

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Commission regarding the selection of middle management staff and advisers in the Commission**

Brussels, 17 June 2009 (Case 2008-751)

### **1. Proceedings**

On 5 December 2008, the European Data Protection Supervisor (hereinafter 'EDPS') received from the Data Protection Officer of the Commission ('DPO') a notification for prior checking regarding the data processing operations that take place in the context of the selection of middle management staff and advisers in the Commission ('the Notification'). The data processing operations are mainly carried out by DG PERSONNEL AND ADMINISTRATION (in particular unit 'ADMIN A5'), by the recruiting Directorates-General ('recruiting DG/s') and by the Consultative Committee on Appointments ('CCA').

On 27 January 2009, the EDPS requested complementary information from the DPO regarding the data processing. The DPO provided the information on 11 March 2009. On the same day, the EDPS requested additional clarification which was received on 5 May 2009. On 8 May 2009 sent the draft Opinion to the DPO for comments which were received on 15 June 2009

### **2. Examination of the matter**

DG ADMIN oversees the selection process of middle management staff and advisers in the Commission in order to select the best suited candidates for a particular position<sup>1</sup>. The positions are open to internal candidates through the procedure of transfer or promotion defined under Article 29.1 (a) of the Staff Regulations. In some fewer instances the vacancies are available to external candidates, the procedure being almost the same<sup>2</sup>. The data processing operations are summarised below under section 2.1.

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<sup>1</sup> The term 'middle management' refers to staff that meet both the following criteria: (a) they involve the permanent and continuous management of an administrative unit; and (b) they appear in the Commission's official organisation chart. The functions of head of unit, head of Delegation, Head of an Office or Representation in the Member States as well as those of Deputy Head of Delegation are defined as middle management functions. These posts are filled at levels AD 9/ AD 14 or at AD 13 /AD 14. Advisers are appointed at the same levels.

<sup>2</sup> Procedures can concern external candidates in the following cases: (a) Given the commitments of the Commission in the context of the EU-10 and EU-2 enlargements, open competitions for heads of unit have been organised. The services recruit laureates from the reserve lists of these competitions to middle management positions. Given the nature of these "candidates" (laureates who have already gone through a comparative assessment of merit), the procedure at the level of the services is the same as the one for the internal selection of middle managers, except that there is no appointment of a Rapporteur and no obligation to hold both pre-selection and final interviews. The recruitment of middle management laureates of grade AD12 is submitted for opinion to the Consultative Committee

## 2.1 The Facts

The *data processing operations* that take place in the context of selecting middle management staff and advisers are summarised below. To better illustrate the data processing, the different data processing activities have been distinguished by 'phases'.

- **First phase:** As far as the selection of middle managers and advisers at level AD 9 / AD 14 is concerned, the Human Resources Unit of the recruiting Directorate ('HR Unit') receives the CVs and motivations letters for a specific vacancy through a mailbox and proceeds to their filing both in paper and electronically and to carry out a prior eligibility check. As far as the selection of middle managers and advisers at level AD 13 / AD 14 is concerned, CVs and motivation letters are received in functional mailbox "ADMIN JOB VACANCIES-MANAGEMENT". ADMIN A5 carries out an eligibility check.
- **Second phase:** Within this phase, two steps can be distinguished:

**First**, regarding both the selection of middle managers and advisers at level AD 9 / AD 14 as well as at level AD 13 / AD 14, the list of applicants together with their CVs and motivation letters is sent to a pre-selection panel set up by the recruiting DG (see below).

The pre-selection panel analyses the documents submitted by each candidate and interviews candidates, where appropriate. The HR Unit acts as the secretariat for the pre-selection panel. Assessment by a pre-selection panel is based on the applications received as well as on the information submitted by candidates during the interviews<sup>3</sup>.

**Second**, a report or, usually containing individual evaluation grids, and presenting the list of candidates best qualified ('**short list**') is submitted to the Director General concerned and to the Rapporteur, to be used during the final interviews (**see third phase**). The report is also sent to ADMIN A 5 for verification of this step of the selection procedure. The report is sent by email or by internal mail marked "staff matter". In the case of AD 9 / AD 14 procedures, the HR Unit verifies the personal file of each of the short listed candidates to verify the absence of disciplinary procedures pending or closed with a sanction<sup>4</sup>.

- **Third phase:** The Director General concerned and the Rapporteur assess the candidates shortlisted by the pre-selection panel, using as a rule individual evaluation grids which will be completed with the outcome of the interview. They *identify* the most suitable candidate(s).

In the case of an AD 9 / AD 14 procedure, the portfolio Commissioner is informed of the proposed appointment. The report of the selection procedure is sent ADMIN A 5. The report is sent by email or by internal mail marked "staff matter".

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on Appointments, in the same manner as is the case for internal selection procedures for AD13-14 level posts. (b) In a very limited number of cases, middle management or adviser positions are published for the recruitment of a temporary agent. Again, the selection procedure is the same as the one for the internal selection of middle managers, except that there is no appointment of a Rapporteur. The engagement of temporary agents to middle management or adviser positions at grades AD12 or AD13 is submitted for opinion to the Consultative Committee on Appointments, in the same manner as is the case for internal selection procedures for AD13-14 level posts.

<sup>3</sup> The pre-selection panel is composed of persons occupying at least the same function as the position to be filled.

<sup>4</sup> If, upon verification of the personal file, the local HR unit finds that there are/have been disciplinary proceedings regarding one of the candidates, it is to inform the Director-General concerned immediately and eventually the Director-General of DG ADMIN on the actions to be taken whenever a problematic case arises.

In the selection of managers and advisers *at level AD 13 and 14*, there is an intermediate step between the interview by the Director General and the selection of the candidate which consists in obtaining an Opinion from the Consultative Committee on Appointments ('CCA').

At this stage, ADMIN A5 (for AD 9 / AD 14 procedures) or ADMIN CCN-Proc (for AD 13 / AD 14 procedures) consult IDOC in order to give full assurance to the AIPN that there are no obstacles with regard to the envisaged appointment. For that purpose, ADMIN CCN-Proc also verifies the personal file of each of the short listed candidates to verify the absence of disciplinary procedures pending or closed with a sanction.

- During *the last phase*, the recruiting DG appoints the selected candidate. For appointments at level AD 13 / AD 14, this is done after having obtained the agreement from the President, the Commissioner in charge of Personnel and the Portfolio Commissioner (by "simplified procedure").

The *purpose* of the data processing operations is to manage the selection of **middle management staff and advisers in the Commission** in order to select the best suited candidates for each particular position.

The *primary responsibility* for the data processing lies within DG ADMIN. In particular, within this DG, the data processing is carried out by Unit A5. This unit, together with the recruiting DG and the Consultative Committee for Appointment and its secretariat (Unit ADMIN CCN-Proc) in cases of AD 13 / AD 14 procedures, carry out most of the data processing operations involved in the selection of candidates.

The *types of data subjects* whose data is collected in the course of the selection of candidates include the following: (i) officials of the EU institutions which are commonly referred to as "internal candidates" and, in some limited cases (ii) external applicants.

The *categories of data* collected and further processed include the following: (i) Identification data, which may include surname, first name, date (and place) of birth, sex, nationality, telephone number, email address; (ii) Education and professional experience, which may include the degree/diploma, date of award of degree, length of professional experience, length of management experience, languages spoken and level, previous working experience and personnel number (if applicable); (iii) Data related to the suitability of a candidate for a particular vacancy, which may include the assessment/grids by the pre-selection panel as regards the eligibility of the candidate, the matching of the application with the selection criteria and the performance during the interview(s) and previous assessment reports.

As far as the *conservation* of the data is concerned, according to the Notification, the selection dossiers are destroyed 10 years after the end of the selection procedure. In case of legal action against the appointment decision, the 10 years retention period is extended until one year after the final decision. This information is stored in paper both in ADMIN A.5 and in the recruiting DG in locked rooms. The electronic data are stored in outlook folders and in a shared drive R/Encadrement, with access limited to ADMIN A5 and ADMIN CCN-Proc on a need to know basis. The servers are located in the Commission's data center.

The data controller may *transfer personal data* gathered to the following types of recipients, all of which are community institutions or bodies:

During the **first phase** (receipt of information), the CVs and motivation letters are made available to the DG which has a vacant post, in particular to the Head of Unit of the HR Unit.

In cases of selection of managers and advisers at level AD 13 / AD 14, a copy of each document is sent to the Secretariat-General Unit A1 for the production of the so-called PERS document<sup>5</sup>.

During the **second phase** (assessment by the pre-selection committee), the CVs and motivation letters are made available to the pre-selection panel.

In case of AD 13 / AD 14 selection procedures, in addition, the same information is made available to the Commissioner in charge of Personal and Administration, to the Private Office of the President, the Private Office of the portfolio Commissioner, the Secretary General, the Director General DG ADMIN, the Director DG ADMIN A, the CCA Permanent Rapporteur and the Rapporteur for the procedure.

During the **third phase** (assessment by the Director General), the pre-selection panel report is made available to the Director General and the Rapporteur for the procedure.

The final report of the selection procedure is made available to the Director General of DG ADMIN and the Secretary General (the latter only for AD 9 / AD 14 procedures), and to the CCA in case of AD 13 / AD 14 procedures. When the CCA has issued a formal opinion, the Opinion will be sent to ADMIN A5 and to the SG for the preparation of the PERS document.

During the **last phase**, in case of AD 13 / AD 14 procedures, the report together with the identity of the selected candidate is sent to the Cabinets of the President, the Commissioner in charge of Personnel and the Portfolio Commissioner (the "simplified procedure").

Whereas most of the information sent to the various recipients in the Commission is transferred by e-mail only, PERS documents are sent in paper form by the Secretariat-General Unit A1.

As far as the **right to information** is concerned, the Notification explains that information is given through different channels. If the candidate applies to a post at level AD 13 / AD 14, the information to candidates is given through an automatic email which acknowledges receipt of the application. As to the applications for AD 9 / AD 14 procedures are sent to the recruiting DG, no such message is sent to the applicants. It is foreseen to include the same information in the vacancy notices for all middle management and adviser posts, including those published at level AD 9 / AD 14.

A copy of the privacy statement providing the relevant information was annexed to the Notification. It contains information on the data controller, purposes of the processing, categories of data, conservation period, legal basis, right of access, reference to the EDPS.

As far as **access rights and rectification** are concerned, as described in the privacy statement, individuals are recognised such rights and they are informed that they can be exercised by contacting the data controller. According to the Notification, candidates are informed at each step of the procedure. They have the possibility to request access to their information, either in an informal manner by contacting the president or a member of the pre-selection panel, or in a formal manner by addressing a message (e-mail or note) to the Director-General concerned and/or the Rapporteur for the procedure. If requested, a re-transcription of the conclusions of the pre-selection and/or final interview panels is transmitted to the candidate. The original minutes and/or evaluation grids are not transmitted insofar as they could contain

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<sup>5</sup>. Documents quoted "PERS" by the Secretariat-General (SG.Direction A: "Registry and Commission decision making process") which include all documents relative to personnel matters in support of Commission decisions.

comparative elements involving other candidates and also because they fall under the secrecy of the proceedings of the panel.

As far as *security measures* are concerned, the data controller acknowledges that it has put technical measures in place to ensure the level of security appropriate to the risks, and to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss or alteration, and to prevent all other unlawful forms of processing.

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## **2.2. Legal Aspects**

### **2.2.1. Prior Checking**

This Notification relates to the procedure that takes place within the Commission, mainly units ADMIN A5 and ADMIN CCN-Proc, the recruiting DG and the CCA towards hiring middle manager officials and advisors. It starts with the publication of a vacancy until the end phase where the most suitable candidate is selected. The data processing operations start with the collection of CVs and motivation letters. They continue with the assessment of candidates which is reflected in reports and paper sheets that are stored and transmitted electronically. The final step is the selection of the most suitable candidate. Taking this into account, this Opinion will assess the extent to which the data processing operations described above carried out by the Commission with the purpose of selecting the best candidates are in line with Regulation (EC) No 45/2001.

This Opinion will not address data processing operations that go beyond this scope. For example, the data processing that takes place after the selected candidate has accepted the job, such as the data processing carried out by the Office for the Administration and Payment of Individual Entitlements ("PMO"), for example in the context of the payment of salaries, pensions, mission expenses, are not dealt under this Opinion. In fact, some of such data processing operations have already been the object of a previous prior check Opinion by the EDPS<sup>6</sup>.

***Applicability of the Regulation.*** Regulation (EC) No 45/2001 applies to the "*processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system*" and to the processing "*by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law*"<sup>7</sup>. For the reasons described below, all elements that trigger the application of the Regulation are present here:

First, the selection of middle management staff and advisers in the Commission entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described in the Notification, personal data of individuals who apply for middle management and advisor positions in the Commission are collected and further processed.

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<sup>6</sup> See for example Opinion of 10 July 2007 on a notification for prior checking related to management of the sickness insurance scheme carried by the PMO (Case 2004-238); Opinion of 22 June 2006 on a notification for prior checking on "SYSPER2- e-CV, the Commission's human capital database" (Case 2005-406) and Opinion of 4 February 2005 on the notification for prior checking relating to the appraisal of senior management staff (Case 2004-95). These opinions are available at: <http://www.edps.europa.eu/EDPSWEB/edps/lang/en/pid/40>

<sup>7</sup> See Article 3(2) of Regulation (EC) No 45/2001.

Second, as described in the Notification, the personal data collected undergo *"automatic processing"* operations, as defined under Article 2(b) of the Regulation (EC) No 45/2001 as well as manual data processing operations. Indeed, some of the personal information is collected electronically directly from members. Other information is created by the pre-selection panel or the panel for the final interviews (Director-General and Rapporteur) on the basis of the candidates' performance and it is stored and transferred electronically at a later stage.

Finally, the processing is carried out by a Community institution, in this case two units within DG ADMIN (ADMIN A5 and ADMIN CCN-Proc), the recruiting DG, the (pre-)selection panel and the CCA, which are part of the European Commission, in the framework of Community law (Article 3(1) of the Regulation (EC) No 45/2001). Therefore, all the elements that trigger the application of the Regulation are present in the selection of middle management and advisors in the Commission.

***Grounds for Prior Checking.*** Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS *"processing operations likely to present specific risks to the rights and freedoms of data subject by virtue of their nature, their scope or their purposes"*. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Obviously, the processing operations that occur in the context of selecting officials precisely aim at evaluating the capacity of each candidate for a particular position. In order to carry out such evaluation, the data controller will perform various assessment activities such as weighing up whether the individual in question matches the selection criteria, judging his/her performance during the interviews, judging the performance of each candidate in his/her current positions, etc. In sum, taking the above into account, clearly the data processing operations fall within Article 27(2) (b) 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, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

***Notification and Due Date for the EDPS Opinion.*** The Notification was received on 5 December 2008. The period within which the EDPS must deliver an opinion was suspended for a total of 139 days to request further information from the data controller and allow for comments on the draft EDPS Opinion. The Opinion must therefore be adopted no later than 19 June 2009.

### **2.2.2. Lawfulness of the Processing**

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, the grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if the processing 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"*.

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) No 45/2001, two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

**Legal Basis.** In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations that take place in the context of the selection of officials for middle management and advisor positions in the Commission, the EDPS takes note of the following legal instruments: (i) Article 29 of the Staff Regulations; (ii) Commission Decision C(2005)4563 on the Rules of Procedure for the Consultative Committee on Appointments, adopted on 23 November 2005 (iii) Commission Decision C(2008)5028 on middle management staff, adopted on 10 September 2008; (iv) Commission Decision C(2008)5029 concerning the function of adviser, adopted on 10 September 2008.

As further described below, these legal instruments set forth the overall policy and specific procedures that the Commission must follow in order to appoint middle managers and advisors in the Commission. In addition, the Rules of procedure for the Consultative Committee on Appointments define the rules of procedure of the CCA, whose intervention is an integral part of the selection of candidates for some of the positions.

Upon analysis of the above legal framework, the EDPS considers that the data processing that occurs in the context of the selection of middle management officials is legally based on the above legal instruments.

**Necessity Test.** According to Article 5(a) of Regulation (EC) No 45/2001, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing is "*necessary*" for the performance of a task, in this case, for the selection of the best suited candidates.

As outlined above, under the Staff Regulations and secondary legislation, the Commission must recruit candidates for middle management and advisor positions. To put into practice this provision, it is necessary for the Commission to collect and further process personal information of candidates. Unless the Commission collects CVs and motivation letters and unless it can test the candidates through various procedures in order to evaluate their competences and whether they match the selection criteria, it would not be possible for the Commission to ensure a fair selection of candidates. In conclusion, it is the EDPS's view that the data processing that takes place in the context of the selection of officials for middle management and advisor positions is necessary to ensure the selection of the best candidates in an open, fair and transparent way.

### **2.2.3. Processing of Special Categories of Data**

Article 10.1 of Regulation 45/2001 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. Among others, such grounds include the consent of the data subject ex Article 10(2)(a).

The Notification states that no data falling under the categories of data referred to in Article 10.1 are processed in the context of the data processing operations notified for prior checking. Taking into account the overall purpose pursued by the Commission when it engages in data

processing operations to select officials, the EDPS understands that the collection of special categories of data is not the Commission's intention in the context of such selection. Indeed, the gathering of special categories of data does not seem helpful towards selecting candidates insofar as such data may be irrelevant for the purposes of selecting the best suited candidate. However, the EDPS considers that in the context of selecting candidates, applicants may reveal information on their disability or other types of special categories of data. If this occurs, it should be considered that candidates have given their consent to the processing of that data, thus, the condition of Article 10(2) (a) would be met. In addition, this consent is given in the context of staff management (recruitment) in order to enable the employer to comply with his specific obligations in the field of employment law to provide for extra time and to provide specific IT equipment for the tests ex Article 10(2)(b) of the Regulation according to which the prohibition shall not apply where the processing is "*necessary for the purpose of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the treaties establishing the European Communities or other legal instruments adopted on the basis thereof*".

Article 10.5 of Regulation (EC) No 45/2001 establishes that "*[processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor.*" According to the Notification no such data are collected in the context of the selection of candidates for senior positions.

#### **2.2.4. Data Quality**

***Adequacy, Relevance and Proportionality.*** Pursuant to Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This is referred to as the data quality principle.

The type of information requested to apply for a middle management and advisor position includes CVs and motivation letters. It also includes information on the candidate's ability for a given position, which is collected in the context of the interviews. Only if the Commission has information on the education and professional experience as well as on the candidate's suitability for a given job, will the Commission be able to select the best suited candidate. In sum, the EDPS considers that the above information complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

In addition, the data controller also collects evidence towards verifying whether there are or there have been disciplinary proceedings regarding the candidates. It appears necessary to verify whether there is an on-going disciplinary procedure, the result of which could jeopardise the exercise of tasks related to these positions and more important put at stake the ability of the person concerned to be appointed for such positions. However, the EDPS has not been provided with arguments to sustain the need to obtain copies of information related to disciplinary procedures that were closed with the conclusion that the staff member concerned was not involved in any wrongdoing ('negative disciplinary procedures'). Thus, it would appear that information related to negative disciplinary procedures should not be collected insofar as it not been taken into account for the purposes of the selection.

***Fairness and Lawfulness.*** Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2).



The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.7.

**Accuracy.** According to Article 4(1)(c) of the Regulation, personal data must be *"accurate and, where necessary, kept up to date, and "every reasonable step must be taken to ensure that the 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"*. In this case, an important part of the data has been provided by the applicant himself/herself. This procedure itself helps to guarantee the accuracy of the personal data. However, other information is not provided directly by the individual but generated by the various assessment bodies. In this regard, as further developed below, it is important for the candidate to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data hold about them is accurate. In this respect, see also Section 2.2.8.

### **2.2.5. Conservation of Data**

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

According to the Notification, the selection dossiers are destroyed 10 years after the end of the selection procedure. In case of legal action against the appointment decision, the 10 years retention period is extended until one year after the final decision.

The EDPS recommends that the controller reconsiders the storage periods. DG ADMIN should reconsider whether keeping applications and relevant documentations for 10 years is necessary, or whether a shorter deadline would be sufficient. In this regard, in principle and since a comprehensive justification is lacking regarding retention, the EDPS has reservations about the need to keep the data for such a long period. The EDPS considers that a maximum period of 5 years would be sufficient for the purposes of facing possible challenges for non-selected candidates, as this is the approximate period during which documents are required to be kept under the Financial Regulation. This is even more the case regarding data of informative nature such as the address, telephone number, etc. Of course, data of candidates that are successful may be retained longer by other data controllers who will have to process such data in the context of their data processing operations. For example, parts of such data will be kept in the personal file of the recruited person. This Opinion does not address the adequacy of such retention periods, which need to be reviewed in the context of each particular data processing operation.

According to the Notification, the possibility for storing data for historical, statistical or scientific reasons appears to be excluded.

### **2.2.6. Transfers of Data**

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 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 to (i) Community 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).

According to the Notification all the transfers are made to Community institutions and bodies, thus, Article 7 of the Regulation applies. Article 7 of Regulation (EC) No 45/2001 requires

personal data to be transferred "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary.

The EDPS considers that the transfers of information to the recipients described in the Notification for the purposes stated comply with the first requirements. Indeed, all the recipients are supposed to have the competences to perform the task for which the data is transferred, i.e. to assess the adequacy of the candidates. The level and concrete tasks vis-à-vis the assessment varies depending on the recipient. All the recipients, at some point of the procedure are supposed to have the obligation to assess the candidates. This applies to the members of the pre-selection committee, to the CCA as well as to the Member(s) of the Commission, particularly to the portfolio Commissioner, who must be able to choose an individual with whom he/she feels that it can build a relationship of trust and confidence.

However, the EDPS does not understand the rationale of sending copies of the CVs and motivation letters of each AD 13 / AD 14 candidate which takes place in the second stage, to the Commissioner in charge of Personal and Administration, to the Private Office of the President, the Private Office of the portfolio Commissioner, the Secretary General, the Director General DG ADMIN, the Director DG ADMIN A, the CCA Permanent Rapporteur and the Rapporteur for the procedure.

The EDPS questions whether the amount of data transferred to each one of the above mentioned recipients is necessary in relation to the purposes for which the data are transferred and further processed by each recipient. . Taking into account that the candidates have to undergo various selection phases during which most of them will not be selected, it seems unnecessary to send the complete CVs and list of candidates to the recipients/assessors who only intervene at the end of the selection process. For example, if the initial list has 30 candidates for one post for which 5 members will be short listed in the second phase, it seems pointless to send the names and CVs of the 30 individuals to recipients other than the Head of Unit Resources of the recruiting DG and the members of the pre-selection and CCA committees. The role played by the remaining recipients (the Commissioner in charge of the Personal and Administration, the Private Office of the President, the Private Office of the portfolio Commissioner, the Secretary General, the Director General DG ADMIN, the Director DG ADMIN A) at the early stages of the selection process is uncertain. However, if the role is to have an overview of the level of interest generated by a given position and an overall view of the number of candidates, it would seem unnecessary for them to have the whole dossier of each candidate. Instead, a report stating the number of candidates should be sufficient.

### **2.2.7. Right of Access and Rectification**

According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

According to the privacy statement, individuals are recognised such rights and they are informed that they can be exercised by contacting the data controller.

The EDPS recalls that candidates should be able to have access to their entire file, comprising the grids and assessment notes concerning them drafted by the various committees competent for their assessment (pre-selection panel and CCA). The EDPS notes that according to the Notification candidates are given access to the conclusion of the pre-selection and to the conclusions of the final interview panels. This is done by providing a re-transcription. Original minutes and/or evaluation grids are not transmitted insofar as they could contain comparative elements involving other candidates and also because they may fall under the secrecy of the proceedings of the panel.

The EDPS is satisfied with the above practice for the reasons explained below. The EDPS is aware of the principle of the secrecy of selection committee's proceedings, as set out in Article 6 of Annex III to the Staff Regulations. According to this principle, no marks given by individual members of the committee should be given. The EDPS notes that in the area in which the selection committee is covered by the principle of secrecy, the right of access does not apply even though personal data are processed, if that area is covered by the exception in Article 20(1)(c) for the protection of the rights of others, in this instance both the right of selection board member themselves and their need to have their independence reinforced and the right of other applicants to be treated fairly and in like fashion. Article 20 (1) states that "*The Community institutions and bodies may restrict the application of ( ) Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject of the rights and freedoms of others*". This means that information comparing the data subject with other applicants should not be provided and no information should be given regarding the particular remarks of members of the committees.

The right of rectification on the other hand, can obviously apply only to factual data. Marks allocated could not under any circumstances be open to a right or rectification by the data subject, except in the context of the established appeals procedures. Furthermore, the EDPS notes that limitations to the right of rectification of candidates' data, after the deadline for the sending of documents regarding a given competition may be necessary for different reasons, including of practical nature. In this regard, the EDPS considers these limitations can be seen as necessary to ensure objective, certain and stable conditions for the competition, and essential to the fairness of processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

### **2.2.8. Information to the Data Subject**

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

In order to comply with this obligation, information to candidates for middle management and advisor positions at level AD 13 / AD 14 is given through an e-mail notification. This takes place when candidates send an email to the functional mailbox "ADMIN JOB VACANCIES-MANAGEMENT". This communication channel seems appropriate insofar as it enables candidates not only to read and print but also to store the privacy statement. Currently no such message is sent to the applicants for AD 9 / AD 14 positions. It is foreseen to include the same information in the vacancy notices for all middle management and adviser posts, including those published at level AD 9 / AD 14. The EDPS encourages this to be implemented as soon as possible.

The EDPS reviewed the content of the information provided in the privacy statement to verify whether the content satisfies the requirements of Articles 11 and 12 of Regulation (EC) No 45/2001. The privacy statement contains information on the identity of the data controller, the purposes of the processing and how the data is processed, the conditions for the exercise of the right of access and the legal basis for the processing operations. The EDPS considers that the privacy statement contains all the information required under Articles 11 and 12 of the Regulation.

### **2.2.9. Security measures**

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must implement the 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 must 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. DG ADMIN acknowledges that it has adopted the security measures required under Article 22 of the Regulation.

On the basis of the available information, the EDPS does not see any indication to believe that the Commission has not applied the security measures required in Article 22 of the Regulation. However, taking into account the type of the information at stake and the risks of links due to the high number involved in its processing, the EDPS wishes to emphasise the need for the data controller to effectively ensure the implementation of a high level of security safeguards. To this end, the EDPS advises the data controller to do its utmost to strengthen the measures.

For example, [.....]

## **3. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations in this Opinion are fully taken into account. In particular, DG ADMIN must:

- Ensure that no data related to closed disciplinary proceedings is collected and further processed.
- Reconsider the storage periods. In particular, evaluate why a shorter maximum period of 5 years is not sufficient for the purposes pursued (as opposed to the current 10 years storage period).
- Limit the amount of information transferred during the second phase. Recipients other than the pre-selection committee and the CCA should only receive a report stating the number and identity of candidates without other personal information included therein.
- Provide an information notice to applicants for all middle management and adviser posts, including those published at level AD 9 / AD 14.
- Raise specific awareness among units ADMIN A5 and ADMIN CCN-Proc regarding the need to ensure the confidentiality of the information. This should include training and signing a specific confidentiality declaration.
- Strengthen the security measures intended to enhance the security of the information held and exchanged electronically, including ensuring that information on candidates

is always transferred in sealed envelopes marked 'confidential' or 'for the addressee only'.

Done at Brussels, 17 June 2009

(Signed)

Giovanni BUTTARELLI  
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