includes data relating to identified natural persons.

The data processing is performed by a European Union institution (former "Community institution") in the exercise of activities which fall within the scope of the European law (former "Community law") (Article 3 (1) of the Regulation).²

Processing operation allowing the follow up of experts' availability in FWC assignment is automated within the meaning of Article 3.2 of Regulation (EC) No 45/2001. A search tool (by names) allows the central FWC Team in DEVCO to see the names of experts who have not respected their commitment, and the exclusion of experts who have repeatedly failed to participate in the execution of the assignments for which they have submitted a declaration of exclusivity. The Regulation therefore applies in accordance with Article 3.2.

² The concepts of "Community institutions and bodies" and "Community law" are not to be any more used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in the light of the Lisbon Treaty.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27.2 contains a list of processing operations likely to present such risks including, in Article 27.2.d "*processing operations for the purpose of excluding individuals from a right, benefit or contract*". The consultation of the availability/unavailability of experts in the CRIS database may lead to the exclusion from a contract and therefore is covered by Article 27.2.d and as such subject to prior checking by the EDPS.

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.

Deadlines: The formal notification was received by e-mail on 18 June 2010. Pursuant to Article 27.4 of Regulation (EC) No 45/2001, the two-month period within which the EDPS must deliver an opinion was suspended during 187 days. The EDPS should therefore deliver an opinion by 24 February 2011.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5 (a) is that 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 (...)*". The processing of personal data for performance of tasks carried out in the public interest includes "*the processing necessary for the management and functioning of those institutions and bodies*" (recital 27).

EuropeAid delivers aid through a set of financial instruments with a focus on ensuring the quality of EU aid and its effectiveness. Experts are contracted to implement projects or activities that relate to the European Union's external aid programmes. The proper management -in particular the availability- of experts is a task carried out in the public interest so as to respect the principle of sound financial management established in these financial instruments.

As stated above, this task is based on legal instruments adopted on the basis of the Treaties:

Pursuant to Article 27 of the Financial Regulation: "*(1) Budget appropriations shall be used in accordance with the principle of sound financial management, namely in accordance with the principles of economy, efficiency and effectiveness. (2) The principle of economy requires that the resources used by the institution for the pursuit of its activities shall be made available in due time (...)*".

The CRIS exclusion application concerns the experts who are in one of the situations referred to in Article 96 of the Financial Regulation applicable to the 10th European Development Fund: "*Candidates or tenderers shall be excluded from participation in procurement procedures if: (...) (c) they have been guilty of grave professional misconduct proven by any means which the contracting authority can justify (...)*".

Experts are hired for specific assignments by the Framework contractors and are in principle sub-contractors. Sub-contractors must satisfy the same eligibility criteria **as** the Framework

contractor who is in competition for a specific contract as per article 4.6 of the General conditions of the FWC:

"Sub-contractors must satisfy the eligibility criteria applicable to the award of the contract and they can not be in any of the situations excluding them from participating in contracts which are listed in Section 2.3.3 of the Practical Guide to contract procedure for EC external actions".

Section 2.3.3.c. of the Practical guide refers to the fact that candidates and tenderers are excluded when *"they have been guilty of grave professional misconduct proven by any means which the Contracting Authority can justify"*.

These legal instruments support the processing of personal data in relation to the CRIS exclusion application.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4.1.c. of the Regulation, personal data must be *"adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed"*. The information presented to the EDPS on the data processed appears to meet these requirements.

The data required are administrative in nature (surname and first name, date of birth of the expert, his/her participation or no participation to the assignment) and are necessary for the proper functioning of the procedure for exclusion. The EDPS considers that Article 4.1.c of Regulation (EC) No 45/2001 is respected.

The EDPS reminds that the data kept to keep track of the penalties applied should also be processed in compliance with Article 4.1.c.

Accuracy: Article 4.1.d. of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and that *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*. The data subject has the right to access and the right to rectify data, so that the database can be as complete and accurate as possible. This also contributes to ensuring the quality of data.

Fairness and lawfulness: Article 4.1.a. of the Regulation also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.7)

3.4. Conservation of data/ Data retention

Article 4.1.e. of the Regulation states that 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"*.

The EDPS notes that a time limit of 7 years is set for the records of experts' unavailability. Following the Commission, this retention period is in line with Article 25 of the Framework Contract Europaid General Conditions that states: *"The Contractor will allow the European Commission, the European Anti-Fraud Office and the European Court of Auditors to verify, in accordance with the tasks entrusted to them by the Treaty establishing the European Community, by means of on-the-spot checks of original documents, the implementation of the*

project and conduct a full audit, if necessary, on the basis of supporting documents for the accounts, accounting documents and any other document relevant to the financing of the project. These inspections may take place up to 7 years after the final payment".

The EDPS considers that a conservation of the data for a period of 7 years is reasonable. Nevertheless, the contractor will not be requested to allow ex post verification as far as experts' availability is concerned. On the other hand, the Commission could be requested to subsequently prove experts' availability or unavailability. That is why the base for the retention period should rather be the provisions of the Financial Regulation in Article 49 of the implementing Rules of the Financial Regulation, for reasons of audit trails.

The EDPS reminds that the data kept to keep track of the penalties applied should also be kept for no longer than is necessary for the purposes for which the data were collected, in compliance with Article 4.1.e.

3.5. Transfer 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.

In the case in point, no structural transfers are foreseen but internal (IAS) and external auditors (Court of Auditors) as well as duly authorised investigation authorities are granted access for the legitimate performance of tasks covered by their competence. These transfers are compliant with Article 7.1.

As it is mentioned in the description of facts under "description of the system and procedure", the Framework contractors who had sent the CVs of excluded experts will probably be recipient of the data. If this is the case, the transfer of data should be done in compliance with Article 8.a of the Regulation.

3.6. Right of access and rectification

Article 13 of Regulation 45/2001 grants the data subject the right of access to personal data being processed. Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data.

As described above, specific procedures have been established to grant these rights to the data subjects and information has been provided in the privacy statement.

The EDPS considers as compliant the right of access and rectification as described in the facts.

3.7. 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.

The EDPS received a copy of the Privacy Statement, where the requirements requested by Article 11 and 12 are covered. The EDPS also notes that the controller suggested adding information about the applicable rules of the penalty. This is warmly welcomed by the EDPS. This privacy statement will be published on the DEVCO website and will be accessible via the statement of exclusivity and availability. These measures should be implemented before launching the processing operations and the controller should verify that the measures adopted properly ensure an easy access to the privacy statement.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account. In particular, the Commission should:

- inform the EDPS as to the practical modalities adopted to apply the penalties: in that regards, (i) the data kept to keep track of the penalties applied should also be processed in compliance with Article 4.1.c. and (ii) these data should be kept for no longer than is necessary for the purposes for which the data were collected, in compliance with Article 4.1.e;
- ensure that in case of transfer of data to Framework contractor, this transfer is compliant with the Regulation;
- ensure that the privacy statement is easily accessible before launching the processing operation;

Done at Brussels, 23 February 2011

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