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GB/DH/kd D(2011)1597 C 2011-0645

**Subject: Prior-checking notification on the selection and recruitment of SNEs, trainees and temporary staff (case 2011-0645/646/647)**

Dear Mr Comerford,

We have reviewed the documents you have provided the EDPS with concerning the notifications for prior checking under Article 27(2) of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the selection and recruitment of SNEs, trainees and temporary staff (interim) at Eurofound. 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. Article 27(2)(d) ("processing operations for the purpose of excluding individuals from a right, benefit or contract") is not relevant in this case. This provision refers to processing operations the aim of which is to exclude individuals from a right, benefit or contract (this typically refers to black lists). The purpose of the processing at stake is to select the best suitable candidate (professional experience, etc.) but not to exclude him/her from any right, benefit, or contract. Certainly the selection rules will cause -if the individual' professional experience or skills do not meet the criteria required- the exclusion from being recruited, but this is clearly not the aim of the processing operation.

The procedures related to the selection and recruitment of SNEs, trainees and temporary staff as well as the data protection practices as presented in the notification are similar to other processing operations regarding selection and recruitment by EU bodies. In this regard, the EDPS issued Guidelines on staff recruitment<sup>1</sup> as well as a Joint Opinion on "*Staff recruitment procedures*

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<sup>1</sup> The EDPS Guidelines can be found on the EDPS website under the title "Thematic Guidelines".

*carried out by some Community agencies*"<sup>2</sup>. In the present case, the notifications have been submitted after the publication of the Guidelines (and relevant Joint Opinion) and therefore, the EDPS will first underline, in the light of the Eurofound cover letters, the Eurofound practices which do not seem to be in conformity with the principles of the Regulation and with the EDPS Guidelines and will then limit his legal analysis to those practices. It is clear that all the relevant recommendations made in the Guidelines apply to the processing operations put in place in the frame of the selection and recruitment of SNEs, trainees and temporary staff at the Eurofound.

As the three notifications (SNEs, trainees and temporary staff) concern the selection and recruitment of staff and thus present similarities, the EDPS has decided to issue a Joint Opinion.

## **Proceedings:**

On 30 June 2011, the EDPS received the three notifications for prior checking from the Eurofound DPO. The EDPS should therefore deliver an Opinion by 30 September 2011 (2 months + the month of August).

### **1. Rights of access and rectification**

**Facts:** The Data Protection Disclaimer (trainee and SNEs) and the Employee Data Protection Policy (temporary staff) mention that candidates have the right to access to their personal data and the right to rectify any inaccurate or incomplete data. The rights of access and rectification deserve a special attention. The Eurofound did not provide the EDPS with comprehensive information as to the implementation of the right of access and rectification. The EDPS would like to remind the rules developed in the Guidelines.

**Reminder:** The EDPS has always recommended in his opinions that data subjects should be given access to their evaluation results regarding all stages of the selection procedure (pre-selection, interview and written tests), unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations is applied. This exception may imply that access should not be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the selection committee if such access would undermine the rights of others applicants or the freedom of members of the selection Committee. Nevertheless, data subjects should be provided with aggregated results if available.

Therefore, it should be clearly established that:

- the objective of any confidentiality requirement is to ensure that the selection committee 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 to access rights must not exceed what is strictly necessary to achieve this purported objective;
- on the basis of Article 20.3, if a restriction provided for by Article 20.1 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.

**Recommendation:** As concerns the right of rectification, the EDPS underlines that this right can only apply in the case of factual data processed within the selection procedure<sup>3</sup>. In addition, he

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<sup>2</sup> EDPS Opinion issued on 7 May 2009 (case 2009-0287).

<sup>3</sup> With regard to evaluation data, due to their subjective nature, data subjects must be provided with a possibility to add, where relevant, their comments.

points out that any limitation to the right of rectification after the closing date of submitting applications should only apply to data related to the admissibility criteria and not to the identification data that can be rectified at any time during the selection procedure. The EDPS considers this limitation necessary for the fairness of the selection procedure and justified in terms of Article 20(1)(c) of the Regulation. It is however important that all applicants are informed about the scope of this restriction before the beginning of the processing operation (see point 3 on information here below).

## **2. Time-limits for blocking and erasure**

**Facts:** The notifications state that following justified legitimate request from the data subject, a time period of 15 working days is required for erasing or blocking data.

### **Reminders:**

With respect to the data subject's right of blocking data, the EDPS reminds the Eurofound that, in accordance with Article 15 of the Regulation, 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 Eurofound 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 unlawful, or when data must be blocked for purpose of proof, the Eurofound 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 nevertheless be dealt with promptly in order to preserve the data subject's rights. Having considered this, the EDPS notes that the decision as to whether to block the data is taken by the Eurofound at the latest within the delay of 15 working days.

## **3. Information to be given to the data subject**

**Facts:** The Eurofound has provided the EDPS with the Data Protection Disclaimer used for the SNEs and trainees processing operations (i). The Eurofound mentions an "Employee data Protection Policy" as regard the information to be provided to temporary staff but did not provide it to the EDPS (ii).

### **Recommendations:**

(i) The Data Protection Disclaimer does not contain Articles 11 and 12 requirements. The identity of the controller, the recipients of the data, the limitation to the right of rectification (see point 1 above), the legal basis and the right to have recourse to the EDPS are not mentioned. Moreover, the purposes of the processing operations (selection and recruitment) are not properly described. The Data Protection Disclaimer must therefore be redrafted accordingly.

(ii) The EDPS would like to receive the relevant part of Employee data Protection Policy to verify the compliance with Article 11 and 12.

## **4. Processing of personal data on behalf of controllers**

**Facts:** An external contractor (local recruitment agency) collects and processes data on behalf of the Eurofound to select the best suitable temporary/interim staff. The EDPS did not receive a copy of the contract between the Eurofound and the local recruitment agency.

***Recommendation:***

The EDPS would like to receive the relevant part of the contract to verify the compliance with Article 23.

Article 23 of Regulation (EC) No 45/2001 foresees that the legal act binding the processor to the controller should stipulate in particular that: "the processor shall act only on instructions from the controller" in this case only on instructions from Eurofound.

Following Article 23.2.b, Article 21 and 22 obligations are also incumbent on the processor unless he is already subject to the same obligations by virtue of the national law of a Member State. In the case in point, the local recruitment agency is subject to the Irish national law and therefore confidentiality and security obligations established by virtue of the Irish law are applicable to the local recruitment agency.

**5. Conclusion**

The EDPS recommends that Eurofound adopts specific and concrete measures to implement these recommendations regarding the selection and recruitment procedures at Eurofound. As concerns the reminders mentioned in this note, the EDPS would like to be informed about the situation regarding the compliance with the Guidelines. The EDPS should be provided 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 Grimmeisen, Data Protection Officer, Eurofound