

Legal Service

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LEGAL OPINION

Re: Appointment of the European Data Protection Supervisor and the Assistant Supervisor, Regulation (EC) No. 45/2001

I. Introduction

1. By letter of 31 January 2014, received by the Legal Service on the same date, Mr Fernando LÓPEZ AGUILAR, the Chairman of the LIBE Committee, requested an opinion of the Legal Service on two questions regarding the Commission's decision of 14 January 2014 concerning the procedure of the appointment of the European Data Protection Supervisor (hereinafter the 'EDPS') and of the Assistant Supervisor (hereinafter the 'AS') (Annex 1). By letter received by the Legal Service on 5 February 2014, two further questions were posed to the Legal Service (Annex 2). To avoid confusion, the two questions in the second letter will be referred to as question three and four.
2. The questions are as follows:
 1. *Could the Legal Service explain if it is for the Parliament and the Council to decide to close a procedure started by the Commission?*
 2. *The Commission has invited the Parliament and the Council to reflect on the publication of two different vacancy notices and to follow two separate procedures for each function. Does the Legal Service consider this suggestion being in line with Regulation 45/2001?*
 3. *Could the Commission decide not to short-list candidates who meet the two above mentioned criteria (i.e. laid down in Article 42(2)) while complying with Regulation 45/2001?*
 4. *Could the Commission lawfully apply additional selection criteria to the two ones required by Regulation 45/2001?*

II. Legal background

3. Unless stated differently in the text, the references to legal provisions concern Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (hereinafter the "Regulation")¹.
4. The procedure of appointment of the EDPS and the AS is laid down in Article 42 of the Regulation. It provides in paragraphs 1, 2 and 8 the following:

"(1) The European Parliament and the Council shall appoint by common accord the European Data Protection Supervisor for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates".

An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same term, who shall assist the Supervisor in all the latter's duties and act as a replacement when the Supervisor is absent or prevented from attending to them.

(2) The European Data Protection Supervisor shall be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of European Data Protection Supervisor, for example because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC.

[...]

(8) Paragraphs 2 to 7 shall apply to the Assistant Supervisor."

5. Further details with regard to the procedure are set out in Decision No. 1247/2002/EC of the European Parliament, of the Council and of the Commission of 1 July 2002 on the regulations and general conditions governing the performance of the European Data-protection Supervisor's duties.² Article 3 of that decision states:

"The European data-protection Supervisor and the Assistant Supervisor shall be appointed following a public call for candidates. The call for candidates shall enable all interested parties throughout the Community to submit their applications. The list of candidates shall be public. On the basis of the list drawn up by the Commission in accordance with Article 42 (1) of Regulation (EC) No. 45/2001, the competent committee of the European Parliament may decide to arrange a hearing in order to enable it to express a preference".

6. The requirements on the function of the EDPS are laid down in Articles 43 to 48 of the Regulation and concern the organisation of his or her office, his or her personal independence in the performance of the duties, professional secrecy and a list of powers and duties.

¹ OJ L 8, 12.1.2001, p. 1.

² OJ L 183, 12.7.2002, p. 1.

III. Question No. 1: Could the Legal Service explain if it is for the Parliament and the Council to decide to close a procedure started by the Commission?

7. The procedure set out Article 42 (1) of the Regulation is composed of two distinct stages:
 - Stage 1 – The Commission has to draw up of a list of candidates suitable for appointment
 - Stage 2 – The European Parliament and the Council decide on the appointment by common accord on the basis of the Commission's shortlist
8. In its duty to draw up a shortlist of qualified candidates, the Commission is bound by the following obligations:
 - a. It has to organise a public call for candidates aiming to satisfy the criteria set out in Article 42 (2) of the Regulation which the legislator considered decisive for the selection of the EDPS and the AS.
 - b. It has to make the list of candidates public.

Within these parameters, the Commission enjoys discretion with regard to the details of the procedure leading to the establishment of a shortlist of suitable candidates.
9. The first stage of the procedure starts on the initiative of the Commission with the publication of the public call for candidates and finishes with the adoption by the Commission of the list of candidates suitable for appointment. It is clear from the text of the Regulation, that at this first stage of the procedure, neither the European Parliament, nor the Council have a formal role to play. If, because of lack of suitable candidates, the Commission is unable to establish a list on the basis of a vacancy notice, then it is for the Commission to close the procedure without drawing up a shortlist and then to open a new one.
10. The second stage of the procedure starts from the moment of transmission of the list established by the Commission to Parliament and Council, then continues with public hearings and finishes with the appointment of the EDPS and the AS. It is impossible to start this stage of the procedure in the absence of a list from the Commission. Without a shortlist presented by the Commission, there is simply no procedure at the level of Parliament and Council. Consequently, they are prevented from starting their deliberations on the appointment.
11. It could happen that Parliament and Council do not approve any of the candidates on a shortlist established by the Commission. In such a case, both institutions would have to close the procedure without making an appointment and request the Commission to prepare a new list. Only in this case would a formal decision by Parliament and Council be required.
12. The shared understanding of the three involved institutions of the procedure as described above is evident from the published vacancy notice and the description of the

appointment procedure in the notice³. It is also evident from the letter, dated 10 June 2013, from the Secretary General of the Commission to the Secretaries General of the Parliament and the Council⁴. The letter states in particular that:

- The mandate of the sitting EDPS expires on 16 January 2014;
- “*The Commission has taken the necessary steps to ensure that a shortlist will be available at a first possible occasion*”;
- The draft vacancy notice is annexed to the letter for information and comments;
- Parliament and Council are invited to designate a representative who would participate as an observer in the meetings.

13. The wording of the letter with which the Commission in essence informs Parliament and the Council of the start of the first stage of the procedure, confirms that there is no need for the other two institutions to take a formal action. There is no request to formally open the procedure, so that the Commission can publish the vacancy notice. Thus, the Commission is solely responsible for the opening and eventual closing of a vacancy notice.
14. It follows from the above that:
 - (a) It is not up to the European Parliament and the Council to close the procedure launched by the Commission before the reception of a list of candidates. At that stage, only the Commission is able to close the procedure due to a lack of suitable candidates to draw up a shortlist and subsequently to open a new selection procedure;
 - (b) The European Parliament and the Council can close a procedure launched by the Commission in view of the appointment of the EDPS and the AS only in the case where they have received a list established by the Commission.
15. The Commission having launched the publication of a vacancy notice in view of establishing a shortlist for the appointment of the EDPS and the Assistant Supervisor, it also falls to the Commission to formally close this procedure and start it from scratch if no suitable candidates have been identified. It is not up to the European Parliament and to the Council to take a formal decision to close the procedure if the Commission has not been able to present such a shortlist.
16. This interpretation was conveyed by the President of the European Parliament to the responsible Commissioner Mr Ševčovič by letter of 6 February 2014.

³ OJ C 219A, 31.7.2013, p. 1.

⁴ Ref. Ares (2013) 1917397.

IV. Question No. 2 : The Commission has invited the Parliament and the Council to reflect on the publication of two different vacancy notices and to follow two separate procedures for each function. Does the Legal Service consider this suggestion being in line with Regulation 45/2001?

17. No indications can be gleaned from the wording of Article 42 of the Regulation on whether one common or two separate vacancy notices are required for the procedure of appointment of the EDPS and the AS. Neither does the wording of paragraph 1 referring to appointment of the AS "in accordance with the same procedure" exclude any of the two approaches.
18. Article 3 of the Decision No. 1247/2002/EC does not provide further clarification. According to this provision, the EDPS and AS shall be appointed following a public call for candidates, the call for candidates shall enable all interested parties to submit their applications and the list of candidates shall be public. Although one could argue that the provision foresees 'a public call for candidates' rather than 'public calls for candidates', which would rather speak for one common procedure for both functions, an interpretation cannot be excluded according to which each one of the two functions is appointed following a separate public call for candidates.
19. When interpreting an unclear wording of a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the object of the rules of which it is part⁵.
20. It shall be recalled that according to Article 42 (8) in connection with Article 42 (2) of the Regulation, the AS, as the EDPS, shall be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills to perform the duties of the EDPS, for example, because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC. Both candidates therefore must have experience and skills required to perform the duties of the EDPS, regardless of whether they are in the end appointed to the function of the EDPS or the AS.
21. Moreover, according to Article 42 (1), the AS shall assist the EDPS in all the latter's duties and act as replacement when the EDPS is absent or prevented from attending to them.
22. The purpose and objective of Article 42 is therefore to establish a selection procedure by which persons are chosen for the functions of EDPS and AS who both have the capacities and qualities imposed by the Regulation on the function of the EDPS, so that the AS can in full capacity replace the EDPS if the need arises. These qualities and capacities are to be reflected in the published call for candidates. The criteria for the two functions formulated in the published call for candidates must therefore be identical.
23. In these circumstances, it is not evident how the Commission can establish two different vacancy notices in order to 'enable it to distinguish better between candidates

⁵ Judgment of the Court of 7 November 2013 in Case C-442/12, Jan Sneller / DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV, pt. 21.

interested by one or the other position⁶. Firstly, the candidates must be willing to exercise the other function, in particular as the AS has a duty to replace the EDPS in case of absence. Secondly, as has been explained above, there shall be no distinction between the candidates on the basis of publishing in the call for candidates a different set of selection criteria, as indicated in Article 42 (2), according to the functions.

24. Finally, to recall the legislative history of Article 42 of the Regulation, it should be noted that the original proposal of the Commission required agreement between all three institutions and did not contain the notion of an assistant supervisor. The text has been amended by the European Parliament into the text presently in force. The reasoning for the proposed amendments contained in the Report adopted by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs⁷ suggests that there was a strong concern expressed of possible blocking by the Commission or the Council of the appointment of candidates of whom they might disapprove. For these reasons it was proposed to choose the candidate possibly from a group of three names proposed by the Commission.
25. It seems thus preferable to maintain the existing single selection procedure covering both, the EDPS and the AS. In practical terms, this offers also more margin of influence for the Parliament, because it will be in a position to indicate its preference for the candidate suitable for the function of the EDPS. This said, Article 42 as such does not prevent the Commission to launch two separate procedures, provided that it respects fully the criteria as laid down in Article 42 (2) of the Regulation.

V. Question No. 3 : Could the Commission decide not to short-list candidates who meet the two above mentioned criteria (i.e. laid down in Article 42(2)) while complying with Regulation 45/2001?

26. The answer to the third question depends on the verification of the legality of the selection criteria published by the Commission in the vacancy notice No COM/2013/10338, which will be addressed in more detail in the context of the fourth question.
27. It should be noted that the public call for candidates (or vacancy notice) describes the profile sought, informs the candidates on the criteria on the basis of which the selection will be conducted and lays down the legal framework for the selection procedure. The public call for candidates must be in line with the Regulation 45/2001.
28. At this point it can be concluded that as long as the selection criteria contained in the public call for candidates are in compliance with the provisions of the Regulation, the Commission may not shortlist candidates who do not meet all the published selection criteria. On the other hand, the candidates who fulfil the criteria shall be entered on the list of suitable candidates.

⁶ See letter of Mr Šefčovič of 20 January 2014.

⁷ A5-0279/2000, Rapporteur Elena Ornella Paciotti.

VI. Question No. 4 : Could the Commission lawfully apply additional selection criteria to the two ones required by Regulation 45/2001?

29. The Regulation stipulates in Article 42 (2) two criteria, namely that the EDPS be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of the EDPS, for example, because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC.
30. These are indeed two mandatory conditions which must be reflected in the vacancy notice determining the suitable candidates. They are, however, very broadly construed.
31. In particular, the phrase "*experience and skills required to perform the duties of European Data Protection Supervisor*" requires further precision. There is no further clarification contained in the Decision No. 1247/2002/EC. Therefore, it is not only justified but also necessary that the two explicit criteria for appointment of the EDPS provided for in Article 42 (2) of the Regulation are expounded or substantiated by the Commission in the public call for candidates.
32. However, considering the lack of any explicit rules on the required content of the public call for candidates, it must be acknowledged that the Commission has a certain margin of discretion in the actual drafting of the vacancy notice. This discretion has to respect in its choice of the detailed selection criteria the requirements imposed by Article 42 (2).
33. The Commission's discretion is limited by the objective of the measure sought - namely finding suitable candidates for the functions of the EDPS and of the AS - and by the explicit provisions of Regulation 45/2001, in particular its Articles 44 to 47, determining the profile of the future EDPS (transferrable also to the AS, as has been explained under reply to question No. 2). The candidates pooled on the shortlist must therefore have experience and skills required to be able to perform the powers and obligations granted to or imposed on the EDPS by the Regulation.
34. Hence, the Commission can lawfully publish specific selection criteria in the call for candidates which develop those mentioned explicitly in Article 42 (2) but it cannot go beyond the Regulation and establish new criteria. That would amount to a modification of the Regulation. Indeed, Article 42 (2) is not drafted in a fashion that indicating that the establishment of the criteria would belong to the Commission. On the contrary, the criteria set out therein are stipulated as clear conditions for a candidate to be appointed.
35. In the present case, the Commission published a vacancy notice for the positions of European Data protection Supervisor and Assistant Supervisor No. COM/2013/10338 where it listed nine selection criteria phrased as obligatory requirements ("should").
36. It can be observed that criteria 1 to 4 have an obvious link with the subject matter of data protection. They concern knowledge and practical experience with regard to application and implementation of data protection rules and assessment of the impact of EU policies in the area of data protection. They thus fall under the experience and skills required to perform the duties of European Data Protection Supervisor, who is the independent supervisory authority responsible for monitoring and ensuring the

application of the provisions of Regulation 45/2001 and other EU acts concerning data protection.⁸

37. Criteria 5 to 9 do not focus on the protection of personal data but constitute rather general personal skills and capacities. It should be considered whether they also amount to criteria which put in concrete terms the general criteria of "having the experience and skills required to perform the duties of European Data Protection Supervisor" and "independence beyond doubt". These criteria will be considered in turn.
38. As for criterion 5, the therein mentioned ability to develop and communicate a vision, to think in global terms of systems and processes can reasonably be required from a person appointed to a function which is of horizontal character - concerns almost all institutions and bodies of the EU - and is exercised in complete independence, neither seeking nor taking instructions from anybody (see Article 44).
39. Concerning the further requirement of ability to propose concrete recommendations and practicable solutions, it shall be recalled that it is the duty of the EDPS to advise all institutions and bodies on all matters concerning the processing of personal data (see Article 46 (d) of the Regulation) and it is the power of the EDPS to give advice to the data subjects in the exercise of their rights (see Article 47 (1)(a)). Furthermore, the EDPS shall monitor relevant developments, in particular the development of information and communication technologies (Article 46 (e)). It also falls under the competence of the EDPS to determine whether and under what conditions monitoring of computer networks operated under the control of Community institutions and bodies is possible for the purposes of prevention of unauthorised use (see Recital 30).
40. With regard to criterion 6 requiring high level management experience and necessary leadership skills, these skills can reasonably be required from a person who is provided with human and financial resources necessary for the performance of the task of the EDPS, who appoints officials and other staff members of his or her own secretariat, the latter being exclusively subject to his or her direction and *vis-à-vis* whom the EDPS acts as their hierarchical superior (see Article 43).
41. Considering that Article 42 (2) requires that the independence of the candidates shall be beyond doubt and that Article 44 imposes independence on the EDPS in the performance of his duties, criterion 7, on ability to act with the required independence, is also legitimate.
42. As for criterion 8 (experience in communicating and networking), the EDPS is obliged to cooperate with national supervisory authorities and bodies, as well as participate in the activities of the Article 29 Working party (see Article 46 (f and g)). Communicating and networking skills are a prerequisite for the exercise of such duties.
43. Finally, good knowledge of English or French is provided as criterion 9 with the reasoning of requirements of internal and inter-institutional communication. Considering that the EDPS is superior to all staff that he or she has at their disposal, he or she must be in a position to communicate with them. The same goes for the inter-institutional communication and such requirement can therefore be considered legitimate. Knowledge of one of the two major working languages of the EU

⁸ See Article 41 of the Regulation as well as recital 3.

institutions facilitates considerably the communication and interaction with EU institutions and other EU bodies.


44. All the specific selection criteria listed in the vacancy notice No. COM/2013/10338 can therefore be considered as closely linked to the two above-mentioned criteria on the profile of the EDPS and that of the AS as determined by Article 42 (2) of the Regulation and are therefore legitimate. Commission has not overstepped the margin of its discretion in the preparation of the vacancy notice.
45. In this context it is worth mentioning that the Commission consulted the Parliament on the vacancy notice before its actual publication. As to the content of obligatory criteria imposed on the candidates, the Parliament did not express any objection.

VII. Conclusions


46. In light of the foregoing, the Legal Service reaches the following conclusions:

- a) The Commission having launched the publication of a vacancy notice in view of establishing a shortlist for the appointment of the EDPS and the Assistant Supervisor, it also falls to the Commission to formally close this procedure and start it from scratch if no suitable candidates have been identified. It is not up to the European Parliament and to the Council to take a formal decision to close the procedure if the Commission has not been able to present such a shortlist.
- b) It seems preferable to maintain the existing single selection procedure covering both, the EDPS and the AS. In practical terms, this offers also more margin of influence for the Parliament, because it will be in a position to indicate its preference for the candidate suitable for the function of the EDPS. This said, Article 42 as such does not prevent the Commission to launch two separate procedures, provided that it respects fully the criteria as laid down in Article 42 (2) of the Regulation.
- c) As long as the selection criteria contained in the public call for candidates are in compliance with the provisions of the Regulation, the Commission may not shortlist candidates who do not meet all the published selection criteria. On the other hand, the candidates who fulfil the criteria shall be entered on the list of suitable candidates.
- d) The Commission can develop criteria mentioned explicitly in Article 42 (2) but it cannot establish new criteria. All the selection criteria listed in the vacancy notice No. COM/2013/10338 can be considered as closely linked to the profile of the EDPS and that of the AS as determined by the Regulation and are therefore legitimate.


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Annexes