



WOJCIECH RAFAŁ WIEWIÓROWSKI  
ASSISTANT SUPERVISOR

[...]  
Data Protection Officer  
EASME  
COV2  
B-1049 Brussels

Brussels,  
WW/SS-ZS/sn/D(2018)1770 C 2017-1036 &  
2017-1040  
Please use [edps@edps.europa.eu](mailto:edps@edps.europa.eu) for all  
correspondence

**Subject: Joint Prior-checking Opinion regarding the selection and management of experts outside the Participant Portal (COSME programme and EMFF) - EDPS cases 2017-1036 and 2017-1040**

Dear [...],

In November 2017, the European Data Protection Supervisor (EDPS) received from you as the Data Protection Officers (DPO) of EASME two notifications for prior checking under Article 27 of Regulation (EC) No 45/2001<sup>1</sup> ("the Regulation") on selection and management of experts outside the Participant Portal.<sup>2</sup>

The processing operations concern experts who will:

- contribute to the activities related to initiatives managed under the COSME programme and mainly the Enterprise Europe Network
- support evaluation and monitoring activities of actions delegated to EASME under the European Maritime and Fisheries Fund (EMFF).

The EDPS has issued Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts<sup>3</sup> ("the Guidelines"). Therefore, this Opinion analyses and highlights only those practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines. In the light of the accountability principle guiding his work, the EDPS would nonetheless like to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place for management of experts outside the Participant Portal in EASME.

---

<sup>1</sup> OJ L 8, 12.1.2001, p. 1.

<sup>2</sup> As this is an ex-post case, the deadline of two months does not apply. This case has been dealt with on a best-effort basis.

<sup>3</sup> Available on the EDPS website: [https://edps.europa.eu/sites/edp/files/publication/13-06-25\\_procurement\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/13-06-25_procurement_en.pdf)

## 1. Legal analysis

### *a) Ground for lawfulness of processing*

The two notifications list consent of the experts among the grounds for lawfulness of processing. The EDPS considers that in the employment context consent is not the most appropriate ground for processing personal data. The main ground for the lawfulness of processing would be that processing is necessary for:

- the performance of a task carried out in the public interest or in the legitimate exercise of official authority vested in EASME (e.g. selection and management of experts),
- the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract (e.g. for the conclusion of the contract with experts) or
- compliance with a legal obligation to which EASME is subject (e.g. publication of experts' data to comply with EASME's obligation to publish information on outcome of procurement procedures and on the beneficiaries of funds deriving from the budget of the Union).

Consent can serve as additional ground for that processing personal data. It can serve as the main ground for the lawfulness of processing non-mandatory data. In this respect, see our third recommendation under point c) information to data subjects.

### *b) Joint controllership*

The EDPS notes that staff members of DG MARE of the European Commission participate in the selection process for experts for the EMFF. EASME and DG MARE have concluded a Memorandum of Understanding on the modalities and procedures of interaction for the implementation of actions covered by the EMFF. The Memorandum and its Annex set out who is in charge of different tasks. The EDPS points out that where the division of tasks would lead to both EASME and DG MARE determining the essential elements of the processing of personal data of experts, EASME and the European Commission (DG MARE) would be joint controllers for the data processing<sup>4</sup>. This could happen e.g. where DG MARE would be in charge of preparation of terms of reference or where DG MARE framework contracts are used.

### *c) Information to data subjects*

Articles 11 and 12 of the Regulation provide for an obligation of transparency with regard to data subjects from whom data are collected and processed and provide a minimum list of information that need to be provided to the individuals concerned. This transparency is necessary both for ensuring the fairness of processing operation and for enabling the exercise of data subjects rights.

In line with the Regulation, EASME has to inform experts for the COSME programme and for the EMFF about how the Agency processes their personal data outside the Participant Portal before and during the processing. EASME has prepared separate data protection notices for the two processing operations.

The application (survey) form for experts for the COSME programme does not contain or link to the privacy statement for processing outside the Participant Portal. The EDPS **recommends** that EASME make available the data protection notice in the application form.

---

<sup>4</sup> In this regard see [Opinion of Working Party 29 1/2010 on the concepts of "controller" and "processor"](#), WP 169: and Article 28(2) of the new data protection rules for EU institutions and bodies (proposal COM(2017)8 final, political agreement of 23 May 2018).

While the invitation letter for experts for the COSME programme does contain a data protection provision providing information on the data controller and data subject rights, there is no link to the full privacy statement for processing outside the Participant Portal. The EDPS **recommends** that EASME include the link to the full data protection notice.

The application (survey) form for experts for the EMFF contains the data protection notice for processing experts' data outside the Participant Portal and applicants have to tick that they have been informed about data protection rules and that they agree to the data protection notice. The EDPS **recommends** that EASME clarify that applicants agree to the processing of non-mandatory information, not to the privacy statement.

The call for expression of interest for experts for the EMFF contains a data protection provision with information on the data controller (EASME) and a link to the Commission's general notice on data protection in public procurement. This link is not appropriate, since experts for the EMFF should be informed about the processing of their personal data by EASME for selection and management of experts for EMFF outside the Participant Portal. The EDPS therefore **recommends** that EASME include in the call for expression of interest a link to the data protection notice from the application (survey) form.

#### *d) Contract with experts*

EASME will have to review data protection provisions in contracts with experts in view of the forthcoming new data protection rules applicable to the EU institutions and bodies. The EDPS welcomes the fact that the EMFF Model Experts Contract contains data protection provisions differentiating between the processing of personal data by the contracting party and the processing of personal data by the experts. This differentiation should be maintained in the reviewed data protection provisions.

## **2. Conclusion**

In this Opinion, the EDPS has made a number of clarifications and recommendations. Provided these recommendations are effectively implemented, the EDPS sees no reason to believe that there is a breach of the Regulation.

Yours sincerely,

[signed]

Wojciech Rafał WIEWIÓROWSKI