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Brussels, 21 October 2011
GB/DH/kd D(2011)1812 C **2011-0388**

Subject : Prior checking, case 2011-0388 : "Staff recruitment"

Dear Mr Ronayne,

We have studied the documents forwarded by the Court to the EDPS within the framework of the notification for prior checking of data processing operations on "recruitment of staff". The reason for subjecting the processing operations referred to above to prior checking by the EDPS is the fact that they involve assessing personal aspects of the candidates – their ability to hold a particular post for example – as specified in Article 27(2)(b) of Regulation (EC) No^o45/2001.

Staff recruitment has been covered by Guidelines¹ published by the EDPS. For the record, on 29 October 2009, the EDPS invited the institutions and agencies which had not yet notified their recruitment procedures to compare these with the Guidelines and to inform the EDPS of any differences in terms of data protection in a cover letter.

In its opinion, therefore, the EDPS begins by highlighting the practices which do not seem to comply in terms of data protection and will then confine its legal analysis to these same practices. It is understood that the recommendations made in the guidelines and relevant to the processing operations in question apply. In the case being studied, the Court's letter specifies that the processing operations do not appear to present significant divergences from the terms of the Guidelines.

¹ The guidelines are available on the EDPS website in the section on supervision under the heading "guidelines". The EPDS also published a joint opinion on 7 May 2009 (case 2009-0287), also available on the EPDS site.

1. Procedure

The notification was forwarded to the EDPS by the Court DPO on 27 April 2011. The EDPS subsequently suspended the procedure on 28 April 2011 in order to obtain the cover letter of the processing operations which arrived on 1 September 2011. The opinion of the EDPS must therefore be given by 24 October 2011 at the latest (28 June 2011 + 125 days of suspension).

2. Data retention period

Facts: (i) The Court states in its cover letter that a data retention period has been laid down for candidates recruited as part of the follow-up to case 2004-281. (ii) The data on non-recruited applicants for temporary agents, contractual agents, national legal professionals and seconded national experts are retained for three years, in order to maintain a reserve list of agents for the Court. (iii) The notification also specifies that the files on recruited trainees and students are retained for three years after the end of the traineeship period or appointment in order to follow up requests for attestation which may arrive a long time after the end of the traineeship or period of employment. (iv) Data on non-recruited trainees are retained for three years after the start of the traineeship period.

Reminder: (i) As a reminder, the EDPS indicates that this retention period has not yet been set and is therefore temporary. Specifically, the letter from the EDPS stated: "The Court has decided on the time-limit for storage of *staff reports on the basis of the European Commission's approach: there the personal files (and hence the staff reports) are destroyed 120 years after the birth of the official.* Given the fact that the Court has adopted a time-limit for retention, we have decided to close this case, in so far as the Court is adapting this retention period according to the results of discussions underway between the Commission and the EDPS. In fact, this retention period proposed by the European Commission has not yet been accepted by the EDPS and the discussion on the subject remains open. Should a different retention period be adopted by the Commission as a result of this discussion, the Court will have to revise its time-limit for retention as a consequence."

Recommendation: (ii) In its Guidelines, the EDPS makes a distinction between non-recruited candidates included on a reserve list and those who are not so included. The data on candidates included on a reserve list may be retained for the entire period of validity of the reserve list plus two additional years in order to cover any possible appeal to the European Ombudsman. (iii) The EDPS wishes to emphasize that the controller may need to keep financial documents for a minimum of five years from the date on which the agency grants discharge for the budgetary year to which the documents relate for audit purposes. This would apply to all categories of data subjects. Finally, for trainees and students in particular, the data necessary for the issuing of a copy of the certificate of traineeship or work, i.e. information on its duration, the department to which the trainee was assigned, the name of the supervisor and the nature of work performed may be stored for a longer period "*in order to follow up requests for attestation which may arrive a long time after the end of the traineeship or period of employment*". (iv) Where no reserve list exists for a category of people, such as trainees for example, there is no justification for retaining this data for longer than the maximum time authorised for bringing a complaint before the European Ombudsman.

3. Blocking and erasure of data

Facts: the notification states that fifteen working days from date of receipt will be needed to manage any request for blocking or erasure of data.

Recommendation: (i) The EDPS reminds that there are two distinct situations involving the blocking of data:

(1) When the data subject contests the accuracy of his or her data, the data must 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 basis, the Court must 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 on the grounds of unlawful processing, or when data must be blocked for purposes of proof, the Court will need some time to make this assessment before deciding to block the data. In such cases, even though the blocking may not take place immediately, the request must be dealt with promptly in order to preserve the data subject's rights. The EDPS therefore takes the view that the assessment of the request should be done as soon as possible and at the latest within fifteen working days, as is done at the Court.

4. Information of the data subject

Facts : (i) The Court's letter mentions the use of a privacy statement attached to the notification and analysed below. (ii) On the other hand, the notification does not refer to the use of such a statement and seems to favour reactive information from the data subject, that is only following the request from the data subject himself or herself. In several cases, (students, trainees, seconded national experts, national legal professionals, special advisers, external recruitment) this information is available on the Court Intranet.

Recommendations : (i) The privacy statement must be amended to include both the specific legal basis for each category of recruitment and the nuances concerning the time-limits for retention of data. This information must be specific to each category of data subject affected by the processing operations and according to the result of the procedure (cf. point 2 above). Finally, the limits on right of access and rectification specified in Article 20 of the Regulation should also be referred to in the document.

(ii) Informing the data subject is an obligation on the controller, a precondition for the exercise of the rights of the data subject provided for in Articles 13 to 19. The information must therefore be proactive and addressed to all the data subjects irrespective of whether or not they have requested it. This use of the intranet as an information vehicle means that this information is available only to people who have actually been recruited. The EPDS is therefore asking the Court to elucidate its policy on information of the data subject (difference of approach between the date from the DPO and the notification) and make it comply with Articles 11 and 12 of Regulation 45/2001, both as regards proactivity and the completeness of the information supplied and the inclusion of every data subject covered by the processing operations.

5. Conclusion

Le EDPS recommends that the Court adopt specific and concrete measures to apply the recommendation on the selection and recruitment of staff at the Court. We would be very grateful if you would make available to the EDPS within three months following the date of the present opinion all the relevant documents in order to confirm that the recommendations have indeed been implemented.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Mr Marc Schauss, Court of Justice, Data Protection Officer