



EUROPEAN DATA PROTECTION SUPERVISOR

WOJCIECH RAFAŁ WIEWIÓROWSKI
ASSISTANT SUPERVISOR

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

Ms. Laura Gomez Gutierrez
Sesar Joint Undertaking
Avenue de Cortenbergh 100
B-1000 Brussels

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

Mr. Tobias Kohlhof
Deputy Data Protection Officer
CHAFEA
Building DRB
L-2920 Luxembourg

Ms. Elke Riviere
EASME
Data Protection Officer
EASME
COV2
B-1049 Brussels

Ms. Nóra Tosics
Data Protection Officer
European Institute of Innovation and
Technology
1/E Neumann János Street, Infopark
H-1117 Budapest, Hungary

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WW/ ZS-CG-SS/xx/ D(2018) 2770
Please use edps@edps.europa.eu for all
correspondence

Subject: Joint Prior-checking Opinion regarding Grants Award and Management in the in the Participant Portal (under H2020 IT tools) in a number of European Union institutions - EDPS cases: C-2017-1080 REA, C- 2017-1076 SESAR, C-2017-1037 INEA, C- 2017-1068 CHAFAEA, C-2017-0977 EASME and C-2017-1070 EIT.

Dear Data Protection Officers (DPOs),

In November 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 award and management of grants in the Participant Portal from the Data Protection Officers (DPO) of the following European Union institutions (EUIs): the Research Executive Agency (REA), the Single European Sky ATM Research Joint Undertaking (SESAR), the Innovation and Networks Executive Agency (INEA), the Consumers, Health, Agriculture and Food Executive Agency (CHAFAEA), the Executive Agency for Small and Medium-Sized Enterprises (EASME) and the European Institute of Innovation & Technology (EIT).²

The notifications of REA, SESAR, INEA, CHAFAEA and EASME are based on the common notification made by the European Commission on behalf of the research family.³ On 19 September 2018, EASME updated its notification and aligned the retention period to 10 years after the closure of the action and to 5 years after the end of the procedure for unsuccessful applications, in accordance with the common notification and privacy statement of the Research Family. The recommendations made in the prior-checking opinion of 14 December 2016 regarding grant management in the context of Horizon 2020 at DG RTD of the European Commission (EDPS case 2016-0951)⁴ are therefore relevant for the present Joint Opinion.

The EIT did not use the common notification and has its own privacy statement for the management of the grants awarded to the Knowledge and Innovation Communities ('KICs'). However, as the KIC calls for proposals are launched via the Horizon 2020 IT tool (the Participant Portal) EIT's grant management is also covered by this joint 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*

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 grant management in the context of Horizon 2020 at DG RTD, available at: https://edps.europa.eu/sites/edp/files/publication/16-12-14_grant_management_ec_en.pdf

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

relevant recommendations made in the Guidelines apply to the processing operations put in place for management of grants in the Participant Portal in the respective EUIs.

1. Legal analysis

a) Grounds for prior-checking

Some of the EUIs refer to Article 27(1)(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 grants does not have as a purpose the exclusion of individuals from a right, benefit or contract in the sense of Article 27(1)(d).⁶ Processing operations on management of grants 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, some EUIs 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 grants in the Participant Portal. While the Regulatory Agencies, Executive Agencies and Joint Undertakings do not develop this tool, they use it for the submission, evaluation and management of grants. They are responsible, for instance, for providing data subject’s access to their own data and for making corrections where necessary. For these reasons, these EUIs should be considered as co-controllers of the processing operation (together with DG RTD of the European

⁶ In this regard, in non-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.’

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.

Commission). It is by awarding and managing their own grants that the EUIs 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.

The EDPS therefore **recommends** that, in line with the new rules on data protection¹⁴, the concerned EUIs and the European Commission establish an **arrangement between them**. In particular Article 28 of Regulation 2018/1275 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 EUIs of personal data for grant management 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 a common privacy statement¹⁶ with annexes to inform data subjects about the processing of personal data in relation to grant management 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. This privacy statement mentions REA, EASME, CHAFEA, SESAR and INEA and is used by them. EIT has its own privacy statement for the management of grants through the Participant Portal.

The EDPS **recommends** that EIT updates its privacy statement and refers to the common privacy statement on grant management through the Participant Portal. The EDPS also recommends that the common privacy statement and its annexes are up-dated with a reference to EIT, the data controller, the DPO and the respective programmes managed. It is also recommended to indicate the differences in the common privacy statement in case a EUI deviates from the common procedure. EIT should e.g. indicate its specific retention period for successful applicants and

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.

¹⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.295.01.0039.01.ENG&toc=OJ:L:2018:295:TOC.

¹⁵ For a description of the common procedure, see notification DPO 3735.2 under Article 25 of the Regulation to the Commission DPO available at: <http://ec.europa.eu/dpo-register/details.htm?id=46027>

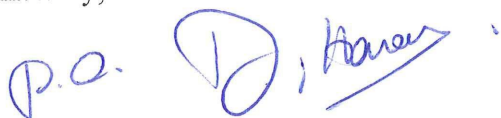
¹⁶ Service Specific Privacy Statements (SSPS) on Grant management, available at: http://ec.europa.eu/research/participants/data/support/legal_notice/h2020-ssps-grants-contacts_en.pdf

awarded beneficiaries, 7 years from the date of payment of the balance (or of a recovery order issued after analysis of the final accounts) and of 5 years following the signature of the Framework Partnership Agreement. 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 grant management.

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 EUIs are invited to inform the EDPS about the preparation of the arrangements mentioned in Article 28(2) of the forthcoming rules by 31 March 2019.

Yours sincerely,



Wojciech Rafał WIEWIÓROWSKI

cc.: Martin Kröger, DPO European Commission.