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WW/UK/ktl/ D(2016) 1553 C 2016-0408
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Subject: Prior-checking Opinion regarding the selection of confidential counsellors at the European Institute for Gender Equality (EIGE) (case 2016-0408)

Dear Mr Jaccarini,

On 26 April 2016, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Institute for Gender Equality (EIGE) a notification for prior checking under Article 27 of Regulation (EC) No 45/2001 (the Regulation) on the processing operations related to the selection of confidential counsellors.

The EDPS has issued Guidelines concerning the processing of personal data during the selection of confidential counsellors and the informal procedures for cases of harassment in European institutions and bodies¹ (henceforth: "Guidelines"). The introductory section of the Guidelines notes that "*processing operations involving personal data in informal anti-harassment procedures are subject to prior-checking in conformity with Article 27(2) (b) and possibly (a) of the Regulation, since they involve... for the selection of confidential counsellors, an evaluation of the applicants' ability to perform the function, and possibly processing operations related to health; ...*". The processing operations under examination (the selection of confidential counsellors at EIGE) are thus subject to prior-checking in conformity with Article 27 of the Regulation².

¹ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-02-18_Harassment_Guidelines_EN.pdf

² The notification in case 2016-0408 and, as a consequence, this Opinion does not cover data processing operations specific to the informal procedure dealing with harassment cases; please see EDPS Opinion case 2013-0732 instead.

The EDPS will highlight only those EIGE practices which do not seem to be in conformity with the principles of the Regulation and with the Guidelines and will restrict his legal analysis to those practices. In the light of the accountability principle guiding his work, the EDPS would nonetheless want to highlight that *all* relevant recommendations made in the Guidelines apply to the processing operations put in place in for the selection of confidential counsellors at the EIGE.

1. Proceedings

The procedure was notified for prior checking under Article 27 of the Regulation on 26 April 2016. The EDPS invited the EIGE to reply to a number of questions on 2 May 2016, to which the EIGE replied on 23 May 2016. The draft Opinion was sent to the DPO for comments on 4 July 2016. The EDPS received a reply on 15 July 2016. 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.

2. Facts and analysis

a) Eligibility check

Under p. 2 of the Guidelines, *"Further to the receipt of applications, the eligibility of the candidates is checked by the dedicated staff (usually from the HR Department). A selection panel/jury assesses then the eligible candidates during personal interviews. The appointing authority (usually the Director) finally accepts or rejects proposed appointments; ..."*. According to section 4, p. 3 of the EIGE's *Manual of informal procedures within the framework of EIGE's Policy on protecting the dignity of the person and preventing psychological and sexual harassment* (henceforth: "Manual") provided with the notification, the Director takes the appointment decision. However, the Manual does not state who performs the eligibility check.

According to additional information provided by the EIGE on 23 May 2016, because of the limited number of staff members at EIGE, there is no open call for applications, but a simplified nomination procedure is applied³. The eligibility will be checked only by the dedicated staff, usually from the HR Department.

The EDPS ***recommends*** clarifying in the Manual that dedicated staff, usually from the HR Department, perform the eligibility check.

b) Specific information contained in the final list of confidential counsellors

P. 2 of the Guidelines further notes that *"The final list of confidential counsellors...specifies information which may be of interest for the alleged victim's selection of a counsellor (gender, nationality, spoken languages, etc.)"*. Whilst section 4.5.2, p. 6 of the Manual stipulates that the list is published on the EIGE intranet, it does not specify which information this list contains.

According to additional information provided by the EIGE on 23 May 2016, the final list of confidential counsellors will be circulated to all staff and will specify information which may

³ As noted in additional information provided by the EIGE on 23 May 2016, the EIGE uses a different procedure to nominate confidential counsellors than described in European Commission decision of 26.04.2006 on the European Commission policy on protecting the dignity of the person and preventing psychological harassment and sexual harassment C (2006) 1624/3.

be of interest for the alleged victim's selection of a counsellor (gender, nationality, spoken languages, etc.).

The EDPS ***recommends*** specifying in the Manual which information of potential interest will be contained in the final list of confidential counsellors.

c) Retention periods

In section 4 of the Guidelines (pp. 7/8), the EDPS has made specific recommendations regarding the establishment of retention periods in the light of Article 4(b) and (e) of the Regulation. The notification states (item 13) that "*There is no retention policy in place yet*".

According to additional information provided by the EIGE on 23 May 2016,

- The EIGE will keep the personal data of selected confidential counsellors 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. More specifically, the EIGE will keep those personal data for the period of their assignment and two months after its expiration.
- Personal data which are to be stored for longer periods for historical, statistical or scientific use will be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the personal data will not be used for any purpose other than for historical, statistical or scientific purposes.
- As far as non-selected counsellors are concerned, a shorter time limit will be adopted, two months after the selection of the confidential counsellors, during which it is possible to challenge the data or the decision taken on the basis of the data for the non-selected persons.

The EDPS ***recommends*** specifying applicable retention periods in the Manual and informing data subjects accordingly.

d) Information to data subject about the right of access and applicable restrictions

The Guidelines on p. 11 invite EU institutions "to guarantee the right of access and rectification of the data subject" and "to provide the data subject with general information about the restrictions to the right of rectification". The privacy statement (Annex V to the Manual) does not provide data subjects with general information about the right of access and restrictions to the right of rectifications

According to additional information provided by the EIGE on 23 May 2016, EIGE will incorporate in its privacy statement (Annex V to the Manual) the necessary information for data subjects about the right of access and restrictions to the right of rectifications that specifically apply in the context of the selection of confidential counsellors. The wording suggested literally reiterates the wording of Articles 13, 14, 15 and 16 of the Regulation.

As to limitations of those rights, the additionally envisaged wording is as follows: "*Data subjects are aware of a limitation to the right of access of the data subject to the overall final assessment of the selection process is possible, in accordance with the principle of the secrecy of selection committee's proceedings only where such restriction constitutes a necessary*

measure to safeguard the protection of the data subject or of the rights and freedoms of others."

The EDPS ***recommends*** adapting the wording of the envisaged section on "Erasure" so as to no longer literally cite "Sections 1, 2 and 3 of Chapter II", as these references are to parts of the *Regulation* rather than the Manual.

The EDPS further suggests adapting the wording of the envisaged section on "Limitation" so as to read "*Data subjects are made aware of...*", clarifying the wording of the section (possibly by splitting it into more than one sentence) and including an explicit reference to Article 20 of the Regulation.

e) Security measures

(...)

3. Conclusion

The EDPS recommends that the EIGE adopts specific and concrete measures to implement the above suggestions and recommendations to ensure compliance with the Guidelines and the Regulation regarding the selection of confidential counsellors. To facilitate our follow-up, please provide the EDPS with all relevant documents within three months of the date of this letter which prove that all recommendations and reminders have been implemented.

Kind regards,

(signed)

Wojciech RAFAŁ WIEWIÓROWSKI

cc.: Mr Christos GEORGIADIS, DPO European Institute for Gender Equality