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Subject: Prior-checking notifications, cases 2010-0488, 2010-590, 2010-591, 2010-592, 2010-593

Dear Ms Vartiainen,

We reviewed the documents you have provided the EDPS with concerning the notifications for prior-checking under Article 27(2) of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the selection and recruitment procedures at the Education, Audiovisual, and Culture Executive Agency (EACEA). The processing operations under examination are subject to prior-checking in conformity with Article 27(2)(b) of the Regulation, since they involve an evaluation of the applicants' ability to perform the functions of the post for which the selection and recruitment procedure has been organised. The processing operations in the present case might also involve data related to health (collection of medical certificate or disability data) and to criminal offences (collection of criminal record), which constitute an additional ground for prior-checking in the light of Article 27(2)(a) of the Regulation.

The procedure related to the selection and recruitment of staff, as well as the data protection practices as presented in the notification, reveal some similarities to other processing operations regarding selection and recruitment by EU institutions/bodies/agencies. In this regard, the EDPS issued Guidelines on staff recruitment¹ as well as a Joint Opinion on "*Staff recruitment procedures carried out by some Community agencies*"². On 29 October 2009 the

¹ The EDPS Guidelines can be found on the EDPS website under the title "Thematic Guidelines".

² EDPS Opinion issued on 7 May 2009 (case 2009-0287).

EDPS requested the Union bodies and institutions that had not yet notified their recruitment processing operations to do so in the light of the Guidelines indicating any differences with the Guidelines. In the present case, the notification has been submitted after 29 October 2009 and therefore, the EDPS will first underline, in the light of the EACEA cover letter, the EACEA practices which do not seem to be in conformity with the principles of the Regulation and with the EDPS Guidelines and will then restrict his legal analysis to those practices. It is clear that all the relevant recommendations made in the Guidelines apply to the processing operations put in place in the frame of the selection and recruitment of staff at the EACEA.

The five notifications -temporary agents, contract agents, trainees, spontaneous applications, and interim staff- relate to the selection and recruitment of staff that is why the EDPS decided to analyse them jointly.

1. Right of access and time-limits for blocking

Facts: The candidates are informed via the privacy notices of the point of contact to which they may submit their request to access their data. The notifications (temporary and contract agents) also mention that the "evaluation grids (pre-selection, written tests and interview) completed by the evaluators are not disclosed to the candidates. In fact, these documents, which facilitate comparative judgements between performances of various candidates, belong to the deliberation process of the Selection Committee; the secrecy inherent in the Selection Committee proceedings precludes their communication". The five notifications mention that a maximum of 45 working (beginning from the reception of the request) days may be necessary to rule on a request for blocking. The EACEA clarified in their comments that the decision as to whether to block the data is taken by the controller as soon as possible and at the latest within the delay of 15 working days. If the request is accepted, the controller has another 30 working days to implement the technical blocking of the personal data (so, a total of 45 days).

Reminders:

(i)The right of access deserves a special attention. The EDPS would like to remind the rules developed in the Guidelines.

The EDPS has always recommended in his opinions that data subjects should be given access to their evaluation results regarding all stages of the selection procedure (pre-selection, interview and written tests), unless the exception of Article 20(1)(c) of the Regulation in line with Article 6 of the Annex III to the Staff Regulations is applied. This exception may imply that access should be granted neither to the comparative data concerning other applicants (comparative results), nor to the individual opinions of the members of the Selection Committee if such access would undermine the rights of others applicants or the freedom of members of the selection Committee. Nevertheless, data subjects should be provided with aggregated results.

Therefore, it should be clearly established that:

- the objective of any confidentiality requirement is to ensure that the Selection Committee is able to maintain its impartiality and independence and is not under undue influence from the controller, the candidates, or any other factor and
- any restriction on access rights must not exceed what is absolutely necessary to achieve this purported objective;
- on the basis of Article 20.3, if a restriction provided for by Article 20.1 is imposed, the data subject should be informed of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the EDPS (see point 2 here below).

(ii) With respect to the data subject's right of blocking data, the EDPS reminds EACA that, in accordance with Article 15 of the Regulation, several situations must be distinguished:

(1) When the data subject contests the accuracy of his/her data, the data should be blocked "for a period enabling the controller to verify the accuracy, including the completeness of the data." Thus, when receiving a request for blocking on this ground, the EACEA should immediately block the data for the period necessary for verifying the accuracy and completeness of the data.

(2) When the data subject requires the blocking of his/her data because the processing is unlawful, or when data must be blocked for purpose of proof, the EACEA will need some time to make this assessment before deciding to block the data. In such cases, even though the request for blocking may not take place immediately, it should however been dealt with promptly in order to preserve the data subject's rights. Having considered this, the EDPS is satisfied that the decision as to whether to block the data is taken by the EACEA as soon as possible and at the latest within the delay of 15 working days.

2. Information to be given to the data subject

Facts: EACEA has adopted a privacy statement for each processing operation and a general one for the staff selection process. The legal basis mentioned in each privacy statements is comprehensive but of general nature.

Recommendations:

(i) The legal basis (in each privacy statement) should refer to the specific relevant articles from the Staff Regulations and from the Conditions of employment of other servants of the European Communities.

(ii) As mentioned in point 1 above, the data subject should be informed of the restriction to his right of access, in compliance with Article 20.3.

3. Processing of personal data on behalf of controllers

Facts: An external contractor (temping agency) collects and processes data on behalf of the EACEA to select the best suitable interim staff. The EDPS received a copy of the "Contrat-cadre multiple" between the EACEA and the temping agency. Another external contractor is in charge of the management of the temporary agent recruitment process on behalf of the EACEA. The EDPS received a copy of the Service Contracts between the EACEA and the Company. The data protection paragraph is the same in each contract.

Recommendation:

The EDPS is satisfied that a paragraph on data protection is included in the contracts mentioned above. As to the content of the paragraph however, the right of access and rectification and the right to have recourse to the EDPS are only guaranteed to the contractor. These rights should be ensured to every person concerned by the data processed. Moreover, Article 23 of the Regulation foresees that the legal act binding the processor to the controller should stipulate in particular that: "the processor shall act only on instructions from the controller" in this case only on instructions from EACEA. The EDPS therefore invites you to revise the present clause.

Following Article 23.2.b, Article 21 and 22 obligations are also incumbent on the processor unless he is already subject to the same obligations by virtue of the national law of a Member

State. In the case in point, the temping agency is subject to the Belgian national law and the company in charge of the temporary agent selection is subject to the French national law. Therefore confidentiality and security obligations established by virtue of the Belgian and French law are applicable respectively to the temping agency and to the French Company.

4. Conclusion

The EDPS recommends that EACEA adopts specific and concrete measures to implement these recommendations regarding the selection and recruitment procedures at EACEA. As concerns the reminder mentioned in this note, the EDPS would like to be informed about the situation regarding the compliance with the Guidelines. To facilitate our follow-up, it would therefore be appreciated if you could provide the EDPS with all relevant documents within 3 months of the date of this letter which prove that all recommendations and reminders have been implemented.

Kind regards,

Giovanni BUTTARELLI

Cc: Mr GASCARD, EACEA Executive Director;
Mr MONET, Data Protection Officer
Mr HOMANN, Deputy Data Protection Officer