



Opinion on a notification for Prior Checking received from the Data Protection Officer of the Council of the European Union regarding the "Organisation of meetings and meals of the Meetings of Heads of States or Governments, of Summits or Official Meetings with Third Countries and of the Council of the E.U and other Meetings at ministerial level or above"

Brussels, 16 March 2012 (Case 2011-0933)

1. Proceedings

On 13 October 2011, the European Data Protection Supervisor ("*the EDPS*") received a notification, from the Council's Data Protection Officer ("*the DPO*"), for the prior checking of the processing of personal data for the organisation of meetings and meals of the Meetings and Summits of Heads of State, Meetings with Third Countries and of the Council and other Meetings at ministerial level or above, by the Council.

On 10 November 2011, the EDPS requested further information on the basis of the notification received by electronic mail. The replies were provided on 19 January 2012. On 7 February 2012, the EDPS sought some more clarifications from the DPO and the answers were given on 14 February 2012.

The draft opinion was sent to the DPO for comments on 28 February 2012. The EDPS received a reply on 8 March 2012. Following to some new factual elements, the EDPS sought further clarifications on 9 March 2012 and the Council replied on 15 March 2012.

2. Facts

The processing operation is carried out by the Protocol Unit and the Catering Unit of the Council.

Purpose

The purpose of the processing is to ensure a good functioning of the various meetings of the Council of the E.U. (summits of Heads of States, at ministerial level or above, meetings with third countries). The Council establishes a list of participants in order to avoid serving them inappropriate meals due to medical and dietary restrictions and also to religious and philosophical beliefs. In addition, in case of severe medical problem, the blood type is necessary for medical intervention.

Legal basis

The processing operation under analysis is based on the following provisions:

- Articles 15(2), 15(3) and 15(6) of the Treaty on the E.U. (TEU) on summits and meetings with third countries,
- Articles 235(3) and 235(4) of the Treaty on the Functioning of the E.U (TFEU) on summits and meetings with third countries,
- Articles 1,2,4 and 13 of the Rules of procedure of the European Council,
- Articles 16(2), 16(6) and 16(7) of the TEU and Article 240 of the TFEU on meetings at ministerial level,
- Articles 1, 19 and 23 of the Rules of procedure of the Council,
- Standing instructions, section II, chapter 9.

Furthermore, the Council has concluded a contract with an external contractor for the preparation of the meals. It is a Belgian branch of an Italian company. The contract makes reference to the application of the provisions of the Council's Regulation on security policy. The Council may use other external caterers for meetings and summits outside the Council Buildings. In light of the Financial Regulation N°1605/2002 of 25 June 2002, they all have their base of operations in the proximity of Brussels and in the near future in Luxembourg at the occasion of the Council meetings taking place in Luxembourg. These external contractors are bound by similar contracts to the one with the main caterer. Article 13 of the General Conditions refers to the confidentiality principle and Article 14 to data protection.

Data subjects

The data subjects are officials of the Council, the Member States delegates, the third country delegates and any person invited.

Procedure

Meetings of heads of State or governments: data related to name, title, medical and dietary restrictions, religious and philosophical beliefs and blood types are sent in COREU¹. The blood type information² is transferred to the medical service and the rest of the data are entered into the database CONFORNET³.

Summits or official meetings with third countries: the data related to name, title, medical and dietary restrictions, religious and philosophical beliefs and blood type are sent to the Protocol's office by e-mail, fax or verbal note by the permanent representation or the third country's mission. These data are only used for the specific meeting and they are deleted afterwards.

Meetings at ministerial level: the data related to the name and title of the participants are sent by e-mail by the permanent representations to the functional mailbox "*Conferences Participants*". The data related to medical and dietary restrictions, as well as religious and philosophical beliefs are sent to the e-mail "*Protocole Repas Officiels*" and are used for the preparation of meals. No information on blood type is collected for this category of data subjects.

¹ It is a restricted communication network between the Council of the E.U, the Member States, the European Commission and the EEAS

² According to a common protocol practice, blood types are collected only for the highest level - President/Prime Minister/Head of delegation. This information is required by the medical service in case of a medical emergency occurs.

³ It is an IT application used by the Protocol Unit for managing the events.

The processing is mostly automated. The data related to the name, title, medical and dietary restrictions) are stored in the database CONFORGNET, the table plans and lists of participants are established in electronic format and are stored in the common drive. The data received through COREU are processed and filed manually.

The name and title of the participants are public on the Council's website, since the participants in the meetings above are public persons.

In order to obtain the medical and dietary restrictions of ministers, heads of delegations and their collaborators, the Protocol Unit sends a standard e-mail asking them to provide such restrictions. In the case of ministerial Councils with third countries and bilateral summits, the Protocol Unit sends the proposed menu and asks the participants to react on that and provide any food restrictions. A clause is added that "the received information will be treated confidentially". The Protocol Unit does not ask explicitly for the religion or philosophical beliefs of the participant.

Recipients

The recipients of the data processed are the following:

Internal recipients:

- the Press Service of the Council and the Photography Service receive the name and title of the participants to their functional mailboxes, in order to cover the meetings and take photos of the participants respectively;
- the European Commission Directorate General for Interpretation is informed of the name and title of the participants, so that the appropriate interpreter can provide a simultaneous interpretation of their intervention;
- where a member of the Economic Policy Committee or the Economic Finance Committee of the Council needs to contact a participant of a meeting for a relevant thematic issue of discussion, they may receive their name and title;
- a member of the European Central Bank or European Investment Bank, who is expert in economic issues, may also receive the name and title of a participant in order to contact him about a specific issue, for example in the context of a meeting on Euro zone;
- the head of the medical service receives the information related to the blood type only for the highest level participants.

External recipients:

- the catering contractor receives information on medical and dietary restrictions from the catering unit;
- table plans are communicated to the Permanent representations of Member States as well as to Missions to the E.U of the third country with only the name and title of the participants so that the latter know who is sitting at the table

Right of access and rectification

All participants to any kind of meeting have the possibility to contact the Protocol Service in order to have access to their data and rectify them. All requests are treated by the Protocol Service without delay and within the limits established in Section 5 of the Council Decision 2004/644/CE adopting implementing rules concerning Regulation 45/2001.

Right of information

A privacy clause is inserted in the invitations to events with reference to the notification of the processing operation under analysis and the DPO website. It states that "*any personal data*

held in relation to this event shall be processed pursuant to Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. For more information see Notification 207N00 in the Register of Data Protection Operations of the Council".

Retention policy

Data related to the name, title, medical and dietary restrictions, which are saved in the database CONFORGNET, are deleted at the end of the mandate of the person concerned.

The information on blood type, which is received in COREU, it is then stored on the common drive and destroyed at the end of the mandate of the person concerned.

Under the title "*historical, statistical or scientific purposes*" of the notification, it is stated that table plans with the names and titles of the participants are kept in order to have precedents and prepare subsequent table plans. The Council proposes to adopt a specific limited retention period for the tables, a period of four years.

Security measures

Access to functional mailboxes "*Conferences Participants*" and "*Protocole Repas Officiels*" is only authorised by the members of the Protocol Unit. The access is password protected.

Access to the data in the common drive and in CONFORGNET application is also restricted by password to the members of the Protocol and Catering Unit.

The offices of the Protocol and Catering Unit are secured with a TESA or CABA lock.

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 an institution of the European Union, the Council, in the exercise of activities which fall within the scope of EU law⁴. The processing of the data is carried out mostly by automatic means (databases and common drive) and when the processing is manual it forms part of a filing system. 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 of data relating to health*" (Article 27 (2) (a) of the Regulation).

In the context of the processing operation under analysis, the Council processes data related to health (medical, dietary restrictions) of all participants, as mentioned in the facts, as well as medical data (blood type) of the Prime Ministers/Presidents/Heads of Delegations. It follows

⁴ 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.

that the data processing operation clearly falls within Article 27(2)(a) 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. However, the EDPS underlines that all his recommendations given in the present Opinion should be duly implemented in all future processing operations carried out by the Council.

Notification and due date for the EDPS Opinion: The notification of the DPO was received on 13 October 2011. 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 77 days for further information from the controller and nine days for comments. Consequently, the present Opinion must be delivered no later than on 19 March 2012.

3.2 Lawfulness of the processing

The lawfulness of the processing operation 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).

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 legal provisions indicated in the facts, which serve as legal basis for establishing the relevant lists of the data subjects concerned.

As concerns the condition of necessity under Article 5(a), the collection of data related to medical and dietary restrictions is considered as "*necessary for the performance of a task carried out in the public interest*", in view of avoiding meals which could be incompatible with the data subject's medical or dietary restrictions. As to the blood type, the EDPS takes note that its processing is considered as necessary so that the Council can provide medical assistance in case of a medical emergency of a Head of delegation, Prime Minister or President. The processing should therefore be considered as lawful.

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.

In the present case, the Protocol Unit does not directly collect any information related to the religious and philosophical beliefs of the participant. However, the processing of data related to medical or dietary restrictions by the Council may reveal information not only on the health

status of an identified participant, but also of their religious and philosophical beliefs, hence the processing is in principle prohibited under Article 10(1) of the Regulation. Data related to blood type are medical data and their processing is therefore also prohibited under the same provision.

Nevertheless, Article 10(2)(a) of the Regulation allows for processing of the above data in case "*the data subject has given his or her express consent to the processing*". The EDPS considers that the processing of these data can be considered as justified in the present case as long as the participant has voluntarily accepted to provide information on their medical dietary restrictions and blood type (in the case of the head of delegation). In this regard, the consent should be based on the information provided by the Council in line with Articles 11 and 12 of the Regulation (see further, in point 3.9 on "*Information to the data subject*").

Taking into account that the blood type, in the case of the highest level participants is important in order to provide medical assistance if an emergency occurs, its processing is therefore considered as necessary to protect the vital interests of the data subject. The EDPS notes that the processing of blood type in the present case also be justified under Article 10(2)(c) of the Regulation.

The data related to medical dietary restrictions and blood type are collected by the Protocol Unit and then transferred to the relevant recipients. Due to the sensitive nature of these data, as they can reveal religious and philosophical beliefs of the data subjects, the EDPS recommends that the Council prepares specific confidentiality declarations regarding the processing under analysis. The staff members of the Protocol Unit, who are in charge of the processing of health related data, should sign these declarations that they are subject to an obligation of professional secrecy equivalent to that of a health professional in compliance with Article 10(3) of the Regulation.

3.4 Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation 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 each participant is asked to provide in the context of the organisation of various meetings by the Council, as described in the facts, are adequate and relevant in relation to the purposes for which they are intended to be used. In order to avoid any medical or dietary risks, the catering contractors of the Council need to know the specific medical and dietary restrictions of each participant, if there are any, for the preparation of the meals. As to the blood type of the highest level participants, it seems to be necessary in case a severe medical emergency occurs. The EDPS considers therefore that the data processed comply 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 notification states that all participants may access the Protocol Service in order to have access to the data concerning them and rectify them. (see more in point 3.6 on "*Right of access and rectification*"). In this way, the Council 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 the Regulation 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 on "*Information to the data subject*").

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 all data processed are kept until the end of the mandate of the participant concerned. This seems to be a necessary and reasonable retention period for the purpose for which they are collected in conformity with Article 4 (1) (e) of the Regulation.

Furthermore, the EDPS notes that the Council proposes to adopt a four-year period for keeping table plans with only the names and titles of the participants, which they use as precedents in organising the meals. The EDPS also notes that this retention period is considered as necessary and reasonable for the purpose for which the data were collected.

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 EU 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

The EDPS considers that the transfer of the name and title of the participants to the recipients within the Council (Press, Photography, Interpretation Service and specific Committees of the Council) as well as to other EU institutions (ECB and EIB) for the purposes described in the facts comply with Article 7(1). These recipients have the competences to perform the task for which the data are transferred, namely to cover the meetings, take photos of the participants, provide translation of their interventions and contact specific participants on thematic issues of discussion during the meetings. As for the Head of the medical service of the Council who receives the blood type of the highest level of participants, the doctor's task concern the medical provision in case of an emergency. 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.

External transfers

i) Article 8

The processing operation in question involves also an external catering contractor who is in principle subject to the national law adopted for the implementation of Directive 95/46/EC. The transfer of medical and dietary restrictions to the contractor may be justified under Article 8(a) of the Regulation if "*the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". The transfer to the recipient in question is indeed considered necessary for the

performance of a task carried out in the public interest based on national legislation, namely for the preparation of appropriate meals for each of the participants at the Council meetings.

ii) Article 9

According to the notification, table plans may be communicated to the Missions to the E.U of the third country involved in a Council meeting. These external recipients are not subject to national law adopted pursuant to Directive 95/46/EC. In such cases, the transfer of data may be justified under Article 9 of the Regulation, if the Council assesses the adequacy of protection in view of the criteria set forth in Article 9(2) of the Regulation. Moreover, the transfer may be justified under Article 9(6)(a) of the Regulation, considering that the Head of Delegation of the third country has given his or her unambiguous consent to such transfer.

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"*.

The Council makes reference to Section 5 of the Council Decision 2004/644/CE adopting implementing rules concerning Regulation 45/2001. This provision concerns the modalities regarding the exercise of the data subjects' rights of access, rectification etc. and the controller's respective obligations.

The EDPS therefore considers that the Council ensures that the right of access and rectification are respected.

3.8 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 provides for certain information to be supplied where the data have not been obtained from the data subject.

In this processing operation, participants can either provide directly their data by using COREU or through their permanent representations or missions to the E.U. The EDPS finds that the privacy clause which is inserted in the invitations to events, as described in the facts, is insufficient, since it does not provide any information about the processing at all.

It is necessary to inform all participants in a clear and precise way about the processing and their rights in order to guarantee fair processing in respect of each data subject having regard to the specific circumstances of the processing operation. The EDPS therefore recommends that the Council prepares a privacy statement providing all participants with at least some minimal information, as it is outlined in Articles 11 and 12 of the Regulation. This privacy statement should also make reference to where the data subjects can obtain more information, if they wish, about the processing. The Council should inform the EDPS about the way the privacy statement is made available and easily accessible to the data subjects and provide a copy of the privacy statement to the EDPS.

3.9 Processing data on behalf of controllers

Article 2 (e) of the Regulation 45/2001 states that *"processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on*

behalf of the controller". Article 23 of the Regulation stipulates on one hand, the role of the processor and on the other hand, the obligations of the controller in ensuring sufficient guarantees in respect of the technical and organisational security measures and ensuring compliance with those measures.

The EDPS considers that the Council, though its contracts with the catering contractors, ensure that its processors respect the security requirement under Article 23(2)(b) of the Regulation. Nevertheless, due to the fact that the catering contractors process data which might reveal religious or philosophical beliefs, the EDPS recommends that the Council formally informs the recipients of these data about the prohibition of processing them in order to identify religious or philosophical beliefs of the data subjects.

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 Council do not comply with Article 22 of the Regulation.

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 Council should:

- ensure that staff members of the Protocol Unit in charge of the health related data should sign specific declarations of confidentiality that they are subject to an obligation of professional secrecy equivalent to that of a health professional;
- remind each of the recipients that they should process the personal data they receive only for the purpose for which they were transmitted;
- prepare a privacy statement providing all participants with the appropriate information, as it is outlined in Articles 11 and 12 of the Regulation a copy of which should be sent to the EDPS;
- specifically inform the recipients of health related data about the prohibition of the processing of those data in order to identify religious or philosophical beliefs of the data subjects.

Done at Brussels, 16 March 2012

(signed)

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