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GB/UK/kd D(2011) 1403 C 2011-0559

Subject: Prior-checking notification case 2011-0559

Dear Mr Renaudière,

We reviewed the documents you have provided the EDPS with on 6 June 2011 concerning the notification for prior checking under Article 27(2) of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the selection procedure for temporary agents organised by the European Commission (EC) for "posts other than supervision and advice/*postes autres qu'encadrement ou conseil* without EPSO concours". The processing operations under examination are subject to prior-checking in conformity with Article 27(2)(b) of the Regulation, since they involve an evaluation of the applicants' ability to perform the functions of the post for which the selection and recruitment procedure has been organised.

The procedure related to the selection of these temporary agents, 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 (henceforth: "Guidelines"). On 29 October 2009 the EDPS requested the EU institutions and bodies that had not yet notified their recruitment processing operations 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 the notification of 6 June 2011 and your email of 29 June 2011, the EC practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines and will restrict his legal analysis to those practices. It is clear that all relevant recommendations made in the Guidelines apply to the processing operations put in place in the

¹ See http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf.

frame of the selection procedure for temporary agents for "posts other than supervision and advice/*postes autres qu'encadrement ou conseil* without EPSO concours" at the EC.

1.1. Proceedings

The procedure was notified for prior checking under Article 27(2) of Regulation (EC) No 45/2001 on 6 June 2011, suspended by email of 15 June 2011 (D-1117) inviting you to provide a cover-letter outlining the differences between the notified procedure and the Guidelines. You replied by email of 29 June 2011 noting that there are, in your view, no such differences. The procedure was suspended on 18 July 2011 for comments, which were received on 28 July 2011.

1.2. Conservation of data/ Data retention

Facts: Regarding the conservation and retention of data, there is a need to differentiate between three different categories of data subjects, namely the recruited applicants, the non-recruited applicants and the non-recruited applicants whose names were put on the "reserve lists for appointment"². The procedure in the case at hand would seem to in principle respect this categorization:

- The **file of successful candidates** ("*lauréats*") is kept by unit DG HR.B2 (section "*Concours sélections*") and is copied by another sub-entity of the same unit (section "*Recrutement AT*") and parts of it (in particular the application letter, the CV, the diplomas and the certificate of employment) are sent to the service in charge of personnel files ("*service des dossiers personnels*") to be included in the personnel file of the successful candidate. At the end of the procedure, the paper copies (e.g. the correspondence with the candidate) are destroyed. The files of the successful candidates are retained for five years after the list is closed for service reasons ("*raisons de service*").
- The **reserve list** ("*liste d'aptitude*") of the non-recruited applicants is retained for five years after the list is closed for service reasons (e.g. the possibility to trace a career ("*reconstituer une carrière*"), audit purposes, Court of Auditors...).
- The application files of **candidates that have not been selected** are kept by the respective DG until the deadline for appeal has expired following the publication of the list of successful candidates.

Recommendations:

(1) The files of **successful candidates** ("*lauréats*") are **generally retained for five years** after the list is closed for service reasons ("*raisons de service*"). The EDPS recommends checking whether such service reasons would not rather be limited to financial documents, thus allowing for a shorter retention period for other documents.

(2) Regarding the reserve list of the **non-recruited applicants**, the EDPS would invite the EC to further clarify why a **general retention period of five years** after closure of the reserve list would be needed with a view to traceability of the selection procedure in the context of audit and Court of Auditors. It would seem that a selective approach would allow the EC to shorten the retention period for certain documents, as a retention period limited to 2,5 years after the end of the validity of the reserve list would generally be sufficient for such purposes (as well as lodging

² See Guidelines, section B.4.

a complaint with the Ombudsman), with the exception of financial documents (e.g. regarding travelling costs), where a longer retention period might be appropriate.

(3) The **CV submitted is retained** for a period of five years. It remains unclear which purpose could be pursued by keeping a CV that for all practical purposes would seem to be outdated after roughly two years and does consequently no longer fulfill the quality requirements of Article 4.1.d) of the Regulation. The EDPS recommends that the CV supplied initially for the selection procedure should be destroyed after a retention period of two years³ and successful candidates should be invited three months before that two year period by email (or via their EPSO account where applicable) to update their profile by sending in a new CV (following the procedure defined for rectification of data). In order to draw the attention of the successful candidates to this situation as early as possible, a respective note announcing the destruction of the initially provided CV and the possibility to update the profile by sending in a new CV could already be included in the information the candidate receives from the Commission following the selection procedure that his/her name will be on the list.

1.3. Transfer of data

Facts: In the procedure under examination, the selection procedure can be organized by the respective Directorate-General (DG) of the EC or by the EC's DG HR at the request of the respective DG (in which case DG HR.B2 is informed at all stages of the procedure and has an advisory role). Also, the file of successful candidates ("*lauréats*") is kept by unit DG HR.B2 (section "*Concours sélections*") and is copied by another sub-entity of the same unit (section "*Recrutement AT*") and parts of it (in particular the application letter, the CV, the diplomas and the certificate of employment) are sent to the service in charge of personnel files ("*service des dossiers personnels*") to be included in the personnel file. There is nothing to suggest that these internal transfers of data within the EC would not be necessary for the management of the selection procedure of temporary agents for "*postes autres qu'encadrement ou conseil*"/posts other than supervision and advice at the EC.

Reminder:

In order to ensure the full compliance with Article 7 of the Regulation, the EDPS recommends that DG HR.B2 remind all recipients of their obligation not to use the data received for other purposes than the one for which they were transmitted, as it is explicitly stated in Article 7(3) of the Regulation⁴.

1.4. Right of access and rectification

Facts: The data subject has the **right to access** to his/her data by sending a respective written request to the functional mailbox of DG HR.B2, whilst adding a copy of his/her ID card. Regarding the **right to rectify**, the data subject has the possibility of sending an email to the same functional mailbox to flag any need for changes regarding their personal data ("*pour signaler tout changement relatif à leurs données à caractère personnel*").

Recommendation:

³ See Guidelines, section B.4., stating inter alia that "...the validity of the respective (reserve) lists shall be duly taken into account. It is worth-noting that in various opinions the EDPS accepted to keep personal data of unsuccessful candidates for two years following the recruitment procedure as that period was derived from the length of time during which a complaint may be brought to the European Ombudsman".

⁴ See Guidelines, section B.5.

Regarding the required **submission of a copy of the data subject's ID card**, the EDPS understands that the EC should be in a position to verify the identity of the person wanting to exercise his/her right of access. The EDPS invites the EC to consider whether the documents to prove the identity could be extended to cover other documents allowing for the identification of the individual requesting access (e.g. a copy of the driving licence).

Reminder:

(1) Whilst nothing in the notification would suggest that the right of access is unduly limited, the EDPS would nevertheless like to recall⁵ that data subjects should be given access to their evaluation results regarding all stages of the selection procedure (here in particular the reasoned report ("*rapport motivé*") of the selection panel), unless the exception of Article 20(1)(c) of the Regulation is 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 panel if such access would undermine the rights of others applicants or the freedom of members of the selection panel. Nevertheless, data subjects should be provided with aggregated results.

Therefore, it should be clearly established that:

- the objective of any confidentiality requirement is to ensure that the selection panel is able to maintain its impartiality and independence and is not under undue influence from the controller, the candidates, or any other factor and
- any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective;
- on the basis of Article 20 (3) of the Regulation, if a restriction provided for by Article 20(1) of the Regulation is imposed, the data subject should be informed of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the EDPS.

(2) As concerns the right of rectification, the EDPS points out that in the case of data related to the admissibility criteria, the right of rectification cannot be exercised after the closing date of candidatures' submission, a limitation the EDPS considers necessary for the fairness of the selection procedure and justified in terms of Article 20(1)(c) of the Regulation⁶. 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*").

1.5. Right of information

Facts: As recommended in the Guidelines⁷, a data protection note ("*Déclaration sur la protection des données personnelles dans le cadre d'une sélection d'agents temporaires pour des postes autres qu'encadrement et conseil*") will to the understanding of the EDPS⁸ be part of the call for the expression of interest ("*avis de sélection*"). As regards the recipients of data, under the heading of "*Destinataires des données*", the actual recipients of the processed data are identified as retaining only a copy of the reserve list ("*Les services concernés de la DG demanderesse (services des Ressources humaines ou tout autre service compétent) et de la DG*").

⁵ See Guidelines, section B.6.

⁶ See Guidelines, sections B.6. + 7.

⁷ See Guidelines, section B.7: "The EDPS has always recommended in his Opinions that a "data protection note" should be posted on the agency's website so that all candidates can be informed of all their rights as well as of all necessary information concerning the processing of his/her data before the selection procedure begins".

⁸ Section 7 of the notification would seem to erroneously refer to it as being annexed to the "**acte de candidature**" (application).

HR (DG HR.B2) conservent une copie de la liste d'aptitude"). The personal data processed in the selection procedure encompasses inter alia the gender and nationality of the candidates.

Recommendations:

(1) The data protection note should clearly state that, in the case of data related to the admissibility criteria, the right of rectification cannot be exercised after the closing date of candidatures' submission.

(2) Although applicants are selected on the basis of their qualifications, the issue of maintaining an appropriate geographical distribution and gender balance during the selection can also be taken into consideration⁹. Thus, the "data protection note" should inform the applicants that data related to gender and nationality, aside from identification purposes, might be processed on the basis of the EC's policy and internal decision, so that the fairness of the processing in respect of the data subject can be guaranteed.

(3) Whilst under the heading "*Destinataires des données*", the actual recipients of the processed data are identified as retaining only a copy of the reserve list, they are, in fact, processing and storing more data. This should be clarified (e.g. with a reference that these recipients also access, process and store other data identified as "*Données concernés*" defined in the data protection note).

Conclusion

The EDPS recommends that the EC adopts specific and concrete measures to implement these recommendations regarding the selection procedure for temporary agents for "posts other than supervision and advice/*postes autres qu'encadrement ou conseil* without EPSO concours".

As concerns the reminder 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

⁹ See Guidelines, section B.7.