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(FCH JU)  
TO 56, Office 4/21  
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Brussels, 15 November 2011  
GB/DH/kd D(2011)1991 C 2011-0834

**Subject: Prior-checking notifications, cases 2011-833 (selection and recruitment of staff) and 2011-0834 (selection and recruitment of trainees)**

Dear Mr De Colvenaer,

we have examined the documents the Fuel Cells Hydrogen Joint Undertaking (FCH JU) sent to the European Data Protection Supervisor (EDPS) concerning the notifications for prior checking on the processing of personal data in connection with the selection and recruitment of staff (permanent, temporary and contract agents and trainees) at FCH JU. These processing operations are subject to prior checking by the EDPS, since they involve the assessment of personal aspects of candidates - their ability to perform the functions of the post for which the selection and recruitment procedure has been organised - as set out in Article 27(2)(b) of Regulation (EC) No 45/2001. Article 27(2)(a) ("processing of data relating to health and to suspected offences, offences, criminal convictions or security measures") can be considered as an additional ground. Indeed, as mentioned in your notification 2011-833, a copy of extract of criminal record and a pre-employment medical certificate are requested to comply with Article 28 of the Staff Regulations and Article 12 of the Conditions of Employment of Other Servants of the European Communities.

The data protection aspect of the recruitment of staff, including trainees, is dealt with in the Guidelines<sup>1</sup> 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.

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<sup>1</sup> 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.

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

Following an examination of the various documents supplied by the FCH JU, we do however have a few recommendations to make.

As both notifications concern the selection and recruitment of staff and thus present similarities, the EDPS has decided to issue a Joint Opinion.

**Proceedings:** On 13 September 2011, the EDPS received a notification for prior checking from the FCH JU DPO. The procedure was suspended during 2 days in order for the EDPS to obtain further information. The EDPS should therefore deliver an Opinion by 16 November 2011 (2 months + 2 days of suspension).

## **1. Data retention**

**Facts:** (i) Both the notification and the privacy statement state that paper copies of recruited trainees files are stored for a period of two years following the traineeship. Applications of non recruited candidates are kept until the end of the year of the traineeship period. (ii) Data of the non recruited candidates on the "reserves list for appointment" are kept as long as the list is valid.

**Reminder:** (1) FCH JU may need to keep documents that have a financial impact for a minimum of 5 years from the date on which the FCH JU grants discharge for the budgetary year to which the documents relate for audit purposes in accordance with the Financial Regulation. The FCH JU could also be requested by former trainees to provide a copy of their trainee certificate. Information on the duration of the traineeship, the department to which the trainee was assigned, the name of supervisor and the nature of work performed could then be stored for a longer period than the one suggested. (ii) An additional period of two years after the validity of the reserve list had expired can be necessary to cover the time allowed to lodge a complaint with the European Ombudsman.

## **2. Right of access and rectification**

**Facts:** (i) The notifications mention, box 8/, that *"the procedure to grant rights to data subjects are laid down in Articles 9 to 18 of the FCH JU Implementing rules concerning data protection"*. (ii) The privacy statement states that the right of rectification applies to e-mail and postal address as well as to civil status.

**Reminder:** (i) The reference to the Implementing rules is welcomed to help data subjects to exercise their rights. Having said this, these rights and their limitations should be considered in the light of the specific processing of personal data at stake: selection and recruitment of staff. Therefore, the EDPS recommends that, the procedures to grant rights to data subjects and their limitations (Article 20 (1) (c) of the Regulation) be guaranteed in the light of EDPS Guidelines.

**Recommendation:** (ii) As concerns the right of rectification (Article 14 of the Regulation), the EDPS acknowledges that this right can only apply in the case of factual data processed within the selection procedure. In addition, he 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 invites FCH JU to broaden the scope of data that may be modified, this should be reflected in the privacy statement (see point 4).

### **3. Blocking and erasure**

**Facts:** The notifications state that the data controller shall take a decision within 15 working days of receiving a request for data to be blocked. If the request is accepted, the data controller must take action within 30 working days and the data subject is notified. Should the request for blocking be rejected, the data controller has 15 working days within which to inform the data subject by means of a letter stating the grounds for the rejection (Article 13(3) of FCH JU Implementing rules).

**Recommendation:** With respect to the right for the data subject to obtain from the controller the blocking of data, 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 FCH JU 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 FCH JU 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 FCH JU as soon as possible and at the latest within the delay of 15 working days.

### **4. Information of the data subject**

**Fact:** The privacy statement concerning the trainees does not mention the Decision of the Executive Director on Rules governing traineeships at the FCH JU, nor describe precisely the procedures to grant the right of rectification to data subjects. The legal basis is also missing in the general privacy statement related to staff recruitment.

**Reminder:** The EDPS reminds FCH JU that the information to be given to the data subject has to be given proactively. Privacy statements must be easily accessible by the data subject.

**Recommendation:** The privacy statements should be updated. The respective legal basis should be included and the conditions to obtain rectification of the data should be modified in compliance with point 2.

### **5. Conclusions**

The EDPS recommends that FCH JU adopts specific and concrete measures to implement these recommendations regarding the selection and recruitment of staff and trainees at FCH JU. 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.

Sincerely yours,

**(signed)**

Giovanni BUTTARELLI