



GIOVANNI BUTTARELLI
ASSISTANT SUPERVISOR

Mr Frank BRISCOE
Director
Fusion For Energy (F4E)
c/ Josep Pla, n°2
Edificio 3
08019 Barcelona

Brussels, 07 April 2011
GB/DH/kd D(2011) 691 C 2010-0454

Subject: Prior-checking notification, case 2010-0454

Dear Mr Briscoe,

we have examined the documents the European Joint undertaking for ITER and the development of Fusion Energy (F4E) sent to the EDPS concerning the notification for prior checking on the processing of data in connection with the selection and recruitment of officials, temporary and contracts agent at the F4E. This data processing is subject to prior checking by the EDPS, since it involves the assessment of personal aspects of candidates - their ability to perform the duties required of a particular post, for example - as set out in Article 27(2)(b) of Regulation (EC) No 45/2001.

The data protection aspect of the selection and recruitment of officials, temporary and contract agents is dealt with in the Guidelines¹ which the EDPS has issued concerning staff recruitment procedures within European Union institutions and agencies. On 29 October 2009, the EDPS asked those institutions and agencies which had not yet sent notice about those procedures to compare their respective procedures with that document and to inform the EDPS of any points where they differed in terms of data protection.

In the present case, the letter from the F4E states that its procedure conforms to the Guidelines and that the F4E fully applies the recommendations included in the Guidelines.

Following an examination of the various documents supplied by the F4E, we do however recommend that you ensure properly **the right for the data subject to obtain from the controller the blocking of data** in accordance with Article 15 of the Regulation.

¹ The Guidelines are available on the EDPS website in the Supervision section, under the heading 'Guidelines'. The EDPS has also published a Joint Opinion, dated 7 May 2009 (case 2009-0287), which can also be found on his website.

Several situations must be distinguished:

(1) when the data subject contests the accuracy of his/her data, the data should be blocked "*for a period enabling the controller to verify the accuracy, including the completeness of the data*". Thus, when receiving a request for blocking on this ground, the ERA should immediately block the data for the period necessary for verifying the accuracy and completeness of the data.

(2) when the data subject requires the blocking of his/her data because the processing is considered unlawful, or when data must be blocked for purpose of proof, the ERA will need some time to make this assessment before deciding to block the data. In such cases, even though the request for blocking may not take place immediately, it should however been dealt with promptly in order to preserve the data subject's rights. The decision as to whether to block the data should be taken by the F4E as soon as possible and at the latest within the delay of 15 working days.

Concerning the **retention period** of the candidates included on a reserve list but not recruited, the EDPS recommends adding a period of two years after the validity of the list had expired. This is the time period within which the data subject may lodge a complaint with the European Ombudsman.

Finally, the EDPS is not in favour of the use of **Article 5 (d)** as the main legal basis to legitimise the processing operation. The consent in the context of employment is of delicate nature and deserves special attention with regard to the information given to the data subject. In this case, grounds for lawfulness can be found in Article 5 (a) (Staff Regulations, CEOS, Decisions establishing the EU body) as rightly mentioned in the notification. The consent may be used as an **additional** ground to legitimise the processing operation.

Having said this, in the selection and recruitment context, the consent may be used to lift the prohibition to process special categories of data in cases where the data subject provides for data which he/she knows are not mandatory. This is also why information on whether information is mandatory or voluntary (Article 11(1)(d)) is so important. Moreover, the consent in the context of sensitive data must be "explicit" following Article 10(2)(a).

The box 13 a/ (time limit for blocking and erasure of the different categories of data) of the notification and the privacy statement (time limits for storage and lawfulness of the processing) should be updated according to paragraphs above.

Please inform the EDPS of the measures taken based on the recommendations of this opinion within a period of 3 months.

Sincerely yours,

(signed)

Giovanni BUTTARELLI

Cc: Mr Radoslav HANAK, F4E Data Protection Officer