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ASSISTANT SUPERVISOR

Mr Paul Berman
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GB/OL/mjs/ D(2014)0689 C 2014-0017
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correspondence

Dear Mr Berman,

Further to the prior check notification received on 8 January 2014 pursuant to Article 27 of Regulation (EC) No 45/2001 ('the regulation') concerning the processing of personal data in the procedures for the appointment of members of the Court of Justice, the General Court and the Civil Service Tribunal and for the appointment of members of the panel under Article 255 TFEU and the committee provided for in Article 3(3) of Annex I to the Statute of the Court of Justice, please see this opinion of the European Data Protection Supervisor (EDPS).

On 9 January 2014, we requested additional information from the Council Data Protection Officer. That information was received on 10 January. This opinion will focus on the aspects which diverge from the EDPS guidelines on staff recruitment¹ or which for other reasons merit particular attention.

The facts

The procedures in question are used for appointments to the above positions/committees.

The members of the Court of Justice and the General Court are appointed by mutual agreement by the governments of the Member States. In both cases, the decision is preceded by an opinion of the panel under Article 255 TFEU. The members of this panel are appointed by the Council from among former members of the Court of Justice and General Court, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament. The Council adopts a decision establishing the panel's operating rules and a decision appointing its members. It acts on the initiative of the President of the Court of Justice.

¹ Available on our website.

The judges of the Civil Service Tribunal are appointed by a unanimous decision of the Council. That decision is preceded by an opinion (which includes a shortlist of candidates) of the committee provided for in Article 3(3) of Annex I to the Statute of the Court of Justice. The members of that committee are chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The committee's membership and operating rules are determined by the Council, acting on a recommendation by the President of the Court of Justice.²

The Legal Service of the General Secretariat of the Council acts as secretariat to the above committees but is not involved in the assessment of candidates.

Data may be retained for the following periods:

- for persons proposed for the post of judge or advocate-general of the Court of Justice and the General Court, six years from the date on which the decision on the appointment of a judge or advocate-general to the vacant post enters into force; this applies to both the appointed candidate and candidates not appointed;³
- for persons who have applied for the post of judge of the Civil Service Tribunal, six years from the date on which the decision on the appointment of a judge to the vacant post enters into force; this applies to the persons proposed.⁴ All other applications are destroyed within three months of the expiry of the final time limit for appeal;
- for persons proposed as members of the panel under Article 255 TFEU and the committee provided for in Article 3(3) of Annex I to the Protocol on the Statute of the Court of Justice, the data are destroyed two years after the end of the committee members' term of office.⁵

As regards the notification form, the EDPS notes that the person entrusted with the processing is given as 'unknown, Directeur, SJ [...]' [unknown, Director, LS ...], that the box on the purpose of the processing refers to its legality and that the box on storage media is empty (although the information required is provided elsewhere on the form). The box on recipients mentions, inter alia, the two committees, Directorate IV of the Council's Legal Service, the Director-General of the Legal Service and the Secretary-General of the Council.

The data protection declaration that is provided to the persons concerned describes the categories of data as 'diverses données à caractère personnel communiquées au Conseil [...]' [miscellaneous data of a personal nature communicated to the Council ...].

Legal analysis

Three phases may be identified in this processing for the two procedures (Court of Justice and General Court on the one hand, Civil Service Tribunal on the other).

1. Appointment of committees. **This phase is not subject to prior checking.** By analogy, the EDPS does not consider the appointment of selection committees in other selection procedures to be subject to Article 27. In addition, the Council decision does not constitute an evaluation for the purposes of Article 27(2)(b).⁶

² Provisions adopted: Council Decision 2013/180/EU appointing the members and Council Decision 2005/49/EC, Euratom concerning the operating rules.

³ For comparison: the term of office of judges and advocates-general is six years, renewable.

⁴ Appointment proposals containing information on the applications selected are retained electronically for six years from the notification of the decision on the appointment.

⁵ The term of office is four years, renewable once.

⁶ Cf. the opinions in cases 2010-0213 and 2013-1238.

2. Evaluation of candidates. In general,⁷ the Article 255 committee interviews candidates in private. Reasons are given for the committee's opinion. That being so, **Article 27(2)(b) applies to this aspect**. The same is true of the committee performing the same task for judges of the Civil Service Tribunal.
3. Final choice of candidates. **This phase is not subject to prior checking**. The members of the Court of Justice and the General Court are appointed by mutual agreement of the Member States by way of an intergovernmental conference. This aspect therefore falls outside the competence of the EDPS. As regards the Civil Service Tribunal, whose members are appointed by a decision of the Council, the EDPS does not consider this aspect to be subject to prior checking as there is no evaluation for the purposes of Article 27(2)(b).⁸

The next question relates to identifying the person responsible for processing. As the committees do not have their own staff, budget or address, they cannot be considered to be an EU institution or body. The General Secretariat of the Council should therefore be considered to be responsible for processing. It has been confirmed that the entry 'unknown, Directeur, SJ [...]' was not intended to indicate a person but rather a function.

The retention periods are longer than recommended for selection procedures.⁹ However, bearing in mind the profile of the posts to be filled, the EDPS considers the period to be acceptable.

As regards the recipients mentioned in the notification, the EDPS wishes to specify that the services and committees that form an integral part of the procedure (e.g. the Legal Service and the committees themselves) are not considered to be recipients. However, the representatives of the Member States and their staff are recipients. The aspects of the notification form mentioned in the description of the facts (person responsible, purpose, storage medium) must be corrected. **We would ask you to submit an updated version of the form on those points.**

In the data protection declaration provided to the candidates, there should be **greater precision as regards the categories of data processed**. Only candidates for the Civil Service Tribunal apply directly; candidates for the Court of Justice and the General Court do not apply themselves but are proposed. They are therefore in the situation covered by Article 12 of the regulation.

The proposed processing does not appear to entail any infringement of the provisions of the regulation, provided that the above comments are taken into account. Please let us know the measures taken within three months.

Yours sincerely,

(signed)

Giovanni BUTTARELLI

Cc: Ms Carmen LOPEZ RUIZ, Data Protection Officer, Council

⁷ Except in the case of renewal of the term of office of a member of the Court of Justice or General Court.

⁸ Cf. the opinions in cases 2010-0213 and 2013-1238.

⁹ Cf. EDPS guidelines on staff recruitment.