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Brussels, 23 July 2012
GB/DH/and D(2012)1530 **C 2011-0482**

Re.: Your email of 2 April 2012 regarding the note of 7 October 2011, for the attention of Mr Bertrand Albugues, about the retention of criminal records

Dear Mr Van Damme,

We confirm receipt of the above internal note. We have given our full attention to examining the Court's arguments and views. We would hereby first address the EDPS's concerns relating to the retention of criminal records and also the ways in which European Union institutions and agencies have approached this issue and, second, share with you our legal analysis of the current situation.

In the first place, prior to the official creation of the EDPS in 2004, the practice of the institutions was to retain criminal records without setting a clear term for retention (the term of the personal file, in some cases, and *ad vitam* in others, etc.), thereby infringing Article 4(1)(e) of Regulation No 45/2001 ('the Regulation'), which stipulates that '*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*' and of Article 4(1)(d) of the Regulation, which states that personal data must be '*accurate and, where necessary, kept up to date*'.

Following the EDPS's recommendations in this regard, and with a view to complying with the Regulation, the institutions proposed various approaches to the EDPS: some suggested returning the extract from the criminal record directly to the data subject, retaining only a statement substantiating that said record had been duly checked, and others suggested

concealing the relevant portion of the original document in conjunction with the provision of a similar substantiating statement. Many agencies have now adopted similar practices in connection with the retention of an extract of a criminal record.

In detailing its approach, the EDPS never implied that Regulation No 45/2001 would take precedence over the Court of Auditors' right to perform its inspection on the basis of documents attesting regular expenditure. The EDPS's objectives were (i) to oversee Court inspection of documents in order (ii) to encourage the Court to define a relevant retention term for the criminal record extract and thereby (iii) reconcile the Court of Auditors' right to perform its inspection (Article 287 TFEU) with the principles of data protection (Article 16 TFEU).

The original purpose of collecting extracts from criminal records within the context of recruitment is explicit, legitimate and specified and Article 28 of the Staff Regulations, which states that recruited officials must offer the requisite moral guarantees to enable them to perform their duties, must be complied with. Once the extract has been checked and the recruitment condition met, the primary purpose of collecting the extract has been fulfilled. Furthermore, it cannot be contested that the criminal record extract is 'accurate' only on the day on which it is issued (this accuracy is, however, relative, since, as stated by the Court in point 10 of its letter: extracts from criminal records *do not take account of any criminal proceedings pending as at the date of issue of such extracts*). The result of this is that, *a fortiori*, five or ten years after the extract has been issued, it is no longer indicative of the moral guarantees required at the time of recruitment; other convictions may indeed arise in the interim and/or might have been erased from the criminal record extract in question.

Article 4(1)(e) states that data must be kept *for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*. This latter purpose, according to Article 4(1)(b), must be compatible with the initial purpose. These two purposes are quite distinct: recruitment condition – inspection of documents relating to the regularity of expenditure (whether or not the candidate is hired). The latter purpose does not appear to be incompatible with the first. This latter purpose may, in fact, be considered to be foreseeable on the part of the data subject, who might readily imagine that good administrative management will involve an inspection, by an independent inspection body (in this case, the Court), of the documents provided to enable the subject's recruitment. Moreover, as explained above, this purpose is based on Article 287 TFEU (read in conjunction with Articles 140 and 142 of the Financial Regulation). Said further processing may thus likewise be deemed to be legitimate. This latter point is particularly important with regard to Article 6(1) of the Staff Regulations, which states: *without prejudice to Articles 4, 5 and 10: (…) personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body*. Thus, Article 6(1), read in conjunction with Article 4(1)(b), therefore requires the change of purpose not only to be compatible but also to be based on the particular institution's internal rules, which is precisely the situation in the present case.

Those in charge of processing the data have a certain margin of manoeuvre with regard to defining the retention period. The EDPS, however, takes the view that the defined period must be reasonably defined. We therefore note the Court's proposal that extracts from criminal records should be retained for a period not exceeding two years after recruitment of the data subject for the purposes of inspection of good administrative management. The EDPS is of the understanding that this is, in fact, a maximum term and that criminal record extracts that have been checked before the end of said maximum term might be destroyed after the checking has taken place.

The test of accuracy of the data referred to in Article 4(1)(d) is performed, in this case, on the basis of the latter purpose, namely the audit. Although the data are no longer accurate with regard to criminal convictions, they are, indeed, accurate (to the extent expressed by the Court) for the verification tasks of the Court, which, at the time of recruitment, has to ensure that the extract from the criminal record has been properly checked with regard to the candidate's character.

As regards compliance with Article 4(1)(c), the Court sets out the limits for collecting such a document in its examination, but, in the absence of another mechanism that could guarantee compliance with Article 28 of the Staff Regulations more effectively, (…) *it is highly desirable to harmonise the approach of the different institutions regarding the gathering of information and the retention of criminal record extracts, as far as the type of documents to be submitted, the origin thereof and also the period of validity thereof are concerned* (…). In addition to the retention of extracts, the EDPS in fact also requested that institutions ensure the quality of the data by gathering only data that are adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed (Article 4(1)(c)). The EDPS thus recommended that the institutions collect only the document that is deemed to be relevant (the criminal record extract) and solely in respect of persons actually selected for recruitment[1].

Lastly, if the Court confirms this period of retention and collection of data, the EDPS proposes, with a view to harmonising the retention and collection of extracts from criminal records amongst the institutions and agencies, issuing a general communication to the institutions and agencies in this connection.

We would like to thank you for your cooperation in this matter and kindly ask you to forward these conclusions to the relevant Court services.

We look forward to your reply concerning the follow-up to be given to this matter by the Court.

Yours sincerely,

(**signed**)

Giovanni BUTTARELLI

Cc.: Tom KENNEDY, Head of the Legal Service

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[1] See the letter sent to the Commission within the context of the follow-up to file 2008-755: *Only the criminal record extract provided by the competent authorities of the Member State concerned may be the subject of data collection. Thus, documents of the 'certificate of good conduct' type or extracts from police records should be excluded, unless a national criminal record does not exist in the Member State in question. In order to ensure that the correct document is requested and data collected therefrom, a list of titles of 'criminal record extracts' for all the Member States and in all the original languages must be prepared and systematically forwarded to recruitment candidates. Given the foreign origin of many recruitment candidates, the candidate must be advised also whether the criminal record extract should originate from his/her Member State of current and/or past residence and/or from the Member State of which he/she is a national.*

Collection of the extract from the criminal record should relate only to persons actually selected for recruitment at the Commission. Thus, said document may not be requested in the case of candidates for a recruitment interview but only upon completion of a selection procedure and only in the case of candidates selected for a post.