



Selection procedure of the members of the Advisory Panel at the Fundamental Rights Agency (FRA).

Prior Checking Opinion

The Fundamental Rights Agency (FRA) has established a cooperation network called Fundamental Rights Platform (FRP) out of which an Advisory Panel (AP) is selected to facilitate communication between the Director and the FRP. Even if the selection of the AP is done by the FRP directly, and this is not subject to prior checking, there is a first pre-selection by the FRA services which imply an evaluation in the sense of Article 27 (2) (b) of Regulation 45/2001.

EDPS recommends FRA to select which fields of the CV page are compulsory and which are not, by virtue of the data minimisation principle, as well as to describe the processing operation subject to prior checking in the privacy notice.

Brussels, 28 July 2017

1 The Facts

1.1 The Fundamental Rights Platform (FRP) and the Advisory Panel (AP)

The FRA, on the basis of Article 10(1) of the Council Regulation establishing it¹, has to establish a cooperation network composed of non-governmental organisations that deal with human rights, trade unions and employers organisations. This network is called Fundamental Rights Platform (FRP) and is open to all interested stakeholders provided that they are qualified. It is a mechanism for exchange of information and pooling knowledge. The FRP is further developed by a Decision of the Director of 17 March 2017² (the decision). When organisations sign up for the FRP, FRA provides them with a data protection notice.

Article 3 of the decision sets up an Advisory Panel (AP) with the intention to facilitate transparent communication between the FRA and the FRP. Its purpose is to provide advice to the Director.

The members of the AP will be elected by the members of the FRP out of the organisations registered in the FRP. Importantly, once elected, these members will be acting in their own independent capacity and not representing a given organisation.³

The AP will have a maximum of 11 (eleven) full members and 3 (three) observers; 6 (six) members will be elected by the organisations that are part to the FRP network and 5 (five) will be appointed -and thus not elected- by the Director.⁴

The AP is consultative and deals with procedural issues only.

1.3 The election of the AP

In order to be eligible for standing for election as member of the AP, candidates have to fulfil the following conditions:⁵

- fulfil the conditions listed under Article 1(3) of the decision of the director⁶;

¹ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights (OJ L 53/1 of 22.02.2007). The recital number 19 of the Council Regulation further specifies that the Agency shall set up a cooperation network called the Fundamental Rights Platform with a view to creating a structured and fruitful dialogue and close cooperation with all relevant stakeholders.

² FRP ToR/DIR/003/2017.

³ See Article 3 (4) of the Decision of the Director.

⁴ The Director may also appoint the observers.

⁵ The conditions foreseen in Article 4(1) of the Decision of the Director.

⁶ Under Article 1(3), the organisations have to:

- be active in at least one of the EU member states, or in a state holding observer status with FRA;
- unreservedly committed to respecting fundamental rights as enshrined for instance in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights and to working for their advancement, protection and promotion;
- have experience and capacity with regard to the protection and promotion of these rights;
- committed to raising awareness of the fundamental rights issues addressed by FRA;

- hold a position with a high level of responsibility within the organisation;
- have a knowledge of the functioning of FRA;
- have a solid background and track record of working with civil society organisations and /or participating in civil dialogue processes with international networks and/or with grass roots organisations.

In practical terms, in order to stand for the elections for the AP, candidates have to fill in one page CV and one page motivation and send them to FRA. FRA will publish these documents on its website one month in advance of the voting date and remove them after the election. Applicants receive a data protection notice; however, the notice does not inform candidates about the legal basis for the processing operation.

The data categories are the following: name, organisation, position, and country, information about current job and previous educational record and work experience.

There is also a box called *about myself* and another one *about my organisation*. Finally, there is an additional part called *statement of motivation* where candidates have to explain why human rights topics are a priority for them personally and for their organisation and why they want to contribute to the AP.

FRA then examines the applications. The director, after having consulted the AP,⁷ may reject certain candidates if he concludes that they do not meet the conditions mentioned above. This data protection notice given to applicants does not mention this concrete part of the processing.

Afterwards, registered members of the FRP will proceed to vote in order to elect 6 (six) candidates (out of the list of candidates previously examined by FRA).

An external contractor will provide an IT tool that enables the voting. The external contractor will receive the names of the candidates, but not their CVs. This contractor will also receive the email address of each of the current registered FRP organisations in order to send them a login and a password that enables the election. At this stage, voters receive a privacy notice for the voting process.

In addition to these members elected by the FRP, the Director may appoint up to five members of the Advisory Panel and will do this from representatives of organisations registered in the FRP database.⁸ For this appointment, no candidacies have to be advanced.

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- committed to pursuing a ‘structured and fruitful dialogue’ with the FRP respecting the dignity and the rights of other organisations and contributing to the overall effective functioning of the FRP;
 - able for the sake of transparency to provide FRA on request with detailed information regarding their organisational structure and financial sources;
 - Refraining from any conduct against the fundamental rights of any person or groups of persons, as are recognised by the Charter and the subsequent interpretation by the authoritative bodies.

⁷ See Article 4 (2) of the Decision of the Director (footnote 3). This means that there is already an Advisory Panel in place.

⁸ The conditions are now foreseen in Article 5(1) of the Director’s Decision according to which the Director may appoint persons who “fulfil all the conditions listed above under article 1(2) and (3), have a knowledge of the functioning of FRA, have a solid background and track record of working with civil society organisations and/or participating in civil dialogue processes with international networks and/or with grass roots organisations.”

There are two privacy notices, one given at the moment when organisations sign up for the FRP and the other at the moment in which the AP members stand for elections. These privacy notices contain complete information about the rights of the data subjects.

FRA will keep the data for six months after collection.

[...].

2 Legal analysis

This prior checking Opinion⁹ under Article 27 of Regulation (EC) 45/2001¹⁰ (the Regulation) will focus on those aspects which raise issues of compliance with the Regulation or otherwise merit further analysis. For aspects not covered in this Opinion, the EDPS has, based on the documentation provided, no comments.

2.1. Necessity of prior-checking

The prior checking notification submitted by FRA relates to the selection process for the members of the Advisory Panel (AP) by the members of the Fundamental Rights Platform (FRP) as well as the IT tools that facilitate this election. However, not all parts of the notified activities are subject to prior checking under Article 27 (2) of the Regulation. Only the pre-selection done by the services of FRA and which allows the subsequent election of the AP by the FRP is subject to prior checking.¹¹

The reasons are the following:

IT tools that facilitate the election process are not subject to prior checking *per se*; what is subject to prior checking is the processing operation. The election of the AP by the FRP is not subject to prior checking either as does not involve directly the institution, body or agency. However, given that there is a first pre-selection done by the staff of FRA and applications can be rejected at this stage, this represents an evaluation in the sense of Article 27 (2) (b) of the Regulation.¹²

⁹ According to Article 27(4) of the Regulation, the EDPS has to provide his Opinion within two months of receiving the notification, not counting suspensions. The notification was received on 24 April 2017 and suspended in view of additional questions. Given that the last information from the DPO was sent on 3rd July 2017, the EDPS shall render his Opinion by 3rd September 2017.

¹⁰ OJ L 8, 12.1.2001, p. 1.

¹¹ In case number 2015-463 ‘pre-selection procedure for the post of Director of FRA’ the EDPS affirmed that as follows: ‘while the processing notification does not directly fall under the scope of EDPS guidelines on selection and recruitment procedures it is sufficient similar to these guidelines to be applied by analogy.’ Same principle applied in the framework of opinion 2014-0017 on pre-selection of the Members of the Court of Justice.

¹² The fact that the director may appoint up to five members of the AP from representatives of organisations does not imply an evaluation (there are no candidacies presented for this) and thus it should not be subject to prior checking.

According to the eligibility criteria, candidates must have a position with a high level of responsibility or must have experience and capacity with regard to the protection and the promotion of fundamental rights. Assessing this criteria involves a certain level of discretion from the side of FRA and represents an evaluation in the sense of Article 27 (2) (b) of the Regulation.

2.2. Lawfulness of the processing operation

The lawfulness of the processing operation is based on Article 5(a) of Regulation 45/2001 as it can be considered "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". As to the legal instruments in question these are Article 10 of the FRA Regulation setting up a FRP, complemented by the decision of the director which states that, out of the platform, an Advisory Panel will be created.¹³

As an additional point, lawfulness is also based on Article 5(d), i.e. data subjects have unambiguously given their consent; candidates stand for the elections on a voluntary basis.

2.3. Data quality

The data requested seem to be adequate, relevant and non-excessive for an election of members of the panel in the sense of Article 4 (1) (c) of the Regulation. As once elected, members of the AP will act in a personal capacity, it may be adequate to provide certain information about themselves and about their profession.

Nevertheless, in order to ensure data *minimisation* some of the boxes could be filled in on an optional basis. For instance, not all *previous educational record and work experience* may be relevant for standing as a candidate for the AP and this information could thus be optional. In other words, by virtue of the data minimisation principle, FRA should assess which fields should be compulsory and which should be not. It should subsequently inform data subjects on this point.¹⁴

The EDPS **recommends** FRA to assess which fields of the CV (part I) should be compulsory and which are optional and include this information in the application form.

In principle, there will be no processing of special categories of personal data in the sense of Article 10 of Regulation 45/2001. However, it cannot be excluded that candidates for elections provide some sensitive data about themselves. In this regard, in order to avoid direct or indirect encouragement to other candidates to provide such data, FRA could recommend candidates not to provide sensitive data (thus concerning health, political ideas, religious ideas, sexual orientation etc.) unless strictly necessary.

¹³ See footnotes 1 and 2.

¹⁴ Article 11 (1) (d) of the Regulation.

The EDPS **suggests** FRA to include a recommendation to candidates not to include sensitive data about themselves, unless they consider it necessary.

FRA will publish the names and summaries of the CVs of the candidates for AP on its web page during at least one month. It is not clear why FRA needs to publish this information for the purpose of the vote. If the aim is to enable the FRP to take an informed decision, then making the information only available to the members of the FRP, instead of publishing it, could be sufficient.

The EDPS **recommends** FRA to examine the possibility of publishing information about candidates in the IT tool enabling the final voting instead of in the webpage of FRA.

2.4. Information to data subjects¹⁵

FRA informs candidates on the processing operation by means of a privacy notice.¹⁶ However, this privacy notice does not describe the processing operation at stake, this is, the examination or pre-screening made by the FRA services on the CVs of the candidates. It does not contain the legal basis for the processing operation either.

The EDPS **recommends** FRA to complete the description of the processing operation in the privacy statement with information about the fact that FRA pre-selects or examines the candidates for the AP. It also recommends to complete the privacy statement with the legal basis of the processing operation.

3 Recommendations

In this Opinion, the EDPS has made several recommendations to ensure compliance with the Regulation, as well as several suggestions for improvement. Provided that the recommendations are implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

For the following **recommendations**, the EDPS expects **implementation** within **three months** of the date of this Opinion:

- The EDPS **suggests** FRA to recommend candidates not to include sensitive data about themselves, unless necessary;

¹⁵ There is a first privacy statement published with the first call, this is, registration by the civil society in the FRP but this is not subject to prior checking here. The subject of the examination is the privacy statement which is published with the second call and which covers the pre-selection/examination made by the Director and FRA services.

¹⁶ As candidates themselves provide their personal data, Article 11 of the Regulation applies.

- The EDPS **recommends** FRA to specify which boxes of the CV (part I) are compulsory for candidates to fill in and which ones are optional;
- The EDPS **recommends** FRA examine the possibility of publishing information about candidates in the IT tool enabling the final voting instead of in the webpage of FRA;
- The EDPS **recommends** FRA to complete the privacy statement with the description of the processing operation of pre-selection of candidacies by the services of FRA as well as with the legal basis of the processing operation, this is, the Regulation establishing FRA as complemented by the decision of the director.¹⁷

[signed]

Wojciech Rafał WIEWIÓROWSKI

Done at Brussels, 28 July 2017

¹⁷ See footnotes 1 and 2.