

Opinion on a notification for prior checking received from the Data Protection Officer of European Investment Bank on "Recording and storage of contracts concluded by and between the Bank and external consultants"

Brussels, 14 July 2006 (Case 2004-301)

1. Proceedings

On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all data protection officers (DPO) asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested notification of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis. After receipt and analysis of the inventories, the EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking.

The DPO mentioned the "Consultants' files (external EIB staff)" as a case falling under Article 27. In the annex of the letter of the EDPS of 30 November 2004, the operation was included "prima facie" in the prior checking scope on the brief information he received, and a case number was assigned.

On 22 June 2005, the EDPS received a notification for prior checking of the "Recording and storage of contracts concluded by and between the Bank and external consultants". On the same day, the EDPS requested an explanation as to why the processing operation deserves a prior check, but received no answer.

On 12 December 2005, the EDPS received the same prior checking notification of the ""Recording and storage of contracts concluded by and between the Bank and external consultants". The notification included Guidelines for the Employment and Management of Consultants and External Services (Consultancy Guidelines or Guidelines)¹ and five attachments: Attachment A- Consultancy purchase request; Attachment B- Project Title. Terms of Reference; Attachment C- Ex-Post Evaluation; Attachment D- Implementation Guidelines; Attachment E- Management of Contracts.

On 13 December 2005, the EDPS again requested the DPO to specify the explicit reason that gives ground for prior checking of the case by the EDPS, because the reference to Article 27.1 of Regulation (EC) No 45/2001 was vague. On 4 January 2006, the DPO indicated that

¹ First approved November 1997, revised July 2000, November 2001, April 2002, February 2004, September 2004 and January 2005.

Article 27(2)(b) constitutes grounds for the ex-post prior checking, because the performance of the consultants is evaluated.

After recognising the case as prior check, on 24 January 2006 the EDPS sent a list of questions regarding the case to the DPO. On 15 February 2006, the EDPS was informed that the system was in the process of change and it was proposed to report it to the EDPS as soon as the new system was internally approved. After discussing the details of the expected internal changes of the data processing operations on 23 February 2006, the EDPS maintained the suspension of the prior checking procedure until the draft internal rules were to be sent to him in a months time. The EDPS noted that, in addition, he was expecting the responses to his request for further information made on 24 January 2006.

On 21 April 2006, after discussing with the DPO that the drafting and adoption of the internal rules on data processing operations regarding the external consultants had not advanced as was expected, and because the responses to the list of questions sent earlier could not be expected, the EDPS maintained the suspension of the prior checking procedure.

After an exchange of information with the DPO on 18 May 2006, and after the proposal of the DPO was received on 24 May 2006, the EDPS decided on 2 June 2006 to prior check the operations based on the available information in the file, because he had not received the responses to his request for further information and because the drafting of the internal rules had not advanced as was expected.

On 27 June 2006, the EDPS made a call to the DPO for further clarification of the file. This information was received immediately.

On 5 July 2006, the EDPS suspended the procedure for a period of 12 days in order to allow the DPO to give relevant comments and provide further information if necessary.

2. Examination of the matter

The acronyms used in the opinion stand for:

- **RH:** Ressources humaines (Human Resources)
- **SG:** Secrétaire Général (Secretary General)
- **AG:** Administration Générale
- **ASA:** Service Achat
- **FC/Compta:** Finance/ Comptabilité

2.1. The facts

The European Investment Bank (EIB or Bank) calls on external consultants or services for particular activities of an intellectual nature for its own account for a variety of reasons: specificity of work, urgency, need for an independent opinion, technical or legal expertise to help a borrower, and outsourcing (Chapter 2.1 of Consultancy Guidelines).

The EIB's Consultancy Guidelines apply to consultants and services. "Consultants" can be consulting firms or self-employed consultants, individual consultants or external experts who would normally be members of a professional association. Freelance translators and former staff members may also be considered as consultants. "Services" should always be obtained only from companies which can make some of their employees available to work for third parties on the basis of a service contract. If the skills are to be provided by an expert from the

company, or if such a qualified and experienced person is required to achieve the tasks, the name of the person(s) can be indicated when the contract is concluded.

The Bank's standard procedures apply whenever the recruitment of a consultant performing or having performed services for the Bank is being considered.

In certain cases, consultants or assigned employees from a company can work on the premises of the EIB.

Personal data are processed by the European Investment Bank to ensure proper execution of tasks indicated in consultancy contracts, and to ensure the correct application by the Services of the EIB rules on the employment and management of consultants.

General description of the tendering procedure:

The procedures for selecting, managing and evaluating external consultants and services are laid down in Guidelines for the Employment and Management of Consultants and External Services. The Guidelines are based on the principles laid down in the Community directives on public procurement. They take into account the principles of Directive 92/50-EEC relating to coordination of procedures for the award of public service contracts of 18 June 1992 and also the principles of Luxembourg Labour Law dated 19 May 1994.

Main steps of the tendering procedure:

- The Directorate concerned completes the Consultancy Purchase Request form and prepares the Terms of reference (TOR) for the mission.
- Before initiating the selection procedure, the Purchase Request, to which the TOR are annexed, must be sent to the Consultancy Compliance Officer (CCO) who, after verification that the reason for the use of the consultant and the information concerning the related projects, if any, are mentioned in the form, sends them to SG/AG/ASA for registration in PeopleSoft (PSFT) (name of consultant, price, duration of the contract, etc). To speed up the process, it is recommended that a copy of the request is simultaneously sent to SG/AG/ASA. However, if a selection procedure involving several bidders is required (normally for contracts not less than EUR 35 000), the Purchase Request should be sent to SG/AG/ASA only when the name of the winning bidder is known.
- SG/AG/ASA and the CCO advises the Directorate on the correct selection procedure to be followed. The procedure is determined by the expected total cost (net of VAT) of the services (Chapter 6.2. of the Guidelines).
- SG/AG/ASA processes the registration of the relevant information in PSFT and informs the Directorate concerned of the purchase order number and the contract number.
- For all bids (for contracts not less than EUR 35 000), the Directorate commissioning the work must set up an evaluation panel (Chapter 7 of the Guidelines).
- The evaluation panel defines the selection criteria and their respective weights (Chapter 6.1 of the Guidelines).
- After selection of the winning bidder, the Directorate concerned prepares a contract (in two original versions) in collaboration with SG/AG/ASA and the CCO (Chapter 8 of the Guidelines).
- After approval by the CCO, the contract is signed by the Directorate commissioning the work and SG/AG Director (for amounts of EUR 125 000 or more) or SG/AG/ASA Head of Division (for amounts less than EUR 125 000) (Chapter 9 of the Guidelines).
- Upon completion of the assignment, the staff member responsible for the liaison with the consultant evaluates the quality of the work performed (Chapter 10 of the Guidelines).

- The final payment is made once the ex-post evaluation has been completed and recorded by the Directorate concerned.

The Consultancy Purchase Request form contains information on the project name, promoter's name and address, consultant's name and address, the indication whether the consultant is a former member of EIB staff (working period: beginning and end date); reimbursable costs (yes/no), stand-alone project (yes/no, if "no": specification of related projects in the "Comments" section); costs, if the contract/working period exceeds the current year, the expenses for next year should be indicated; the "Comments" section requires specification of the reason(s) for the use of a consultant (with reference to Chapter 2.1 of the Consultancy Guidelines); and a brief explanation as to why the above- mentioned consultant has been selected; signatures (Directorate, Visa Directorate Budget Officer); date.

The Terms of Reference (TOR) are compulsory, whether for consultancy work or service providers. The Terms of Reference for consultancy or Scope of the Works for services provide the operational basis for the selection and employment of a consultant. The wording of the Terms of Reference is essential to allow potential candidates to make precise offers and to reduce the possibility of extension request and the cost of the consultancy or services.

They must be attached to the request to the Director General² to employ consultants and must have been approved by the Director General concerned together with the request prior to initiating the selection process in conjunction with SG/AG/ASA and the CCO. When a decision to call on consultants by a Directorate is taken for services or tasks relating to the information technology, the Terms of Reference should be approved by IT so that the services or the tasks undertaken are compatible with the overall systems of the Bank or will fit with the existing program under implementation. (Also, before the contract is signed, IT should initial it.)

The Terms of Reference, together with the offer, if any, from the consultant or the service provider are annexed to the contract.

Depending on the nature of the assignment, the Terms of Reference could/should cover:

- a) the required qualifications or detailed definition of all the possible tasks;
- b) a detailed description of the tasks to be undertaken and the related timetable;
- c) information and reports to be provided by the consultant and the date of completion;
- d) definition of critical success factors and key performance indicators.

As an example, a TOR normally contains the following main sections: Project title; Background; Objective (including critical success factors); Tasks to be realised; Deliverables and their related timetable; Qualification/Skills/Experience required; Information to be submitted in the tender; Working Terms (including obligation for the winning bidder to accept the Bank's Standard Contract and General Conditions appended to the TOR); Selection/Award Criteria (to be formally defined once the evaluation panel has been established. These criteria should reflect the critical success factors described before); Tender procedure to be followed (including guidance for obtaining clarification on tender documents; time limits and formalities for submission of tenders; where appropriate, information concerning the number of tenderers to be invited to make a detailed presentation, etc).

² For the purposes of the Guidelines, the term Director General applies also to the most Senior Cadre of Directorates and Autonomous Departments.

Critical success factors facilitate the definition of the selection criteria as they aim at identifying the most important things to do, strategically, technically, organisationally or procedurally.

The key performance indicators inform the consultant or the service provider on the expected quality level and how their work will be evaluated.

Selection criteria and their respective weights:

A decision to engage a consultant or a service provider must be taken on the basis of pre-defined general and project specific selection criteria. The selection panel set up for the evaluation of bids is responsible for defining these criteria.

The general selection criteria normally include:

- qualification and experience of the consultant or of the service provider
- qualification and experience of the key staff proposed (where the consultant is a firm)
- ability to perform the requested services (e.g. in terms of consultant's financial standing and technical capability)
- cost of the service and
- timing.

Project specific selection criteria take into account the specificities of each project. In practice, the project specific criteria are the critical success factors for a particular project. For example, the adequacy of the proposed work plan and methodology in responding to the TOR.

The relative weights given to different criteria shall be determined by the selection panel for each case depending on the nature of the assignment.

The Guidelines require - in order to ensure a fair and non-discriminatory treatment of all possible candidates - that the selection criteria and their respective weights are defined in advance and applied in an objective and transparent manner.

Before issuing the invitations to tender, the agreed selection criteria and their respective weights must be notified to the CCO whose task is to review that the said criteria and weights are adequate and in line with the general principles underlying the procedures for selecting consultants.

Choice of the appropriate procedure

SG/AG/ASA and the CCO advise the Directorates on the correct selection procedure to be followed. The procedure is determined by the expected total cost (net of VAT) of the services and takes into account the services listed in the respective annexes of Directive 92/50/EEC.

Evaluation of bids:

For contracts below EUR 35 000, if more than one bid is sought, the normal purchasing procedure should be followed. Otherwise all bids (for contracts less than EUR 35 000), and in case of publication of international competitive bidding in the OJEU, a panel is set up according to criteria specified in the Guidelines to evaluate bids. In some cases the CCO may decide to participate in the panel as an observer, in other cases his presence as an observer is mandatory. The CCO's task is to ensure, in coordination with SG/AG/ASA and the

responsible services, that the rules governing public procurement, notably Directive 92/50/EEC, are respected.

The panel reports in writing on the selection process and proposes attribution of the contract for approval by the Director General/Head of Department concerned. The report and the decision based thereon are then stored in the relevant Directorate and notified to the CCO before signature of the contract. The report should mention details of the selection process and indicate, among other things, whether the proposed consultant (firm/individual) has already worked for the Bank on related projects during the last two years.

In open and restricted procedures, contacts with candidates or tenderers prior to the contract award are strictly forbidden unless made for the purpose of clarifying or supplementing the content of the tenders or the user requirements and provided this does not involve any discrimination. Questions for clarifications should be made in writing and answers should be sent to all candidates or tenderers.

Award of the contract:

The Directorate commissioning the work prepares a draft contract and submits it to the CCO for approval. The Bank's standard consultancy and service contracts are available, in English and in French, on the JU public folder (Directorates/JU/Consultants-services). Two original versions are to be drafted.

Any deviation from or modification to the standard contract needs a prior approval by the CCO. After checking the contract, the CCO initials it for approval of the procedure.

The Directorate concerned sends two original copies of the contract to the consultant for signature. The consultant keeps one original copy for himself and returns the other copy to the Directorate concerned. A copy of the contract and the consultancy purchase request must be provided as soon as possible to the CCO. SG/AG/ASA should receive the original version of the contract or a certified copy of it.

SG/AG/ASA shall transmit necessary information or documentation to RH.

All contracts will specify the name of the staff member responsible for the liaison with the consultant. The Guidelines define further the procedure of signing the contract.

Storage of contracts:

If a call for tender has been published in the Official Journal of the European Union, the contracts kept with the Central Purchasing Services are destroyed after a period of 10 years starting from the end of the contracts. Regarding other bidders, that period is reduced to 5 years from the award decision.

In case there was no publication in the OJEU, contracts kept by the Central Purchasing Services will be destroyed after 5 years.

The ex-post evaluation:

Consultants' work should be continuously supervised and monitored. Upon completion of the assignment, the staff member responsible for the liaison with the consultant evaluates the quality of the work performed on the basis of a form. The form contains the following fields:

- *General information:* Directorate/Division; Name of the consulting firm; Name of the consultant(s) (Former EIB retired); Name of supervisor; Project; Starting and ending date; Duration (working days, months); Contract date; Information on cost; Number of consultants/individuals.
- The *Evaluation* part contains the evaluation itself, the estimated cost and actual cost; estimated duration and actual duration; compliance with Terms of References; and a quality assessment.

For contracts below EUR 200 000, the evaluation form should be signed by the staff member responsible for the consultant and approved by the Division Head concerned. For contracts above EUR 200 000, the report should be signed by the Director General/Head of Department concerned. A copy of the evaluation form must be sent to SG/AG/ASA and the CCO within one month following the completion of the assignment. The Directorate concerned and FC/Compta should not approve the payment of the final invoice before the evaluation form is completed.

The CCO takes the responsibility to store performance evaluations in a central database. He ensures that past evaluations are taken into account when considering the same consultant for future assignment.

Annual reporting to the Management Committee:

An annual report on the use of consultants, as well as on the adherence to the applicable guidelines is prepared by the CCO on the basis of the information provided by the Directorates concerned, essentially through the relevant information provided to SG/AG/ASA and the CCO. This report only covers services completed during the year under review.

Dispute resolution:

In the event of disagreement about the procedure to be followed, the CCO consults the Consultancy Compliance Committee, composed of the Secretary General, the General Counsel (or his delegate) and the Head of Internal Audit. The Committee may, after hearing the Director General concerned, terminate any contract concluded in disregard of these guidelines.

The CCO immediately informs the Consultancy Compliance Committee, if the Directorate to which he has notified a non-compliance with rules and the obligation to restart the procedure has not respected such notification.

Rights of data subjects:

A reference is made in the contracts to Regulation (EC) No 45/2001.

Security measures:

Only a limited number of persons has access to personal information contained in consultancy contracts. Files are kept under lock and key.

2.2. Legal aspects

2.2.1. Prior checking

The notification for prior checking relates to the processing of personal data ("any information relating to an identified or identifiable natural person"- Article 2(a) of Regulation (EC) No 45/2001). The data processing in question is carried out by a Community body in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation). Therefore, the EDPS recommends to avoid mentioning Luxembourg law in the context of data protection.³

In the selection process and during the ex-post evaluation the personal data being processed relates to natural persons who perform intellectual activities and whose ability and conduct is evaluated. This applies clearly when it is a physical person with whom the EIB concludes the contract, but also in many other cases, when it is a company with whom the EIB concludes the contract. In all these cases, it is in fact the natural persons acting *pro se* or on behalf of their companies, who are evaluated or who will be directly affected by the outcome of an evaluation, and there can hardly be any doubt as to their identity. Recital (8) of Regulation (EC) No 45/2001 stresses that *"the principles of data protection apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable, account should be taken of all the means likely to be reasonably used either by the controller or by any other person to identify the said person."* Although in the ex-post evaluation form it seems that only the companies are mentioned, if the EIB concluded a contract with them to perform the work, in fact, the ex-post evaluation is also an evaluation of the employees' work who were assigned from the company to perform the work. Not only their name may be mentioned in the contract (if the skills are to be provided by an expert from the company, or if such a qualified and experienced person is required to achieve the tasks), but they may have worked on the premises of the Bank, or their identity can be found out without unreasonable effort from the supporting documents annexed to the offer. For the evaluation purpose they therefore become identifiable. The ex-post evaluation of the company thus also includes the evaluation of the work by the person assigned to do it from the company. The ex-post evaluation constitutes also their personal data.

According to the notification, the processing under the present tendering procedure includes manual processing and automated (format PSFT) processing as well. In any case, manual processing is assumed to be carried out for the handling of the paper file of the consultants, for the selection of the winning bidders, after that for keeping the original tendering documents, concluding the contract and for keeping the ex-post evaluation of the consultants' work. Thus, the processing of personal data forms part of a filing system, and Article 3(2) is therefore applicable.

The scope of the prior checking examination covers data processing operations both in the tendering procedure and in the ex-post evaluation. The first phase is implicitly covered by the name of the processing operation ("Recording and storage of contracts by and between the Bank and external consultant") and described in the documentation annexed to the notification to the EDPS, and the last phase is covered because the DPO has clarified that the performance of the consultants is evaluated and further used for future assignments.

³ The Luxembourg Labour Law dated 19 May 1994 is mentioned in the Guidelines in the broader context of employment and management of consultants and external services.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all *"processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes"*. Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks, among them processing operations which are *"intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"* (Article 27 (2)(b)).

The present processing operations fall under Article 27 (2) because of the evaluation of personal aspects (either conduct or ability) of the consultants or employees from a company in at least three stages: 1) the evaluation of the bidders for a tender, and 2) the evaluation of the quality of the consultant's work upon completion of an assignment. 3) The CCO stores performance evaluations in a central database, and he makes sure that past evaluations are taken into account when considering the same consultant for future assignments.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly. This is even more true since the internal rules on processing operations of external consultants' file are in draft stage.

The notification of the DPO was received on 12 December 2005. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 13 February 2006. The procedure was suspended between 13 December 2005 and 4 January 2006 (22 days), between 24 January 2006 and 24 May 2006 (120 days), and between 5 and 17 July 2006 (12 days). Thus the opinion should be issued no later than 17 July 2006.

2.2.2. Lawfulness of the processing

Personal data may be processed only if it is lawful under Article 5 of the Regulation. In the present case, Article 5 (a) applies: the *"processing is necessary for the 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 or in the legitimate exercise of official authority vested in the Community institution or body."* Concluding contracts with external consultants can be considered as reasonably necessary in the legitimate exercise of official authority vested in the EIB. This needs to be done with an adequate degree of care and on the basis of objective criteria.

According to the notification, the Guidelines for the Employment and Management of Consultants and External Services (See reference in 2.1. "Facts" part) constitute the specific legal basis for the present processing operation. The Guidelines are based on the principles laid down in the Community directives on public procurement (and they take into regard the principles of the Luxembourg Labour Law).⁴

The requirements as to the legal basis will depend on the processing. The need for legal guarantees provided differs and has to be assessed by taking into account the risks presented by the processing operation. Since the present case concerns evaluation of ability and conduct of individuals which presents specific risk for the data subjects, the legal status of the Guidelines requires more clarification. In principle guidelines are considered to be "soft law"

⁴ Specific guidelines may be established for some services which are either exempted from the application of Directive 92/50/EEC (Annex I A (footnote 3) financial services involving transactions in securities and other financial instruments) or which are listed in Annex I B to that directive (e.g. legal services.)

but this is subject to the nature of the decision which approves them. The Bank should clarify this aspect and make it publicly known.

2.2.3. Data Quality

Data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*" (Article 4.1(c)). The data required can concern identification data (name of consultant/ key staff proposed by the company, nationality, sex, address of consultant); data allowing evaluation of the consultant's ability to perform a contract (professional background, previous experience, qualification, financial standing); and performance assessment of the consultant's work evaluated by the service of the EIB concerned.

There are no systematic rules on the type of data which may be included in a tendering file. The nature of the data depends to a large extent on the task to be performed. The EDPS considers that the role of the CCO to review that the selection criteria and their respective weights are adequate and in the line with the general principles underlying the procedures for selecting consultants, is a guarantee to ensure that the data collected are adequate and relevant for the tendering procedure. Personal data contained in the ex-post evaluation form seem to be adequate and relevant for the purposes of the collection.

The data must be processed "*fairly and lawfully*" (Article 4(1)(a) of the Regulation). The lawfulness of the processing has already been discussed (see 2.2.2 above). As regards fairness, this relates to the information given to the persons concerned (see part 2.2.7). To guarantee the fairness of the processing, the EDPS finds it important that the rules on the use of the ex-post evaluation when considering consultants for future assignments are specified by the EIB.

"*Data must be accurate, and where necessary, kept up to date*" (Article 4(1)(d)). Data accuracy seems to be ensured in the tendering procedure, as it is the responsibility of the individuals submitting the documents containing their personal data. As to the system of ex-post evaluation, some mechanism should be put in place to ensure the right of access to and rectification of one's own data, so that their evaluation files can be as complete as possible. (For further comments on the right of access and rectification, see Part 2.2.6).

2.2.4. Conservation of data

According to Article 4(1)(e) Regulation (EC) No 45/2001 "*personal data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

When the call for tender was published in the Official Journal (OJ), the contracts kept by the Central Purchasing Services are destroyed after 10 years starting from the end of the contract. It is assumed by the EDPS that since the offer is annexed to the contract, supporting documents (e.g. documents on the experience and qualification of consultants) submitted for the tender are treated the same way. The EDPS also assumes that the 5 years conservation period from the award decision as to other bidders relates to the storage of the offer and supporting documents of unsuccessful bidders.

If there was no publication in the OJ, contracts kept with the Central Purchasing Services are destroyed after 5 years. The EDPS assumes that the same rules apply to data contained in the documents of unsuccessful bidders.

The EDPS would like to see precise rules established for the storage of contracts and supporting/ background documents containing personal data. Sufficient justification should be given in the light of the purpose of the processing for the 5 and 10 years long time-limitation respectively for contracts and supporting documents containing personal data of consultants.

There seems to be no time limit set for other documents concerned: for the ex-post evaluation reports including the copies kept by SG/AG/ASA and the CCO; for the written panel reports containing personal data of tenderers on the selection process kept by the Director General/ Head of Department concerned.

For the protection of personal data, the EDPS recommends that the internal rules set a clear time-limit for storing those documents in the light of the purposes for which data were collected and/or further processed. For example, in case of storing ex-post evaluation it should be taken into regard that the report on the evaluation of bids should mention, among other things, whether the proposed consultant (firm/individual) has already worked for the EIB on related projects during the last two years. This two year period can guide the drafters of the new internal rules in setting the time limit for storage of ex-post evaluation data.

Although the notification rules out statistical purposes, the EDPS draws the attention of the controller Article 4 (1)(e) of the Regulation: *"The Community institution or body shall lay down that personal data which are to be stored for longer periods for statistical use should be kept either in anonymous form only or, if that is not possible only with the identity of the data subject encrypted. In any event, the data shall not be used for any purpose other than for statistical purposes"*. That article seems to be applicable to the annual report to the Management Committee on the use of consultants for example.

2.2.5. Transfer of data

The processing operation should also be examined in the light of Article 7 (1) of Regulation (EC) No 45/2001. Article 7 (1) specifies that *"personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipients"*.

The present processing operations include numerous transfers of data within the institution as was mentioned in Part 2.1. because the documents concerned contain various personal data of the consultants. The following are such examples: CCO, SG/AG/ASA, RH, Division Head/ Head of Department/ Director General concerned, EIB's internal audit, Central Purchasing Services, Accountancy (for invoicing purposes), etc.

The only recipients of personal data outside of the EIB seem to be the external counsels in case of dispute according to the notification.

Data transfers as described in the Guidelines and in the notification form comply with Article 7 of the Regulation as those seem to be necessary for the legitimate performance of tasks covered by the competence of the recipients.

2.2.6. Right of access and rectification

According to Article 13 of Regulation (EC) 45/2001, the data subject shall have the right to obtain without constraint and at any time within three months from the receipt of the request and free of charge from the controller information at least as to the purposes of the processing

operation, the categories of data concerned, the recipients to whom the data are disclosed and communication in an intelligible form of the data undergoing processing and of any available information as to their source, and a confirmation as to whether or not data related to him/her are being processed. Article 14 provides: *"the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

Rules on accessing the documents (containing the consultant's own personal data) submitted for the tender and the access to his/her ex- post evaluation should be clearly defined and made available for the data subjects (see 2.2.7 below).

The system should provide for the right to rectify inaccurate or incomplete personal data. Consultants or the employees who performed the work from the company should be enabled to make comments on the ex-post evaluation of their work, in order to guarantee that data in the file are as comprehensive as possible. Also fairness requires so, because the ex-post evaluations are taken into regard in the future when considering the same consultant for an assignment.

Article 20 of Regulation (EC) No 45/2001 provides for possible grounds for restrictions on the right to access and rectification. Although there is no mention in the dossier, in case any restriction on those rights is considered by the EIB it should be justified according to Article 20 of the Regulation.

2.2.7. Information to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed when his or her personal data are processed and lists a set of information that must be given either in cases where the data have been obtained from the data subject (Article 11) or in cases where the data have not been obtained from the data subject (Article 12).

Inasmuch as the consultants provide their personal data required for the tendering procedure (qualification, etc) Article 11 applies. In other cases, personal data is not obtained from the data subjects themselves, thus Article 12 applies. For example: where the staff member responsible for the liaison with the consultant evaluates the quality of the work performed, or when the ex- post evaluation stored in the central database of the CCO is taken into regard for a particular assignment.

The EDPS endorses the requirement in the Guidelines that the language of the information specified in the rules should be comprehensible. This is the case with the Terms of Reference, which provide for the operational basis for the selection and employment of the consultants, and which contains the guidance on what personal data should be submitted in the offer. The wording of the TOR is essential to allow potential candidates to make precise offers so the quality of data provided for the tender is guaranteed for the sake of fairness in the tender itself and during the ex-post evaluation.

The EDPS also endorses the requirement that in order to ensure a fair and non-discriminatory treatment of all potential candidates, the selection criteria (including the required information on the quality and experience of the consultant, financial standing and technical ability) and the respective weights should be defined in advance and in an objective and transparent manner. As to the evaluation of the work performed, the EDPS finds it appropriate for fairness in data protection that the key performance indicators inform the consultant/ service provider on the expected quality level and how their work will be evaluated.

Although a reference is made in the contracts to Regulation (EC) 45/2001, the EDPS draws to the attention of the controller that information as to the identity of the controller, purposes of the processing, recipients, the existence of right of access, rectification of one's personal data (e.g. in the ex-post evaluation and to the documents submitted for tender) should be provided under Regulation (EC) No 45/2001. Article 11(1)(d) requires the controller to provide information whether replies to the questions obligatory or voluntary, as well as the possible consequences of failure to reply. Consultants should be clearly informed what type of personal data they should submit for the tender and what are the consequences of failing to do so.

For reasons of fairness the EDPS requires that data subjects are also informed of the legal basis of the processing operation, the time-limits for storing the data and of the right to have recourse at any time to the EDPS.

Data subjects should be informed of the procedure and rules how the ex-post evaluation of their work will be taken into regard while considering them for future assignments.

2.2.8. Security measures

As stipulated in the notification form, only a limited number of persons has access to personal information contained in consultancy contracts. Files are kept under lock and key.

The EDPS draws the controller's attention to this point in the Regulation. Care should be taken to ensure that Article 22 of the Regulation is fully respected, both regarding automated and manual processing.

Preventing unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and preventing other unlawful forms of processing are key objectives of the article. To achieve this aim various technical and organisational measures should be put in place. Security measures should be designed in all stages of the procedure: for the automated processing and also for hardcopy documents submitted for the selection, for the contracts, the ex-post evaluations, and all copies (containing personal data) prepared and circulated for the defined purposes within the institution.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account:

- Mentioning Luxembourg law in the context of data protection should be avoided.
- The legal status of the Guidelines and of the decision approving them should be clarified and made publicly known.
- The procedures and rules on the use of the ex-post evaluation when considering consultants for future assignments should be specified by the EIB.
- A mechanism should be put in place to ensure the right of access to and rectification of one's own data. The system should provide for the right to rectify personal data, including the right of the consultants to make comments on the ex-post evaluation of their own work.

- Precise rules should be established for the storage of contracts and supporting/ background documents containing personal data. Sufficient justification should be given in the light of the purpose of the processing for the 5 and 10 years long time-limitation respectively for contracts and supporting documents containing personal data of consultants
- The internal rules should set a clear time-limit for storing other documents (ex-post evaluations and copies made of them, written panel reports containing personal data of tenderes, etc) in the light of the purposes for which data were collected and/or further processed.
- If personal data are stored for statistical purposes Article 4 (1)(e) of the Regulation should be respected.
- Rules on accessing the documents (containing the consultant's own personal data) submitted for the tender and the access to his/her ex- post evaluation by the data subjects should be clearly defined and made available for the data subjects.
- In case any restriction on the right of access and rectification is considered by the EIB it should be justified in line with Article 20 of the Regulation.
- Information should be provided to the data subjects as to the identity of the controller, purposes of the processing, recipients of personal data, existence of the right of access and rectification to one's personal data, the consequences of failing to provide the requested personal data for a tender, the legal basis of processing, time-limits for storing data, and the right to have recourse at any time to the EDPS.
- Appropriate technical and organisational measures should be put in place securing both the automated and manual processing in all stages of the procedure.

Done at Brussels, 14 July 2006.

Peter HUSTINX
European Data Protection Supervisor