

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Central Bank regarding the "Selection of the members of the European Systemic Risk Board Advisory Scientific Committee".

Brussels, 13 April 2011 (Case 2011-0101)

1. Proceedings

On 3 February 2011, the European Data Protection Supervisor ("*the EDPS*") received a notification for prior checking relating to the processing of personal data for the purpose of selection and appointment of members of the Advisory Scientific Committee ("*the ASC*") of the European Systemic Risk Board ("*the ESRB*") and establishment of a reserve list, from the Data Protection Officer ("*the DPO*") of the European Central Bank ("*the ECB*") at the request of the ESRB pending the appointment of a Data Protection Officer for the ESRB¹.

On 15 February 2011, the EDPS requested further information on the basis of the notification received by electronic mail. The replies were provided on the following day. On 21 March 2011, the EDPS sought some more clarifications from the DPO and the answers were given on 25 March 2011.

The draft opinion was sent to the DPO for comments on 6 April 2011. The EDPS received a reply on 8 April 2011.

2. Facts

The ESRB was established by Regulation 1092/2010 (see below) as an independent body responsible for the macro-prudential oversight of the financial system within the E.U. The ESRB Secretariat is in charge of the processing operation under analysis. The ECB provides the ESRB Secretariat with inter alia administrative and logistical support under Council Regulation 1096/2010 (see below).

Legal basis

The processing operation under analysis is based on the following legal instruments:

- E.U. Regulation n. 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a ESRB ("*Regulation 1092/2010*"),

¹ The General Board of the ESRB - through its Decision 2011/4- appointed the DPO of the ECB as the DPO for the ESRB from 25 March 2011 onwards. The Executive Board of the ECB authorised the DPO of the ECB to take up this independent mandate for the ESRB.

- Council Regulation (E.U.) n. 1096/2010 of 17 November 2010 conferring specific tasks upon the ECB concerning the functioning of the ESRB ("*Council Regulation 1096/2010*"),
- Decision of the ESRB of 20 January 2011 adopting the rules of procedure of the ESRB (in particular Article 11 on the ASC) ("*the Rules of procedure of ESRB-2011-1*"),
- Decision of the ESRB of 20 January 2011 (2011/2) on the procedures and requirements for the selection, appointment and replacement of the members of the ASC ("*the Decision on the selection procedure of the ASC-2011/2*").

On 8 February 2011 the first selection procedure of external experts to be appointed for the ASC of the ESRB was launched with the publication of the call of expression of interest in the Official Journal. The deadline for submitting applications was 1st March 2011. The procedure has been finalised and on 18 March 2011 a press release has been issued with the publication of the names of the appointed experts of the ESRB's ASC.

Data subjects

The data subjects are all candidates applying to the publication of the call for expression of interest for the ASC.

Purpose

The purpose of the processing operation in question is to organise pre-selection and selection procedures for the appointment of 15 external experts for the ESRB's ASC, of a Chair and two Vice-Chairs for the ASC and the establishment of a reserve list. As it is stated in Article 12(1) of Regulation 1092/2010, candidates will be selected on the basis of their general competence and their diverse experience in academic fields or other sectors, in particular in small and medium-sized enterprises or trade-unions, or as providers or consumers of financial services. They are appointed for a four-year renewable mandate.

The ASC is an integral part of the ESRB. At the request of the ESRB Chair, the ASC will provide analytical and consultative tasks to the ESRB on macro-prudential policy tools, strategies and operational frameworks.

Procedure

Applications should be submitted either by registered post, or by private courier or by e-mail.

Hard copies and electronic storage of the applications, Cv's and any further related documentation generated within the ESRB are stored on a dedicated and strictly confidential part of the ESRB's DARWIN workspace ("*Documents and Records Web-based Information Network of the ECB*").

Candidates are asked to provide in their application:

- a detailed CV (European model) specifying the different diplomas obtained (copies of which may be requested by the ESRB) and the skills and experiences relevant to the subject of the call for expression of interest;
- an application form which is composed of three parts and which should be signed by the candidates. Candidates are required to:
 - fill in their identification data (forename, name, date of birth, address, citizenship, telephone and e-mail address),
 - provide relevant information regarding all five selection criteria indicated in Article 3 of the Decision on the selection procedure of the ASC and in the call of expression of interest in the light of Article 12(1) of Regulation 1092/2010,

- declare that they are not a member of the European Supervisory Authorities, they are not an employee of an ESRB member institution and they will not reveal any non-public information whatsoever acquired in connection with the application form. Candidates are also asked to state yes or no as to whether they perform any functions in the financial industry;
- an optional motivation letter.

According to Article 2(5) of the Decision on the selection procedure of the ASC -2011/2, the ESRB Secretariat may be assisted by selected staff of the ESRB member institutions. This means that the pre-selection phase of the procedure is carried out by a review panel of an ad-hoc group of officials, which is convened only and specifically for the purpose of assisting the ESRB Secretariat in the preparation and organisation of the selection activity.

This ad hoc review panel is composed of senior staff level representatives of some national central banks of the Member States, which are institutions from which the ESRB draws its members of the General Board and representatives from the ESRB Secretariat. These representatives are merely acting for their organisations in their capacity as ESRB members and not in their capacity as staff members of an organisation. For instance, for the selection procedure carried out in February 2011, the ad hoc review panel was composed of 13 persons, 10 of which were representatives of the ESRB member institutions.

The ESRB Steering Committee² will then evaluate the candidates according to the selection criteria mentioned above.

The Steering Committee will complete an individual assessment form for each candidate rating from 1-best to 4-worst each candidate's academic experience, publications, both academically and policy oriented, policy experience and experience in a multidisciplinary international context. The Committee should also indicate the field(s), which are appropriate for each candidate, such as banking, markets, trade unions etc. Finally it should include a summary highlighting the specific merits and shortcomings of each candidate, an overall compatibility with the selection criteria and a conclusion regarding their suitability to be appointed as a member of the ASC or to be included in the reserve list.

It will then present the results of the selection process to the General Board for approval, proposing those candidates to be members of the ASC and those suitable for inclusion in a reserve list.

The General Board may approve the proposals of the Steering Committee or request the Steering Committee to propose other candidates among those not discarded by the Committee.

The Chair and the two Vice-Chairs of the ASC will be appointed by the General Board following proposal from the Chair of the ESRB. After their nomination, the Chairs and the two vice-Chairs will sign a written declaration confirming that they do not have any function in the financial industry.

² It is a permanent body of the ESRB and it is composed of the Chair and first Vice-Chair of the ESRB, the Vice-President of the ECB, four other members of the General Board who are also members of the General Council of the ECB, a member of the Commission, Chairpersons of different European Supervisory Authorities, etc.

All experts appointed as members of the ASC will sign a declaration of independent commitment, a confidentiality declaration and a declaration of interests; in the latter declaration candidates should provide information regarding their direct and indirect interests of potential relevance to the work of the ASC and their interests deriving from their professional activities or from those of their close family members, their membership role or affiliation in organisations/bodies/clubs with an interest in the work of the ASC, as well as any other interests the member considers relevant.

All the above declarations are made public on the ESRB website.

The reserve list will include candidates who are not appointed as members of the ASC, although they were not discarded in the selection process.

All candidates applying to the call for expression of interest will be informed in writing about the outcome of the selection and appointment process.

The call for expression of interest and the Rules of procedure of ESRB-2011-1 indicate that the names of the ASC members will be published on the ESRB website.

Recipients

The recipients of the data processed are the:

- the ad hoc review panel for the pre-selection, as explained above,
- the Steering Committee,
- the General Board,
- bodies entrusted with a monitoring or inspection task, such as the European Court of Auditors, the Internal Audit Service, OLAF and the EDPS.

Right of access and rectification

According to the notification, in the absence of implementing rules concerning data protection at the ESRB, the latter uses the Decision of the ECB of 17 April 2007 adopting implementing rules concerning data protection. It is stated that Article 9 of this Decision on the exercise of the data subjects' rights and Article 10 regarding restrictions and exemptions to these rights under Article 20 of the Regulation apply within the ESRB.

In the call for expression of interest, it is stated that the candidates have a right of access to their data and to update or correct their identification data. They should also inform the ESRB Secretariat in writing of any change in their situation or address without delay, so that their application may be kept up to date. On the other hand, it is stated that data demonstrating compliance with the eligibility criteria and selection criteria may not be updated or corrected after the closing date of the call for expression of interest.

Right of information

The call for expression of interest contains a paragraph which is entitled "*handling of personal data in the context of this call of expression of interest*" and it contains the following information:

- reference to Regulation 45/2001,
- identification of the data controller,
- indication of the purpose of the data processing,
- information on the right of access and rectification,
- reference to the right of data subjects to have recourse at any time to the EDPS.

Furthermore, the call for expression makes reference to the different legal instruments mentioned above and to some of the recipients involved in the selection process. It also states that unclear or incomplete applications will not be considered.

Retention policy

Data related to appointed members of the ASC are kept in the ESRB Secretariat for a period of 5 years after the expiry of their mandate.

Data regarding successful candidates in the reserve list are kept for a period of two years from the approval of the reserve list; its validity can be extended until a new call for expressions of interest is published.

The data of unsuccessful candidates are kept for a period of 2 years following completion of the selection procedure.

In case of a legal dispute, the above retention periods will be extended for two years after completion of all relevant proceedings.

At present, data will not be collected for statistical purposes. It cannot be excluded that in the future it might be the case. If it is so, the data used will be fully anonymised.

Security measures

The personal files will be stored in a -lockable- filing cabinet within the ESRB Secretariat. Following the closure of the selection procedure, only the following five members of the ESRB Secretariat have access to the personal files: the Acting Head of the ESRB Secretariat, one of the Advisors of the ESRB Secretariat and the three assistants of the ESRB Secretariat. The acting head of the ESRB Secretariat attributes and control access to the files.

The Darwin System -where all electronic data are stored- allows the ESRB to implement for this selection procedure a strict access right management coupled with an audit trail to see at all time who has accessed the data. Access will be provided only on an individual basis to those with authorised access. In particular only the ten members and bodies responsible for the pre-selection and the members of the Steering Committee in charge of the selection will be granted access to the data of all applicants. Members of the ESRB General Board will be granted access to the data of candidates not previously discarded.

According to the notification, all the persons involved in the processing operation under analysis, are subject to professional secrecy under Article 8 of Regulation 1092/2010, Article 6 of Regulation 1096/2010 and Article 22 of the Rules of procedure of ESRB -2011/1.

3. Legal aspects

3.1 Prior checking

Applicability of Regulation 45/2001 ("the Regulation"): The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*"-Article 2 (a) of the Regulation). The data processing is performed by a body of the European Union, ESRB, in the exercise of activities which fall

within the scope of EU law³. The ESRB as a whole, rather than its Secretariat as mentioned in the notification, is to be considered the controller of such processing. The processing of the data is done partly by automatic means (application forms with documents required may be submitted by e-mail and are stored in the Darwin system) and when the processing is manual it forms part of a filing system (application forms may be sent by post or courier and documents are processed in paper form by the different evaluators of the selection procedure). Therefore, the Regulation is applicable.

Grounds for prior checking: Article 27 (1) of the Regulation subjects to prior checking 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*" by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subjects*" (Article 27 (2) (b) of the Regulation).

The processing operation in question aims at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, different parties involved in the processing will perform various assessment activities, such as weighing up whether the individual in question meets the eligibility requirements of the call for expression of interest, making a comparative evaluation on the basis of the selection criteria set out by the ESRB, and finally selecting the most appropriate experts to be appointed in the ASC. Taking the above into account, clearly the data processing operation falls within Article 27(2) (b) of the Regulation and must therefore be prior checked by the EDPS.

Ex-post prior checking: 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. In this case, the EDPS regrets that the processing operation has already been established prior his prior-checking opinion. Indeed, the call for expression of interest was launched five days after the notification had been submitted for prior-checking. However, the EDPS underlines that all his recommendations given in the present opinion should be duly implemented in all future selection procedures of experts carried out by the ESRB.

Notification and due date for the EDPS Opinion: The notification of the DPO was received on 3 February 2010. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 4 days for further information from the controller and 2 days for comments. Consequently, the present opinion must be delivered no later than on 13 April 2011.

3.2 Lawfulness of the processing

The lawfulness of the processing operations has to be examined in light of Article 5 of the Regulation. Pursuant to Article 5 (a) of Regulation 45/2001, the processing is lawful if it 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).

³ The concepts of "Community institutions and bodies" and "Community law" can not be any longer 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 light of the Lisbon Treaty.

It follows that the first issue under Article 5 (a) is to determine whether there is a specific legal basis for the processing and the second issue is to verify whether the processing in question is necessary for the performance of a task carried out in the public interest.

The rules governing the processing operation under analysis are found in all four legal instruments indicated in the facts. They serve as legal basis for the selection procedure of members of the ASC and the establishment of a reserve list.

As concerns the condition of necessity under Article 5(a), the collection of applications forms and other detailed information related to the candidates' expertise for the pre-selection and selection phases of the procedure must be considered as "*necessary for performance of a task*" of selecting the most suitable members, Chair and Vice-Chairs of the ASC of the ESRB. The processing should therefore be considered as lawful.

Moreover, the EDPS notes that the call for expression of interest and the Rules of procedure of ESRB-2011-1 indicate that the names of the ASC members will be published on the ESRB website. The EDPS considers that this publication can be considered to be necessary in compliance with Article 5(a) of the Regulation. Indeed, Article 11(1) of the Rules of procedure of ESRB-2011-1 provides that "*the Steering Committee shall propose the 15 experts to be approved by the General Board under Article 12(1) of Regulation 1092/2010 according to the principles of publicity, transparency, equal access and non-discrimination*". Furthermore Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents foresees that the "*institutions shall as far as possible make the documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned*". Since the exceptions to the principle of transparency do not apply *a priori* in the present case, making the list of appointed experts of the ASC available to the public can therefore be considered as lawful. Candidates might however object to this publication on the basis of Article 18 of the Regulation (see below point 3.8 on "*the right to object*").

3.3 Processing of special categories of data

Article 10(1) of the Regulation establishes that "*the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life are prohibited*". The prohibition is lifted if grounds can be found in Articles 10(2) and 10(3) of the Regulation. Among others, such grounds include the consent of the data subject (Article 10(2)(a)).

Candidates through their CV and the list of their publications may reveal information about them which can be of a sensitive nature, namely political opinions, religious or philosophical beliefs. If this occurs, it should be considered that candidates have given their consent to the processing of such data, since such information is purely based on their will. Thus, the condition of Article 10(2)(a) of the Regulation would be met.

Data related to trade-union membership is also considered to be sensitive under Article 10(1) of the Regulation. According to the selection criteria, one of the fields in which the candidates are required to have general competence and experience is the sector of trade-unions. Furthermore, one of the declarations that the appointed members should fill in concerns interests, activities and membership in an organisation or body; in such case candidates might provide information about their experience with regard a trade union. In such cases, any information that a candidate might reveal related to his/her trade union experience, competence or activity, could be considered as necessary under Article 10(2)(b) of the

Regulation, for the ESRB to comply with the specific rights and obligations in the field of employment law, as it is authorised by the Treaties establishing the European Union or other legal instruments adopted on the basis thereof. The ESRB has an obligation under Regulation 1096/2010 to select the most suitable experts with specific expertise and competences in the field of trade union in order to comply with the selection criteria for the ASC, as set up in Article 12(1) of the Regulation 1092/2010 and in Article 3 of the Decision of the selection procedure of the ASC-2011.

3.4 Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*".

The EDPS considers that the information that candidates need to provide in the context of the selection procedure, as described in the facts, are adequate and relevant in relation to the purposes for which they are intended to be used. Indeed, in order to determine whether a candidate complies with the minimum conditions of eligibility for the ASC, the ESRB must necessarily know for instance the years of experience of the candidates, their main fields of expertise, relevant publications etc., so as to be able to pre-select and finally select the most suitable candidates for the published positions. The EDPS considers therefore that the information collected from the candidates in the context of the processing in question, complies with Article 4(1)(c) of the Regulation.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*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*". The personal data are collected from the data subjects themselves and the candidates have a right of access to their data (see more in point 3.6 on "*Right of access and rectification*"). In the call of expression of interest, it is also explicitly stated that candidates should inform the ESRB Secretariat in writing of any change in their situation or address without delay, so that their application may be kept up to date. In this way, the ESRB ensures that the data processed are accurate, complete and up to date under Article 4(1)(d) of the Regulation.

Fairness and Lawfulness: Article 4 (1) (a) of Regulation 45/2001 provides that personal data must be "*processed fairly and lawfully*". The issue of lawfulness was analysed above (see point 3.2). The issue of fairness is closely related to what information is provided to data subjects, which is further addressed in point 3.9.

3.5. Conservation of data

Article 4 (1) (e) of Regulation 45/2001 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 the specific retention periods of data regarding the three categories of data subjects concerned are reasonable and not excessive in conformity with Article 4 (1) (e) of the Regulation. However, this information should be clearly indicated in the call of expression of interest (see more in point 3.9 on "*the right to information*").

Furthermore, with regard to the reserve lists' retention period, the EDPS recommends that the ESRB adopts an additional 2-year period after the expiry of the validity of the reserve list. This is indeed the time period within which data subjects may lodge a complaint with the European Ombudsman.

3.6 Transfer of data

Articles 7, 8 and 9 of the Regulation set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made (i) to or within Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46 (based on Article 8), or (iii) to other types of recipients (based on Article 9).

Internal Transfers

According to the notification, the transfers of the candidates' personal data, are made to the individuals coming from other E.U. institutions and bodies and representatives from the national central banks of some Member States (responsible for the pre-selection phase, as described in the facts), the Steering Committee and the General Board of the ESRB. Furthermore, other potential recipients could be the Court of Auditors, the Internal Audit Service, OLAF and the EDPS. These are transfers within the ESRB or between Community institutions and bodies, thus Article 7 of the Regulation applies. Article 7 of the Regulation requires personal data to be transferred only "for the legitimate performance of tasks covered by the competence of the recipient". In order to comply with this provision, in sending personal data, it should be ensured that (i) the recipient has the appropriate competences and (ii) the data are necessary for the performance of this competence.

The EDPS considers that the transfers of data to the recipients within the ESRB for the purposes described in the facts above comply with Article 7(1). Indeed, these recipients have the competences to perform the task for which the data are transferred, namely to assess the competence of the candidates at different levels of the procedure. As for the other recipients between the ESRB and the other institutions and bodies, during the selection procedure, their tasks also concern the assessment and selection of the candidates and in the case of potential recipients, their tasks relate to audit, budgetary discharge, and/or complaints. The transfer of the personal data is therefore considered as falling within the tasks covered by the competence of each of the recipients.

However, the EDPS recommends that in accordance with Article 7 (3) of the Regulation, each of the recipients is explicitly reminded that they should process the personal data they receive only for the purpose for which they were transmitted.

3.7 Right of access and rectification

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. Article 14 of the Regulation provides that "*the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

According to the notification, the ESRB is using the Decision of the ECB on implementing rules regarding the exercise of the data subjects' rights of access, rectification etc. The EDPS invites the ESRB to determine its modalities for granting these rights, when adopting its own

implementing rules under Article 24(8) of the Regulation and submit a copy before adoption to the EDPS for consultation under Article 28(1) of the Regulation.

Furthermore, the EDPS notes that the ESRB rightly indicated in the call of expression of interest, that candidates have a right of access to their data and to update or correct their identification data. On the other hand, it is stated that data demonstrating compliance with the eligibility criteria and selection criteria may not be updated or corrected after the closing date of the call of expression of interest.

Right of access

The EDPS recalls that candidates should also be able to have access to their entire file, comprising the assessment form concerning them drafted by the various evaluators involved during the pre-selection and selection procedure (pre-selection persons, Steering Committee, General Board). As it was underlined in the EDPS prior-checking Opinions, candidates should be given access to their evaluation results regarding all stages of the selection procedure.

It is true that Article 20 (1) (c) of the Regulation provides for an exception to the principle of access by stating that "*The Community intuitions and bodies may restrict the application of Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others*". This exception may imply that certain information comparing the data subject with other candidates should not be provided and no information should be given regarding the individual marks or assessments of the evaluators involved.

However, as concerns the candidates, the EDPS highlights that in the context of this data processing, the candidates' right of access to the marks and assessment comments by the evaluators concerning them should not be restricted more broadly than it is necessary under Article 20 (1) (c) of the Regulation. Granting the right of access, it enables candidates to see which elements were taken into account for the overall assessment and to see that the evaluators have acted fairly and objectively. Any restrictions to the right of access to such information on the basis of Article 20(1) (c) should therefore be applied restrictively.

As to the protection of the individual opinions of the evaluators, the ESRB should take into consideration that:

- (i) the objective of any confidentiality requirement is to ensure that the evaluators are able to maintain their impartiality and independence and are 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.

The ESRB should therefore ensure that it does not restrict access more broadly than is justified on grounds of safeguarding the confidentiality of the deliberations and decision-making of the evaluators. The principle of confidentiality cannot be prejudiced if the evaluators disclose in a transparent manner to candidates the criteria according to which the candidate concerned has been evaluated as well as the actual detailed marks and comments he received regarding his competences and the profile of expert sought.

In the light of the above, the EDPS recommends that the ESRB sets up justified and documented methods in order to ensure that candidates have access to their own personal

evaluation data⁴ throughout the selection procedure. This right of access may be limited on the basis of Article 20(1)(c) only in cases where this is absolutely necessary, namely no disclosure of comparative results when this is necessary to protect others and no disclosure of individual opinions of the evaluators in order to protect the independence of the evaluators. In such cases, data subjects should be informed of the principal reason for restricting the right of access and the right of recourse to the EDPS, in accordance with Article 20(3).

Right of rectification

The EDPS notes that the ESRB grants the right of rectification regarding identification data at any time and it introduces limitations regarding the rectification of eligibility and selection data. This policy is in compliance with the Guidelines on staff recruitment. The EDPS considers this limitation necessary to ensure objective, certain and stable conditions for the selection procedure, and essential to the fairness of the processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others. It is however important that all candidates are informed about the reasons for this restriction at the time of the processing operation (see below point 3.9 on the "*right of information*").

3.8 Right to object

Article 18(a) of the Regulation provides that the "*data subject shall have the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of personal data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data*". According to the EDPS, since the publication of the names of the experts appointed in the ASC of the ESRB is based on Article 5(a), these experts might use their right, on compelling and legitimate grounds, to request that their names are not made publicly available on the ESRB website. If such case occurs, the ESRB will need to take the necessary measures in order to weigh the compelling and legitimate interests that the expert might evoke against the interests of transparency of the public mandate of the ESRB.

3.9 Information to the data subject

Article 11 of the Regulation provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of the Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the selection procedure under analysis, personal data are obtained directly from the data subject on the application form and from the different evaluators at different levels of the procedure. Thus Articles 11 and 12 will both apply. Both provisions provide a list of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

In this processing operation, the EDPS notes that candidates are informed about most of the elements provided in Articles 11 and 12 of the Regulation through the call of expression of interest and a paragraph which is entitled "*handling of personal data in the context of this call of expression of interest*". The EDPS would invite the ESRB to consider renaming this paragraph as "privacy statement", so that the purpose of this paragraph would be more clear and precise to the candidates. Moreover, the EDPS recommends that the ESRB should inform

⁴ See also Working Party 29 Opinion no 4/2007 on the concept of personal data, pages 11 and 12.

all candidates through this privacy statement included in the call of expression of interest about:

- all the recipients of pre-selection and selection phase of the procedure as well as potential recipients as indicated in the facts,
- the retention periods of the data related to the three categories of data subjects of the processing, namely successful candidates, reserve list candidates and unsuccessful ones, as well as the 2-year additional retention period of the reserve lists after the expiry of their validity,
- justified and documented methods in view of granting access to the evaluation results of the candidates upon request and any limitation thereof, and
- the reasons for restricting the right of rectification under Article 20(1)(c) of the Regulation in the case of eligibility and selection data after the deadline of submitting applications.

3.10 Security Measures

According to Article 22 of the Regulation concerning 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*". These security measures should in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

After review of the security measures described in the notification, there is no reason to believe that the measures implemented by the ESRB do not comply with Article 22 of the Regulation.

However, the EDPS would like to highlight that the provisions on professional secrecy and confidentiality (indicated in the notification) binding all the persons involved in the processing operation under analysis focus in essence on their daily tasks and missions within the ESRB. In the absence of a specific provision on confidentiality, in the Decision on the selection procedure -2011-/2, to be respected by the various evaluators, the EDPS recommends that the ESRB prepares specific declarations on confidentiality to be signed by each of the evaluator involved. This declaration may also evoke the principle under Article 7(3) of the Regulation (see point 3.5 on the "*transfer of data*").

4. Conclusion

There is no reason to believe that there is a breach of the provisions of the Regulation, provided that the following considerations are taken into account. In particular the ESRB should:

- adopt an additional 2-year period after the expiry of the validity of the reserve list;
- explicitly inform each of the recipients that they should process the personal data they receive only for the purpose for which they were transmitted;
- take the necessary measures to weigh the compelling and legitimate interests that the expert might evoke against the interests of transparency of the public mandate of the ESRB;

- set up justified and documented methods to ensure that candidates have access to their own personal evaluation data throughout the whole selection procedure taking into account any restriction that may be applicable under Article 20(1)(c), as described in section 3.6 above;
- consider renaming the paragraph on "*handling of personal data in the context of this call of expression of interest*" as "privacy statement", so that the purpose of this paragraph would be clear and precise to the candidates;
- inform all candidates through this privacy statement included in the call of expression of interest about:
 - all the recipients of pre-selection and selection phase of the procedure as well as potential recipients as indicated in the facts;
 - the retention periods of the data related to the three categories of data subjects of the processing, namely successful candidates, reserve list candidates and unsuccessful ones, as well as the 2-year additional retention period of the reserve lists after the expiry of their validity;
 - justified and documented methods in view of granting access to the evaluation results of the candidates upon request and any limitation thereof, and
 - the reasons for restricting the right of rectification under Article 20(1)(c) of the Regulation in the case of eligibility and selection data after the deadline of submitting applications;
- prepare specific declarations on confidentiality to be signed by each evaluator involved in the selection procedure;

Done at Brussels, 13 April 2011

(signed)

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