

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Commission regarding the "Selection procedure for the position of Member of the Management Board of the European Food Safety Authority (EFSA)"

Brussels, 03 October 2011 (Case 2011-0575)

1. Proceedings

On 14 June 2011, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data by the services of the European Commission (EC) concerning the "Selection procedure for the position of Member of the Management Board of the European Food Safety Authority (**EFSA**)" from the Data Protection Officer (**DPO**) of the EC.

The draft Opinion was sent to the DPO for comments on 8 September 2011. The EDPS received a reply on 23 September 2011.

2. The facts

The notification covers the **processing operations performed by the EC** in establishing a list of candidates for the position of Member of the EFSA Management Board and in transferring of such list to the Council and European Parliament (EP). It does not cover processing operations performed by other institutions in the context of the respective selection procedure.

The **purpose** of the procedure is to draw up a short-list of candidates for the position of Members of the EFSA Management Board, on the basis of which Council will take its appointment decision. In order to draw up the abovementioned list, the EC (Directorate-General for Health and Consumers, henceforth DG SANCO) launches and manages a call for expressions of interest.

Data subjects are all candidates applying on the basis of the call for expressions of interest.

According to **Article 25 of Regulation (EC) No 178/2002**¹, the EFSA Management Board "...shall be composed of 14 members appointed by the Council in consultation with the European Parliament from a list drawn up by the Commission which includes a number of

¹ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, (OJ L 31, 1.2.2002, p. 1); see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002R0178:20090807:EN:PDF>.

candidates substantially higher than the number of members to be appointed, plus a representative of the Commission. Four of the members shall have their background in organisations representing consumers and other interests in the food chain. The list drawn up by the Commission, accompanied by the relevant documentation, shall be forwarded to the European Parliament. As soon as possible and within three months of such communication, the European Parliament may make its views available for consideration by the Council, which will then appoint the Management Board. The members of the Board shall be appointed in such a way as to secure the highest standards of competence, a broad range of relevant expertise and, consistent with these, the broadest possible geographic distribution within the Union".

Additionally, **Article 37 of Regulation (EC) No 178/2002** requires Members of the Management Board to undertake to act independently in the public interest and to disclose at any time the existence of possible conflicts of interests that may place the impartiality of EFSA at risk.

The processing is largely carried out electronically, with the creation and transmission of electronic application and selection files.

The **procedure** consists of the following steps:

The EC launches and manages an open call for expressions of interest to which applicants reply by filling in an **application form** containing the following mandatory elements: (1) identification data, including name and nationality; (2) contact information; (3) data on the applicants' language knowledge; (4) current employer as well as (5) qualifications and professional experience.

Applicants also need to attach a **CV** and a **motivation letter** (supporting documents may be requested at a later stage of the procedure) and they need to provide a **declaration of interests form**², containing information on (1) the applicants' professional career (e.g. participation in a management body, activities as a member of a scientific advisory body, employment, consultancy or advisory activities); (2) private interests (e.g. ownership or other investments, research funding, intellectual property, other membership or affiliation) as well as (3) interests of close family members.

The above application documents are received by **DG SANCO DDG2.03** by post/courier service or by hand and scanned. Where necessary, they are sent to **DGT** for translation after removal of the applicant's identification data. The original application documents are filed in locked cabinets of DG SANCO DDG2.03, the scanned copies are placed on a SANCO secured network drive and form the electronic application file.

DG SANCO DDG2.03 then makes the application documents available electronically (using encryption techniques or a secured shared network drive), or in paper form, to the **Pre-selection Committee**, which is chaired by the Head of Unit SANCO DDG2.03 and composed of representatives of DG SANCO and other EC DGs. The Pre-selection Committee carries out an eligibility check, screens the applications using a standard evaluation grid and draws up minutes of the meeting(s), in which applicants are referred to not by names, but by ID numbers.

² As mentioned in the notification, the declaration of interests form annexed to the Call for expressions of interest is the same form already in use at EFSA for Annual Declarations of interests (ADoIs) of Members of the Management Board. Data quality aspects in relation to the data fields requested in this form have been already assessed by the EDPS in the context of a prior checking procedure concerning the "Handling of Annual and Specific Declarations of Interest" by EFSA (Case 2008-737).

The data is then transferred to the **Selection Committee** composed of DG SANCO senior management (chairperson) and representatives of other Directorates-General of the EC; an EP representative participates in the meeting(s) as an observer. The Selection Committee examines the preparatory work and screening by the Pre-selection Committee and assesses the eligible candidates on the basis of comparative merits in relation to the criteria established in the Call for expressions of interest. It draws up a proposal for a list of candidates to be adopted by the Commission and adopts a Report in which applicants are referred to not by names, but by ID numbers.

The list of names of proposed candidates is transmitted electronically (e-Grefte) to the Members of the **Commission**, who upon a specific request can consult application documents available at the Registry Directorate of the Secretariat-General. Once adopted by the Commission, the short-list is published on the DG SANCO website and transmitted electronically (using encryption techniques) to **Council**, which also receives all application documents of the successful candidates. The Council forwards the documentation received by the Commission to the **EP's** responsible committee. The EP disposes of three months of such communication to make its views available for consideration by the Council, which will then take the final decision on appointment.

After publication of Council's final appointment decision, a copy of the CVs and contact details of the nominated candidates is transmitted by **DG SANCO** to **EFSA** by encrypted email, registered post/courier service or hand delivery.

Recipients include staff members of EU institutions and bodies (DG SANCO, DGT, Members of the Pre-selection Committee as well as the Selection Committee and the EP observer, Members of the Commission, Council, EP Committee ENVI, EFSA) as well as the general public following publication of the short-list of successful candidates on the DG SANCO website.

As explicitly noted in a Specific Privacy Statement published on the call webpage, applicants have a **right to access and rectify**, block or erase their data by contacting DG SANCO Unit 03 "Relations with agencies and advisory groups" and explicitly stating their request. Legitimate requests will be replied to within 15 working days as from receipt. Applicants have the right to request the rectification of their identification data at any time; however, data demonstrating compliance with the evaluation criteria may not be rectified or updated after the closing date for the respective call.

As regards the **right of information**, the Call for expressions of interest, the Application form and the Declaration of interests form all contain a specific section on personal data protection and refer to a "Specific Privacy Statement" published on the call webpage, which contains the following information:

- reference to Regulation 45/2001;
- identification of the data controller;
- indication of the purpose of the data processing;
- information on the data recipients;
- some information on the right of access and rectification;
- information that the names of short-listed candidates will be published on DG SANCO's webpage (http://ec.europa.eu/food/efsa_en.htm) for transparency reasons together with an indication of their nationality and of whether they have a background in organisations representing consumers or other interests in the food chain -as well as a reference to the right to object to such publication of personal data on the grounds that it would harm the applicant's legitimate interests;

- information on the time limits for storing the data;
- reference to the legal basis and;
- reference to the right of data subjects to have recourse at any time to the EDPS.

Both, electronic files and selection files in paper format are kept for a **retention period** of 5 years as from the end of the selection procedure. Data regarding successful candidates are kept for the entire period in which these candidates are on duty (i.e. up to a maximum period of 8 years after appointment, corresponding to two consecutive mandates of four years).

Security measures

[...]

3. Legal analysis

3.1. Prior checking

This Opinion covers the processing operations performed by the EC in establishing a list of candidates for the position of Member of the EFSA Management Board. The subsequent step of the procedure, i.e. the transmission of the short-list and the application documents by Council to the EP for consultation in view of the Council's final appointment decision, are not covered by this Opinion³.

The processing of data under analysis is done mostly by automatic means (with the creation and transmission of electronic application and selection files) and when the processing is manual (documents to be submitted by applicants in the framework of the selection process), it forms part of a filing system. Therefore, **Regulation (EC) No 45/2001 ("the Regulation")** is applicable.

The processing operation aims at evaluating the capacity of each candidate for a position as Member of the EFSA Management Board. The data processing operations are performed with the intention to "*evaluate personal aspects relating to the data subjects*" in the sense of Article 27(2) (b) of the Regulation and must therefore be prior checked by the EDPS.

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, regrettably, the processing operation has already been established. In any case, any recommendations made by the EDPS should be adopted accordingly.

The notification of the DPO was received on 14 June 2011. According to Article 27 (4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended during the month of August 2011 and for a total of 11 days for further information from the controller and 15 days for comments. Consequently, the present Opinion must be delivered no later than 11 October 2011.

3.2. Lawfulness of the processing

³ The EDPS had earlier concluded in the context of a consultation by the Council under Article 27(3) of Regulation (EC) No 45/2001 (Case 2010-213), that the processing of personal data solely at the level of the Council in the frame of the selection procedure of the members of the EFSA Management Board is not subject to prior checking by the EDPS.

The rules governing the selection of Members of the EFSA Management Board are found in Articles 25 and 37 of Regulation (EC) No 178/2002 and the establishment and operations of the EFSA Management Board are set up on the basis of this Regulation. This legal instrument thus serves as the legal basis for the selection of the Members of the EFSA Management Board.

As regards the **publication after formal adoption of the EC short-list of candidates** together with an indication of their nationality and of whether they have a background in organisations representing consumers or other interests in the food chain on the DG SANCO website, the notification refers to transparency reasons. In fact, Article 38(1) of Regulation 178/2002 stipulates that "*The Authority shall ensure that it carries out its activities with a high level of transparency*". The provision does, however, not specifically refer to the publication of the EC short-list of candidates for the EFSA Management Board. The EDPS would invite DG SANCO to weigh the transparency considerations against the right to privacy of the short-listed candidates to establish the necessity of this particular processing operation.

With regard to the other processing operations, there is no reason to believe that the processing would not meet the condition of necessity under Article 5(a) of the Regulation.

3.3. Data Quality and processing of special categories of data

The EDPS notes that the mandatory information that applicants need to provide in the context of the selection procedure, as described in point 2, are considered as adequate and relevant in relation to the purposes for which they are intended to be used and therefore comply with Article 4(1)(c) of the Regulation. The personal data are collected from the data subjects themselves and the applicants have a right of access to their data (see above point 2 and below point 3.6 on "*Right of access and rectification*"). This ensures that the data processed are accurate, complete and up to date in the sense of Article 4(1)(d) of the Regulation.

Candidates through their CV, their motivation letter or through the information provided in declaration of interests form may reveal information about them which can be of a sensitive nature, namely political opinions, religious or philosophical beliefs or trade-union membership. If this occurs, it should be considered that candidates have given their consent to the processing of such data, since such information is based on their will. Thus, the condition of Article 10(2)(a) of the Regulation would be met. The prohibition stipulated in Article 10(1) of the Regulation would therefore not apply.

3.4. Conservation of data/ Data retention

The EDPS notes that the specific retention periods of data regarding the three categories of data subjects concerned -unsuccessful candidates, short-listed candidates as well as candidates selected from that short-list for the position of Members of the EFSA Management Board- are in principle reasonable, not excessive and thus in conformity with Article 4 (1) (e) of the Regulation. The EDPS nevertheless invites DG SANCO to examine whether it would be possible to erase data of unsuccessful candidates after a shorter time period following completion of the selection procedure.

3.5. Transfer of data

According to the notification, only internal transfers to other EU institutions or bodies under Article 7 of the Regulation take place. The EDPS considers that the transfers of data to the recipients within or between the different actors listed above for the purposes described in the facts above comply with Article 7(1) of the Regulation.

3.6. Right of access and rectification

According to the notification, applicants have a right to access, rectify, block or erase their data at any time. However, data demonstrating compliance with the evaluation criteria may not be rectified or updated after the closing date for the respective call. This is explicitly mentioned in a Specific Privacy Statement published on the call webpage, which notes that this restriction applies in order to ensure fair and equal conditions for the selection process (see point 3.9 on information to the data subject).

Right of access

The EDPS recalls that candidates should also be able to have access to their entire file, comprising their individual results of the analysis of qualifications and competences as well as their ranking points resulting from comparison of "merits" as established by the different actors involved in the assessment under the selection procedure (Pre-selection Committee, Selection Committee and the EP observer, Members of the Commission, Council, EP Committee ENVI). As was highlighted by the EDPS Guidelines on staff recruitment⁴, candidates should be given access to their evaluation results regarding all stages of the selection procedure.

Article 20 (1) (c) of the Regulation provides for an exception to the principle of access by stating that "*The Community institutions and bodies may restrict the application of Articles 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others*". This exception may imply that certain information comparing the data subject with other candidates should not be provided and no information should be given regarding the individual remarks or evaluations of "merits" as established by the different actors involved. As regards the other candidates, it should be noted that the data contained in the minutes of the Pre-selection Committee and the Report of the Selection Committee do not contain any reference by candidates' name, but rather by an ID number, which -except for those exceptional cases where identification of a particular candidate is possible by means of the remaining data- should suffice to protect their rights and freedoms. The EDPS highlights that in the context of this data processing, the applicants' right of access to their individual results of the analysis of qualifications and competences as well as their ranking points resulting from comparison of "merits" concerning them should not be restricted more broadly than it is necessary under Article 20 (1)(c) of the Regulation. Granting the right of access enables applicants to see which elements were taken into account for the overall assessment and to see that the actors involved in the selection procedure have acted fairly and objectively. Any restriction to the right of access to such information on the basis of Article 20(1)(c) of the Regulation should therefore be applied restrictively.

As to the protection of the individual opinions of the different actors in the selection procedure, it should be ensured that access is not restricted more broadly than it is justified on

⁴ http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/08-10-10_Guidelines_staff_recruitment_EN.pdf.

grounds of safeguarding the confidentiality of the deliberations and decision-making of the actors involved. It should be noted that the principle of confidentiality cannot be prejudiced if the criteria according to which an individual applicant has been evaluated as well as his / her individual ranking points regarding his/her qualifications and competences is disclosed in a transparent manner to applicants.

In the light of the above, the EDPS recommends that procedures are set up to ensure that applicants have access to their own personal evaluation data throughout the selection procedure; this right of access may be limited on the basis of Article 20(1)(c) of the Regulation only in cases where this is absolutely necessary, namely no disclosure of comparative results when this is necessary to protect others and no disclosure of individual opinions of the actors involved in the selection procedure in order to protect the independence of these actors. In such cases, data subjects should be informed of the principal reason for restricting the right of access and the right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation.

Right of rectification

The EDPS notes that the right of rectification is granted regarding identification data at any time and limitations exist regarding the rectification of data demonstrating compliance with the evaluation criteria. This policy is in compliance with the Guidelines on staff recruitment. The EDPS considers this limitation necessary to ensure objective, certain and stable conditions for the selection procedure, and essential to the fairness of the processing. Thus it can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

3.7. Right to object

The Call of expressions of interest, the Application form and the Declaration of interests form all refer to a "Specific Privacy Statement" published on the call webpage, which contains an explicit reference to the right of the short-listed candidates to object to the publication on DG SANCO's webpage of their name, an indication of their nationality and of whether they have a background in organisations representing consumers or other interests in the food chain on the grounds that it would harm the applicant's legitimate interests.

According to the EDPS, since the publication of the names of the short-listed candidates is based on Article 5(a) of the Regulation, these candidates might use their right, on compelling and legitimate grounds, to request that their names are not made publicly available on the DG SANCO website. The EDPS invites the EC to rephrase the reference to the applicant's "legitimate interests" contained in the "Specific Privacy Statement" published on the call webpage to "compelling and legitimate interests", so as to better reflect the wording of Article 18 of the Regulation. The EDPS further recommends that DG SANCO develop a procedure that, if such a case occurs, allows taking the necessary measures in order to weigh the compelling and legitimate interests that the short-listed candidate might evoke against the interests of transparency of the public mandate of the EC.

3.8. Information to the data subject

The EDPS notes that applicants are informed at the time of the processing of most of the elements provided in Articles 11 and 12 of the Regulation by means of the Specific Privacy Statement published on the call webpage (see above point 2). However, the EDPS

recommends that applicants should additionally be informed about the procedures in place for granting access to their individual evaluation results upon request and any limitation thereof.

3.9. Security measures

[...]

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the considerations contained in this Opinion are taken into account. In particular, the EC (DG SANCO) must:

- set up procedures to ensure that applicants have access to their own personal evaluation data throughout the selection procedure. This right of access may be limited on the basis of Article 20(1)(c) of the Regulation only in cases where this is absolutely necessary; in such cases, data subjects should be informed of the principal reason for restricting the right of access and the right of recourse to the EDPS, in accordance with Article 20(3) of the Regulation;
- inform applicants about the procedures in place for granting access to their individual evaluation results upon request and any limitation thereof.

In addition, the EDPS:

- invites the EC (DG SANCO) to examine the possibility of applying a shorter retention periods before erasing data of unsuccessful candidates following completion of the selection procedure;
- invites the EC (DG SANCO) to rephrase the reference to the applicant's "legitimate interests" contained in the "Specific Privacy Statement" published on the call webpage to read "compelling and legitimate interests", so as to better reflect the wording of Article 18 of the Regulation;
- recommends that the EC (DG SANCO) develop a procedure that, if such a case occurs, allows taking the necessary measures in order to weigh the compelling and legitimate interests that the short-listed candidate might evoke against the interests of transparency of the public mandate of the EC.

Done in Brussels, 03 October 2011.

(signed)

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