

Opinion on the notifications for prior checking from the Data Protection Officer of Fusion for Energy concerning the calls for expression of interest for external experts to be appointed to the Executive Committee and the Technical Advisory Panel of the Fusion for Energy

Brussels, 26 July 2011 (Joint Cases 2011-0363 and 2011-0364)

1. Proceedings

On 18 April 2011, the European Data Protection Supervisor (EDPS) received two notifications for prior checking from the Data Protection Officer (DPO) of the European Union's Joint Undertaking for ITER¹ and the Development of Fusion Energy (F4E) concerning calls for expression of interest for members of the Executive Committee (ExCo) and the Technical Advisory Panel (TAP) of Fusion for Energy (F4E). The notifications were accompanied by the respective calls for expression of interest published on 14 April 2011 on the F4E website.

On 1 June, the EDPS sent a request for additional information to the DPO. The reply was provided on 17 June 2011 together with the following documents:

- Final Recommendation to the F4E Governing Board on the adoption of the Decision laying down the Procedure of the Appointment of New Members to the Executive Committee and Technical Advisory Panel of 8 March 2011 (GB 19-12);
- Summary of Decisions of the 19th meeting of the F4E Governing Board of 8 March 2011 (GB 19-Summary);
- Draft Recommendations to the F4E Governing Board on the adoption of the Decision concerning the Appointment of the Chair, Vice-Chair and Members of the Executive Committee of 28 May 2011 (GB 20-11a);
- Draft Recommendations to the F4E Governing Board on the adoption of The Decision concerning the Appointment of the Chair, Vice-Chair and Members of the Technical Advisory Panel of 28 May 2011 (GB 20-11b).

The draft Opinion was sent to the DPO for comments on 29 June 2011. These were received on 21 July 2011.

2. Facts

This prior checking Opinion deals with the selections of several members of the F4E Executive Committee and Technical Advisory Panel based on the respective calls for expression of interest. According to the new appointment procedure established in the Decision of the F4E Governing Board of 8 March 2011 (GB19-12), at least a half of the Executive Committee members, including its Chairman, have to be replaced by July 2011,

¹ International Thermonuclear Experimental Reactor.

whereas at least four members of the Technical Advisory Panel are due to be replaced by September 2011.

The **purpose** of the processing operations is to evaluate personal aspects of applicants for appointment as a member of the ExCo or TAP, as well as the establishment of the respective reserve lists².

The evaluation of the submitted applications (motivation letters and CVs) is carried out by the three members of the respective Selection Committee, i.e. the Chair or Vice-Chair of the Governing Board, the Chair of the respective advisory body (ExCo or TAP), as well as the TAP Vice-Chair or Euratom representative (in case of the ExCo). The Selection Committee establishes a shortlist of the most suitable candidates which is then submitted to the Governing Board with recommendations for appointment and/or placement on the respective reserve list. All candidates are informed of the outcome of the selection procedure by email from the Governing Board Secretariat.

The following **categories of data** may be processed:

- personal identification details (surname, first name, date of birth, gender, address, email address);
- "selection criteria information" in terms of education, training and professional experience, languages spoken etc.;
- any information provided by applicants in their motivation letters.

The following **retention policy** applies:

- personal data of unsuccessful candidates will be discarded one year after the selection process closes;
- personal data of shortlisted but non appointed candidates will be retained in a reserve list for an initial period of two years and afterwards for another two years from the day of the expiry of the reserve list validity;
- personal data of successful candidates will be kept for five years following the expiry of the mandate of the respective ExCo or TAP member.

All paper files will be destroyed immediately after the nomination of successful candidates.

Apart from the members of the respective Selection Committees, personal data of all candidates may also be disclosed to the Secretary of the GB, as well as the Assistant to the Secretariat of the GB, whereas personal data of shortlisted candidates may be transmitted to certain officially nominated members of the Governing Board³. The data should be marked as "Restricted" and the data recipients have to sign declarations of confidentiality to this respect.

When appropriate, data may also be disclosed to the internal auditor, the Court of Auditors, the F4E legal advisor, OLAF, the European Ombudsman, the European Data Protection Supervisor and the Court of Justice.

Access to and rectification of the data processed can be granted upon an email request to the controller (gb-secretariat@f4e.europa.eu). After the expiry of the deadline for applications, only identification details and contact information can be updated.

The following **information to data subjects** is provided in the calls for expression of interest:

- identity of the controller (F4E as represented by the Secretary of the Governing Board);

² These lists are used in case of resignation of a current member of the respective advisory body during its mandate.

³ Which are "the officially nominated Representatives of the GB Members (EU Member States, Switzerland and Euratom)".

- legal basis of the processing;
- purpose of the processing;
- categories of data processed;
- recipients of the data processed;
- retention policy;
- existence of the rights of data subjects of access and rectification;
- existence of the right of data subjects to have recourse to the EDPS.

As regard **security measures**, (.....)

3. Legal aspects

3.1. Prior checking

The processing of personal data relating to the calls for expression of interest for selection of experts to be appointed to the ExCo and TAP of Fusion of Energy falls within the scope of Regulation (EC) 45/2001. It is subject to prior checking by the EDPS pursuant to its Article 27(2) (b) since it is clearly intended to evaluate the capacity of each applicant for the respective advisory body.

Since prior checking is designed to address situations that are likely to present certain risks, the Opinion of the EDPS should have been given prior to the start of the processing operation. In this case, however, it is regrettable that the notifications were submitted when the processing operations had already been launched, as both calls for interest were published four days before the submission of the respective notifications. In any case, any recommendations made by the EDPS should be respected accordingly.

Both notifications were received by email on 18 April 2011. According to Article 27(4) of Regulation (EC) 45/2001, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for 39 days (16 + 23) to allow for provision of additional information, as well as comments on the draft Opinion. Therefore, the present Opinion must be delivered no later than 27 July 2011.

3.2. Lawfulness of the processing

The calls for expression of interest for external experts to be appointed to the ExCo and TAP of Fusion for Energy are based on Articles 6(3)(c) and (q), 7(6) and (8) and 9 of the F4E Statutes⁴, as implemented by the following decisions of the F4E Governing Board:

- Decision of 17 July 2007 concerning the mandate and rules of procedure for the Technical Advisory Panel (GB02-04.4);
- Decision of 8th March 2011 concerning the procedure for the appointment of new Executive Committee and Technical Advisory Panel members (GB19-12).

The respective processing of personal data is necessary for the management and functioning of the F4E joint undertaking and can therefore be considered as lawful in terms of Article 5(a) of Regulation (EC) 45/2001 (read together with its recital 27).

3.3. Data quality

Pursuant to Article 4(1)(a), (c) and (d) of Regulation (EC) 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose they are collected or further processed, as well as accurate.

⁴ Annexed to the Council Decision of 27 March 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon it (in OJ L 90/63).

The accuracy of the data processed is facilitated by the fact that data are provided by the respective data subjects who can also make use of their right of access (see point 3.6).

Lawfulness of the data processing has been already discussed (see point 3.2), whereas fairness has to be assessed in the context of information provided to data subjects (see point 3.7).

The applicants may provide in their motivation letters and CVs information that may not be necessary for the respective selection procedure. Provided that the controller does not process further data that are irrelevant or excessive to what is requested for the purposes of the processing operations, compliance with the principles relating to data quality as stipulated by Article 4 (1)(c) of Regulation (EC) 45/2001 will be ensured.

3.4. Data retention

According to Article 4(1)(e) of Regulation (EC) 45/2001, personal data may be kept in a form enabling 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 is of the opinion that the differentiated retention policy described above is in compliance with Article 4(1)(e) of Regulation (EC) 45/2001.

3.5. Transfer of data

The internal and inter-institutional data transfers mentioned above are subject to Article 7 of Regulation (EC) 45/2001. They should be necessary for the legitimate performance of tasks covered by the competence of the particular recipient who can process the data only for the purposes for which they were transmitted.

In the present case, the transfers of personal data to the members of the Selection Committee, as well as the officially nominated members of the Governing Board are considered as necessary for the accomplishment of the respective selection procedure. Furthermore, the data transfers to the legal advisor of Fusion for Energy, internal auditor, Court of Auditors, OLAF, European Ombudsman, the European Data Protection Supervisor and the Court of Justice are considered as necessary for the performance of respective legal, audit or supervisory tasks.

As indicated above, the officially nominated members of the Governing Board have to sign a confidentiality declaration with respect to the transmitted data of shortlisted applicants. Nevertheless, the EDPS recommends that all recipients are reminded of their obligation not to use the data received for another purposes than the ones for which they were transmitted in terms of Article 7(3) of Regulation (EC) 45/2001.

3.6. Rights of access and rectification

As indicated above, access and rectification of data processed can be granted upon an email request sent to the controller, whereby after the expiry of the application deadline, the right of rectification is limited to the identification details and contact information. This restriction can be deemed necessary to ensure the fairness of the selection procedure, i.e. safeguard the protection of rights of other applicants in terms of Article 20(1)(c) of the Regulation.

3.7. Information to the persons concerned

The EDPS notes that the calls for expression of interest provide for all information as required in terms of Articles 11 and 12 of Regulation (EC) 45/2001.

3.8. Security measures

On a basis of the available information, the EDPS has no reason to believe that the measures implemented by Fusion for Energy are not adequate in light of Article 22 of the Regulation.

4. Conclusion

The proposed processing operation does not appear to involve any breach of the provisions of Regulation (EC) 45/2001, provided that the recommendations made above are taken into account. This means, in particular, that:

- the controller should not process further data supplied by the data subjects but irrelevant or excessive to what is requested for the purposes of the processing operations (Article 4 (1)(c) of Regulation (EC) 45/2001);
- all data recipients should be reminded of the purpose limitation of the transfer in question (Article 7(3) of Regulation (EC) 45/2001).

Done at Brussels, 26 July 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor