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correspondence

Subject: EDPS prior-check Opinion on the "*Selection procedure for the position of Members of the Advisory Forum of the ECDC*" at DG SANTE, Commission (case 2018-0039)

Dear Mr (...),

On 14 November 2017¹, the European Commission (the Commission) sent a notification to the EDPS for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation)² on the processing operations in the context of the selection procedures for the position of Members of the Advisory Forum of the ECDC” at DG SANTE of the Commission.

As the DPO of the Commission pointed out in his note, the selection procedure under analysis is similar to two previously prior-checked notifications on selection procedures managed by DG SANTE, namely:

- “the selection procedure for the position of Member of the Management Board of the European Medicines Agency (EMA) and for the position of Member of the following scientific committees of EMA: Committee for Advance Therapies, Committee for

¹ As this procedure had already been launched at the time of its notification and it is therefore an ex-post case, the deadline of two months does not apply. The EDPS has dealt with this case on a best-effort basis.

² OJ L 8/1, 12/01/2001.

Orphan Medicinal Products, Paediatric Committee, Pharmacovigilance Risk Assessment Committee”³, and

- the “Selection procedure for the position of Member of the Management Board of the European Food Safety Authority (EFSA)”⁴.

The EDPS has thoroughly analysed the documents enclosed with the notification:

- the note stressing the role of the ECDC in the context of the selection procedure including the application of the data minimisation principle,
- the specific privacy statement and
- the table explaining how the Commission has implemented the EDPS recommendations made the two previous prior-check Opinions (see above) in the selection procedure at hand.

On the basis of the above and of the EDPS Guidelines on the processing operations in the context of the selection and staff recruitment procedures⁵, the EDPS has identified only one issue which is not in conformity with the principles of the Regulation.

Lawfulness of the processing

The notification states that the “processing is lawful in accordance with Article 5(a), (b) and (d) of Regulation (EC) No 45/2001. In addition, applicants freely submit their personal data for processing, in an informed manner and for this specific processing operation, which amounts to unambiguous consent”.

The lawfulness of the selection procedure under analysis can indeed be justified under Article 5(a) of the Regulation, since it meets the two requirements of this provision are met: there is a specific legal basis⁶ and the processing is necessary for the performance of ECDC’s mission carried out in the public interest on that legal basis. In addition, the processing of the declaration of interest forms can be justified under Article 5(b) of the Regulation, since the Commission, being the controller of the processing under analysis is subject to the legal obligation of Regulation (EC) No 851/2004⁷.

However, contrary to what the notification states, the applicants' consent cannot be considered as a legal basis for the processing operations under analysis. Article 5(d) of the Regulation specifically requires that persons “unambiguously” give their consent before the processing of their personal data. This means that the applicants’ consent in this specific case must be a freely given, specific and informed indication that they agree that their data are collected through all different steps of the processing⁸. Otherwise the consent is invalid. In this particular case,

³ EDPS Opinion of 26 November 2012, case 2011-1166.

⁴ EDPS Opinion of 3 October 2011, case 2011-0575.

⁵ Available on our website:

https://edps.europa.eu/sites/edp/files/publication/08-10-10_guidelines_staff_recruitment_en.pdf

⁶ Regulation (EC) No 851/2004 of the European Parliament and of the Council of 21 April 2004 establishing ECDC:

https://ecdc.europa.eu/sites/portal/files/media/en/aboutus/Key%20Documents/0404_KD_Regulation_establishing_ECDC.pdf

⁷ See page 12 of the EDPS Guidelines on the processing of personal data with regard to the management of conflicts of interest in EU institutions and bodies:

https://edps.europa.eu/sites/edp/files/publication/14-12-08_coi_guidelines_en.pdf

⁸ Article 2(h) of the Regulation states that the data subject’s consent shall mean “any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or he being processed”.

consent is a sensitive matter as it is doubtful whether applicants can freely provide "*unambiguous consent*" in an employment context, taking into account the power imbalance between employee and employer.

Recommendation:

The Commission should remove references to Article 5(d) and any other references to consent in the notification. The processing operation at hand can only be based on Articles 5(a) and 5(b) of the Regulation.

Conclusion

The EDPS considers that there is no reason to believe that there is a breach of the provisions of the Regulation provided that the recommendations made in his previous prior-check Opinions have been implemented.

In light of the accountability principle, the EDPS **expects the Commission to implement the above recommendation** accordingly and has therefore decided to **close the case**.

Yours sincerely,

(signed)

Wojciech Rafał WIEWIÓROWSKI

Cc: Mr (...), Data Protection Officer, European Commission.