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Brussels, 09 October 2014
GB/SS/sn/D(2014)2033 C 2014-0637
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correspondence

Subject: Prior checking ex-ante notification of the processing of personal data in the framework of traineeships (SLA DG EAC) at EFCA (Case 2014-0637)

Dear Mr Savouret,

On 12 June 2014, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of your Agency an ex-ante notification for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation) on the processing of personal data in the framework of traineeships (SLA DG EAC) at EFCA. The notification included also the Service Level Agreement between the European Commission's Traineeships Office Unit and EFCA (the SLA DG EAC) in 3 copies, the statement on the Protection of personal data in relation to traineeships in accordance with the Service Level Agreement with DG EAC (European Commission) (the Privacy statement) and the HR Procedure.

The data protection aspect of the recruitment of staff, including trainees, is dealt with in the Guidelines which the EDPS has issued concerning staff recruitment procedures within EU institutions and agencies¹.

¹ The Guidelines are available on EDPS website (www.edps.europa.eu) under the section Supervision/Thematic Guidelines.

We have analysed the supplementary and revised documents you have provided to the EDPS concerning the above notification in the light of the EDPS Guidelines on staff recruitment. The present Opinion will therefore highlight only those aspects that do not seem to be in conformity with the principles of the Regulation and with the Guidelines and limit the legal analysis to those practices. In light of the accountability principle guiding his work, the EDPS would nonetheless want to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations under consideration.

The processing operations as regards Blue Book traineeships carried out by the European Commission's Traineeship Office are outside the scope of this Opinion as they have already been analysed in case 2008-0485.

The procedure was notified for prior checking under Article 27 of the Regulation on 12 June 2014. Additional information was requested from the EFCA's DPO and controller on 1, 9 and 25 July 2014 and received on 18 July and 2 September 2014 with the updated notification, Privacy statement and HR Procedure. The case was suspended for a total of 62 days. According to Article 27(4) of the Regulation, the present Opinion must be delivered within a period of two months, that is no later than 13 October 2014.

The facts

For the selection, recruitment and management of Blue Book trainees, EFCA cooperates with the European Commission's Traineeship Office. This cooperation is formalised in a service level agreement. The Traineeship Office provides administrative assistance, including financial management). EFCA is responsible for the everyday managements of recruited trainees. EFCA has restricted access to the virtual blue book of pre-selected trainees - access to anonymised data for basic consultation by the EFCA staff and access to contact details for the traineeship coordinator from EFCA's HR Section. EFCA selects trainees and informs the Traineeship Office of its preferences. EFCA's HR Section liaises with the Traineeship Office for the final recruitment of the selected candidates on all necessary formalities as established by the Traineeship Office. The Traineeship Office receives the necessary documents from the candidates. At the end of the traineeship, an evaluation report for the trainee is prepared by EFCA and submitted to the Traineeship Office, as well as a questionnaire on their performance. Traineeship certificates are issued by EFCA. EFCA receives the personal file with all implementing documents regarding a traineeship of recruited trainees from the Traineeship Office after the end of the traineeship. For certain EU institutions and bodies (e.g. the EDPS) the Traineeship Office applies exceptions to the storage procedure of trainees' personal data which are mentioned in the Traineeship Office's Specific Privacy Statement for the official traineeship with the European commission, agencies and bodies.

Legal analysis

Prior checking:

The processing operation under examination is subject to prior-checking in conformity with Article 27(2)(b) of the Regulation, since it involves an evaluation of the applicants' ability to perform the functions of a Blue Book trainee for which the selection and recruitment procedure has been organised.

The notification (point 16) referred also to Article 27(2) point (d) (processing intended to exclude individuals from a right, benefit or contract) as reasons for prior-checking. The EDPS underlines that Article 27(2)(d) is not relevant here, since it targets processing operations such as blacklists and asset freezing², and should be deleted from the notification and the Privacy statement.

The processing operation in the present case also involves the collection of information on disabilities, collected to ensure that any necessary accessibility measures can be put in place. This collection constitutes an additional ground for prior-checking in the light of Article 27(2)(a) of the Regulation, which should be mentioned in the notification and the Privacy statement.

The EDPS therefore invites EFCA to add Article 27(2)(a) and erase Article 27(2)(d) in both the notification and the Privacy statement and updated versions should be sent to the EDPS.

Lawfulness:

The notification mentions Article 5(a) and (d) of Regulation (EC) No 45/2001 as the ground for lawfulness of the notified processing. Article 5(a) requires the controller first to determine whether there is a specific legal basis for the processing and then to verify whether the processing of personal data is necessary for the performance of a task carried out in the public interest.

The EDPS considers that Article 5(a) is the main ground for lawfulness, since it is a processing which is necessary for the performance of a task carried out in the public interest.

The notification and the Privacy statement mention the SLA DG EAC and in particular the data protection clause in point E thereof as the legal basis of the processing operation. In point C (Commitment of the Decentralised Agency) of the SLA DG EAC it is expressly stated that EFCA will apply the rules governing the official traineeships programme of the European Commission and that trainees recruited in EFCA will be treated accordingly. Consequently the EDPS recommends that the Commission Decision of 2.03.2005 on the rules governing the official traineeships scheme of the European Commission (C(2005)458) is added as the legal basis of the processing in the notification and the Privacy statement.

Furthermore, the notification mentions Article 5(d) of the Regulation as an additional ground for lawfulness of the processing. EDPS considers that consent (Article 5(d)) in the context of employment is not the appropriate legal basis. The notification and the Privacy statement should be updated accordingly.

Data quality:

The data on spouses and children (surname, forename and date of birth of spouse and of each child) collected at the time of recruitment in the updated notification and Privacy statement do not seem to be relevant for the recruitment procedure as such; they are relevant only so that spouses and children can be covered if necessary by the health insurance. This is a separate procedure not covered by this notification³. The notification should therefore be updated to accurately reflect the distinction between these two procedures.

² Exclusion databases offer an example of Article 27(2)(d): if a person is placed on the exclusion list, she is worse off (in that he/she is no longer eligible for participation in calls for tender) than if the exclusion database did not exist. Article 27(2)(d) therefore applies to such databases. See cases 2010-0426 and 2009-0681.

³ In several cases (2007-0558, 2013-0729) the EDPS has held the procedures for the establishment of rights are not subject to prior checking, since they do not constitute an evaluation of the data subject in the scope of Article 27(2)(b) of the Regulation, but rather an evaluation of objective external factors - e.g. distance to the place of origin, marital status, number of children etc.

Recipients of personal data:

EFCA will, according to points C and D of the SLA DG EAC, communicate to the Traineeship Office any relevant information concerning its trainees, in particular any change in the situation of a trainee that might affect payments in the financial management of the traineeship.

The EDPS recommends that EFCA includes the Traineeship Office in both the notification and the Privacy statement as recipients of personal data.

Information to the data subject:

The notification states that the new trainee receives the Privacy statement from EFCA's HR Section at the beginning of the traineeship.

The EDPS recommends that EFCA publishes the Privacy statement on EFCA's website so that all candidates can be informed of all their rights as well as of all necessary information concerning the processing of their data before the selection procedure begins. This is important so that EFCA can guarantee a fair and transparent processing operation in conformity with Articles 11 and 12 of the Regulation.

Retention policy:

EFCA will receive from the Traineeship Office the personal file with all implementing documents regarding a traineeship. EFCA should ask the Traineeship Office to add ECFA to the list of EU institutions and bodies for which exceptions to the storage procedure apply, which appears on the Traineeship Office's Specific Privacy Statement for the official traineeship with the European commission, agencies and bodies.

EFCA will destroy all personal data after a period of two years after the end of the traineeship. The EDPS reminds EFCA of the recommendation in his Guidelines that for pre-selected but not recruited candidates the starting date for computing the storage period should be the immediate official starting date of the traineeship period.

The EDPS welcomes the EFCA's decision to keep only the following data of recruited trainees, name, surname, date of birth, period of stage, name of supervisor, nature of work performed, for up to fifty years in order to be able to provide a copy of the trainee certificate.

Security measures:

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Conclusions

Taking into account the notification and documents annexed to it as well as additional information and updated notification, Privacy Statement and HR Procedure provided by EFCA, the EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the considerations contained in this Opinion are fully taken into account.

The EDPS expects the EFCA to implement the recommendations accordingly and will close the case.

Kind regards,

(signed)

Giovanni BUTTARELLI

Cc : Ms Rieke ARNDT, Data Protection Officer - EFCA
Mr Niall MCHALE, Head of Unit Resources - EFCA