



EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

Ms Marta CAMPOS ITURRALDE
Data Protection Officer
Bio-based Industries Joint Undertaking
Av. De la Toison d'Or 56-60
B-1160 Brussels

Ms Panagiota KALYVA
Data Protection Officer
EACEA
Avenue du Bourget 1
B-1140 Brussels

Mr Evangelos TSAVALOPOULOS
Data Protection Officer
Research Executive Agency
COV2
B-1049 Brussels

Ms Laura GOMEZ GUTIERREZ
Data Protection Officer
Sesar Joint Undertaking
Avenue de Cortenbergh 100
B-1000 Brussels

Ms Caroline MAION
Data Protection Officer
INEA
Chaussee de Wavre 910
B-1049 Brussels

Ms Kalliroi GRAMMENOU
Data Protection Officer
CHAFEA
Building DRB
L-2920 Luxembourg

Ms Elke RIVIERE
Data Protection Officer
EASME
COV2
B-1049 Brussels

Brussels, **25 SEP 2018**
WW/EF-ZS-SS/sn/D(2018)2179
C 2017-1073, 1063, 1085, 1075, 1038, 1053 & 0976
Please use edps@edps.europa.eu for all
correspondence

Subject: Joint Prior-checking Opinion regarding the management of experts in the Participant Portal (under H2020 IT tools) in a number of Executive Agencies and Joint Undertakings - EDPS cases: C-2017-1073 BBI, C-2017-1063 EACEA, C-2017-1085 REA, C- 2017-1075 SESAR, C-2017-1038 INEA, C- 2017-1053 CHAFAE and C-2017-0976 EASME.

Dear Data Protection Officers (DPOs) of Executive Agencies and Joint Undertakings,

During the months of November and December 2017, the European Data Protection Supervisor (EDPS) received the above-mentioned notifications for prior checking under Article 27 of Regulation (EC) No 45/2001¹ ("the Regulation") on management of experts in the Participant Portal from the Data Protection Officers (DPO) of the following Executive Agencies and Joint Undertakings: BBI, EACEA, REA, SESAR, INEA, CHAFAE and EASME.²

These notifications are based on the common notification made by the European Commission on behalf of the research family.³ The recommendations made in prior-checking opinion of 14 November 2016 regarding independent expert management in the context of Horizon 2020 at DG RTD (EDPS case 2016-0950)⁴ are therefore relevant for the present Opinion.

The EDPS issued Guidelines on the processing of personal data in the context of public procurement, grants as well as selection and use of external experts⁵ ("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 in the Participant Portal in the respective Agencies and Joint Undertakings.

1. Legal analysis

a) Grounds for prior-checking

Some of the Executive Agencies and Joint Undertakings refer to Article 27(2)(d) of the Regulation as the basis for the prior checking. It should be noted this is not the correct provision, as the management of experts does not have as a purpose the exclusion of individuals from a right, benefit or contract in the sense of Article 27(2)(d).⁶ Processing operations on management

¹ OJ L 8, 12.1.2001, p. 1.

² 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.

³ European Commission's Directorates-General, Executive Agencies and Joint Undertakings of the Research family.

⁴ Prior-checking Opinion regarding independent expert management in the context of Horizon 2020 at DG RTD, available at: https://edps.europa.eu/sites/edp/files/publication/16-12-14_expert_management_ec_en.pdf

⁵ Available on the EDPS website: https://edps.europa.eu/sites/edp/files/publication/13-06-25_procurement_en.pdf

⁶ In this regard, in prior checking opinions C2013-0728 and 0709 of 10 September 2013, the EDPS stated as follows: 'Even though failure to supply the information requested will result in non being granted certain rights and entitlements, the purpose of the processing is not to exclude individuals from these rights and benefits but, on the opposite, to grant certain allowances –under certain conditions- to individuals. The provision of Article 27 (2)(d) relates to matters such as blacklisting or exclusion databases.'

of experts should be subject to prior checking, in particular, on the basis of Article 27(2)(b) of the Regulation.

b) Joint controllership

The EDPS also notes that, in some cases, some Executive Agencies and Joint Undertakings were not sure if their role is that of a controller or a processor in the present processing operation.

Article 2(d) of the Regulation provides that ‘controller’ shall mean the Community institution or body, the Directorate General, the unit or any other organizational entity which alone or jointly with others determines the purposes and means of the processing of personal data. The concept was further developed by the Article 29 Working Party in its opinion 1/2010⁷ (hereinafter: “WP 29 Opinion”) and by the case law of the Court of Justice of the European Union⁸.

The WP 29 Opinion sets out that the concept of the controller is a functional concept based on a factual rather than a formal analysis⁹. In case of doubt other elements than the terms of the contract may be useful to determine the controller, such as the degree of actual control exercised by a party, the image given to data subjects and reasonable expectations of data subjects on the basis of visibility¹⁰. The WP 29 Opinion also specifies that parties have a certain degree of flexibility in distributing and allocating obligations and responsibilities among them as long as they ensure full compliance¹¹.

The Participant Portal has been developed by DG RTD of the European Commission and includes provisions on the processing of personal data¹². The European Commission, to a big extent, determines the purposes and means of the processing of personal data relating to experts in the Participant Portal. While the Executive Agencies and Joint Undertakings do not develop this tool, they use it for the selection of their own experts. They are responsible, for instance, for providing data subject’s access to their own data and for making corrections where necessary. For these reasons, Executive Agencies and Joint Undertakings should be considered as co-controllers of the processing operation (together with DG RTD of the European Commission). It is by selecting their own experts that the Executive Agencies and Joint Undertakings also determine the purpose and means of the processing of their data in the sense of Article 2(d) of the Regulation.¹³

As another example, parts of the processing operation are performed by other actors, e.g. validating the legal entity form is done by REA on behalf of all institutions and bodies that use the Participant Portal. These institutions and bodies cannot influence how REA processes these legal entity forms but benefit from the results. This is another case of shared responsibility where various controllers are involved in the processing of personal data at different stages and to different extents.

⁷ Opinion 1/2010 on the concepts of “controller” and “processor”, WP 169, available at: http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp169_en.pdf

⁸ See in particular the two following Judgements of the Court: judgment of 13 May 2014 in *Google Spain and Google* (case C-131/12) as well as judgment of 5 June 2018 in *Wirtschaftsakademie* (case C-210/16).

⁹ See page 11 of the WP 29 Opinion mentioned in footnote 7.

¹⁰ See page 12 of the WP 29 Opinion mentioned in footnote 7.

¹¹ See page 26 of the WP 29 Opinion mentioned in footnote 7.

¹² This became the common notification of the Research family.

¹³ In the prior checking opinion “EU High Level Advisers programme in Moldova”, Cases 2016-0505 and 2017-0712, the EDPS reasoned in a similar way by stating that, ‘it is the EU Delegation in Moldova, as part of the EEAS, which is responsible for managing the processing of personal data. EEAS is therefore the co-controller with the Commission. The subsequent EEAS notification confirms the joint controllership and also indicates that in certain cases the Delegation may manage the whole selection procedure.’ See point 2(a) of the opinion.

The EDPS therefore **recommends** that, in anticipation of the forthcoming new rules on data protection¹⁴, the Executive Agencies, Joint Undertakings and the European Commission establish an **arrangement between them**. In particular Article 28 of the proposal states that in case of joint controllership an arrangement should be made and paragraph 2 states that ‘the arrangement [...] shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of this arrangement shall be made available to the data subject.’ This arrangement could take the form, for instance, of a Memorandum of Understanding (MoU) between different co-controllers.

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.

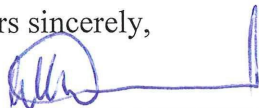
The processing by the Executive Agencies and Joint Undertakings of personal data for management of experts in the Participant portal is in general based on and similar to the processing operation as set up by the European Commission. A common procedure is thus in place¹⁵. There is one common privacy statement¹⁶ with annexes to inform data subjects about the processing of personal data of experts in the Participant portal for the different programmes run by EU institutions and bodies, their rights and the contact details of the responsible services of the controllers.

The EDPS **recommends** that those Executive Agencies and Joint Undertakings which deviate from the common procedure indicate the differences in the common privacy statement. EASME should e.g. indicate its specific retention period for pre-selected experts of 7 years after the end of the particular programme on which they provided their services.¹⁷ The EDPS also **recommends** amending the common privacy statement to include the information that personal data may be collected from and exchanged with other information systems of the EU institutions and bodies in relation to and for the purposes of the services applied for and requested by the experts.

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. Nevertheless, the Agencies and Joint Undertakings are invited to inform the EDPS about the preparation of the arrangements mentioned in Article 28(2) of the forthcoming rules by the end of the year 2018.

Yours sincerely,



Wojciech Rafał WIEWIÓROWSKI

Cc: Mr Martin KROEGER, DPO European Commission.

¹⁴ Proposal COM(2017)8 final of 10 January 2017. The legislators reached a [political agreement](#) on the text on 23 May 2018 and the new regulation is expected to enter into force around autumn 2018.

¹⁵ For a description of the common procedure, see notification DPO 3736.2 under Article 25 of the Regulation to the Commission DPO available at: <http://ec.europa.eu/dpo-register/details.htm?id=46028>

¹⁶ Service Specific Privacy Statements (SSPS) on Independent Expert management, available at: http://ec.europa.eu/research/participants/data/support/legal_notice/h2020-ssps-experts_en.pdf

¹⁷ In an email of 12.09.2018, following a consultation on the draft opinion, EASME affirmed that it will apply the same retention period than the other Executive Agencies.