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Brussels, 19 June 2013  
GB/XK/mk D(2013)1225 C 2013-0156  
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**Subject: Prior checking notification on the selection procedures in view of recruiting personnel to the European agency eu-LISA from DG HOME.**

Dear Ms Pyke,

We have analysed the documents you have provided to the EDPS concerning the notification for prior checking under Article 27(3) of Regulation 45/2001 ("the Regulation") on the processing operations related to the selection procedures in view of recruiting personnel to the European agency eu-LISA from the Commission's Directorate General for Home Affairs (DG HOME), in light of the EDPS Guidelines on staff recruitment ("the EDPS Guidelines")<sup>1</sup>. 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 the post for which the selection and recruitment procedure has been organised.

In this letter, the EDPS will only identify and examine the Commission's practices which do not seem to be in conformity with the principles of the Regulation and the EDPS Guidelines, providing the Commission with relevant recommendations.

### **The Facts**

The processing operation relates to selection procedures for recruiting personnel to the European agency eu-LISA for the operational management of large-scale IT systems in the area of freedom, security and justice. The agency took up its responsibilities on 1 December 2012. DG HOME, acting as the controller, is responsible for the establishment and initial

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<sup>1</sup> The EDPS Guidelines can be found on the EDPS website under the title "Thematic Guidelines".

operation of eu-LISA until the latter has the operational capacity to implement its own budget.

The EDPS regrets that this processing operation was only submitted to him on 6 February 2013 after it had already been launched. Notifications for prior checking should be submitted before the start of the processing operation, so that any recommendations made can be taken into account before starting to process personal data.

## **Recommendations**

### **1) Lawfulness**

The EDPS notes that the Specific Privacy Statement -in addition to Article 5(a) of the Regulation- refers to Article 5(b), and states that that the processing is necessary for compliance with a legal obligation to which the controller is subject under Article 28 of Regulation (EU) No 1077/2011.

In general, Article 5(a) applies when a task is attributed to the Commission and *in order to fulfil it*, personal data need to be processed. Article 5(b) on the other hand applies if the provision in question *requires* the Commission to do so *without leeway* in the implementation. The EDPS highlights in particular that Article 5(b) is also used when an EU institution or body needs to comply with an obligation resulting from national legislation of the Member State where it is set up. This has been the case in processing operations which relate to the safety and security of staff members at their workplace<sup>2</sup>. In the present case, the lawfulness of the processing should therefore be justified under Article 5(a) of the Regulation and not Article 5(b).

Moreover, Article 5(d) of the Regulation may be considered as an additional ground for rendering processing legitimate, although the EDPS is not in favour of using Article 5(d) as ground for lawfulness in the field of recruitment. In an employment situation, consent is a sensitive issue, since there is in principle undue pressure; hence it is not freely given by the staff in the sense of Article 2(h) of the Regulation<sup>3</sup>.

The EDPS therefore recommends that the Commission amends the Specific Privacy Statement accordingly, and provides us with a copy of it.

### **2) Information to be given to the data subject**

Articles 11 and 12 of the Regulation provide that data subjects must be informed of the processing of data relating to them, and be given specific additional information in order to guarantee fair processing.

The EDPS Guidelines recommend that the data subject is made aware of which information is mandatory or optional (Article 11(d) of the Regulation). Although candidates are only invited to submit information which is directly relevant to their application, the EDPS would recommend that the Specific Privacy Statement makes clear that all information is therefore mandatory and describes the consequences of failure to reply.

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<sup>2</sup> "Safety Inspections at the JRC Ispra Site", EDPS Opinion 6/09/2010, case 2009-682, "Study on stress at work" by OHIM, EDPS Opinion 2/05/2007, case 2006-0520.

<sup>3</sup> see Opinion 8/2001 of the Article 29 Working Party on the processing of personal data in the employment context.

In light of the EDPS Guidelines, data subjects should also be made fully aware that they are able to access their evaluation results regarding all stages of the selection procedure unless the exception of Article 20(1)(c) of the Regulation- in line with Article 6 of the Annex III to the Staff Regulations- is applied.

The EDPS invites the Commission to include the above information in the Specific Privacy Statement and provide us with an updated version.

### **3) Retention period**

Article 4(1)(e) of the Regulation 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"*.

In terms of recruitment, the "necessary" retention period will vary depending on the status of each individual's particular application. As such, the EDPS Guidelines point out the need to differentiate between three categories of data subject; specifically the recruited applicants, the non-recruited applicants and the non-recruited applicants whose names were put on the *"reserve lists for appointment"*. It is worth-noting that in various previous opinions, the EDPS accepted that it was reasonable to retain the personal data of unsuccessful candidates for two to three years *following the recruitment procedure* as that period was derived from the length of time during which a complaint may be brought to the European Ombudsman.

The EDPS would therefore recommend that the general five year retention period, indicated in both the notification and Specific Privacy Statement, is reconsidered. The three categories of data subjects should be clearly stated as well as the respective retention periods of their data in light of the EDPS Guidelines. All changes should be appropriately communicated to the data subjects and updated versions of the notification and the Specific Privacy Statement should be provided to the EDPS.

### **Conclusion**

Provided that the recommendations made above are taken into account, there is no reason to believe that there is a breach of Regulation (EC) No. 45/2001. Please inform the EDPS of the measures taken, providing all relevant documents based on the recommendations of this Opinion, within a period of 3 months.

Yours sincerely,

**(signed)**

Giovanni BUTTARELLI

Cc: Mr, Philippe RENAUDIÈRE, Data Protection Officer, European Commission

Mr Ioan-Dragos TUDORACHE, Head of Unit C.3 Transeuropean Networks for Freedom and Security and relations with eu-LISA