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CEDEFOP

European Centre for the Development
of Vocational Training

DIRECTOR

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Médiateur européen

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DETAILED OPINION

Date d'arrivée

Detailed opinion of Cedefop on the draft recommendation dated 17 October 2012 of the European Ombudsman in his own-initiative inquiry OI/4/2012/CK concerning Cedefop

REFERENCE: Letter of the European Ombudsman dated 17 October 2012

On 22 February 2012 the European Ombudsman visited Cedefop in the framework of his programme of visits to EU agencies. This visit took place on the basis of the European Ombudsman's competence to conduct own-initiative inquiries under Article 228 of the TFEU (Treaty on the Functioning of the European Union). In the context of this visit, the European Ombudsman raised the disclosure of the names of members of Selection Boards in selection procedures. Cedefop thoroughly explained its views on this matter and provided proper justification for its stance. During a short discussion that followed the official programme, the Legal Advisor of Cedefop also confirmed to the Ombudsman that the stance of Cedefop was supported by case-law of the Court of Justice of the European Union. Cedefop thus considers that it engaged also in a constructive dialogue as it has done so in all other matters raised by the Ombudsman.

On the basis of this own-initiative inquiry and its aftermath, the European Ombudsman made the above-mentioned draft recommendation. According to the draft recommendation of the European Ombudsman "With a view to ensuring transparency in selection procedures, Cedefop should adopt a new policy enabling it to disclose the names of Selection Board members in a manner compliant with data protection rules".

Cedefop is of the opinion that a misunderstanding of the current practice of Cedefop as regards the disclosure of names of Selection Board members in compliance with data protection rules has occurred. Cedefop apologises for this misunderstanding that may have come about in the context of the understanding of 'public' disclosure (interpreted as disclosure on the website of Cedefop) as opposed to disclosure under the specific legal and procedural provisions to which the EU Agency Cedefop is bound. When Cedefop stated in the context of the own-initiative inquiry of the Ombudsman that disclosure would not occur, it referred to disclosure on its website, i.e. disclosure within the general public sphere without a

differentiation of the disclosure to specific persons/candidates that may demonstrate the necessity to have access to such information.

Cedefop would thus like to correct its response to the Ombudsman following the apparent misunderstanding of this matter in the course of the own-initiative inquiry as follows:

Cedefop has had a long-standing practice in selection procedures that the names and the functions of Selection Board members are always announced to the candidates selected during the interview phase, i.e. an introduction by each member of the Selection Board of him/herself takes place before the start of the oral part of the test/interview. This disclosure of the names of the Selection Board members not only reflects general politeness but very importantly reflects the right of any member of the public who deals with a civil servant to know the name of that civil servant. This practice also follows the principles set by the 'Code of Good Administrative Behaviour' of Cedefop. It should be noted that in line with the stringent rules of the Staff Regulations, in particular Article 6 of Annex III of the SR and the Guide for Selection Boards, candidates have been informed in advance not to contact Selection Board members during the selection procedure as it could otherwise jeopardise the impartiality and the objectivity of the selection procedure as well as infringe on the secrecy of the deliberations of the Selection Boards. The interview phase is thus an exception to the rule that candidates shall not have any contacts whatsoever with the members of Selection Boards.

Cedefop fully agrees with your assertion as also reflected in case-law of the Court of Justice of the EU that it is a fundamental principle of good administration that any EU/Cedefop staff members interacting with members of the public shall provide their names in order to avoid an administration without a 'face and a name'. Cedefop indeed not only fully agrees with the correctness of this fundamental principle of good administration but has furthermore consistently implemented this principle by always providing the names of HR staff members (both the name of the Head of HR as well as the names of other HR staff members who are in contact with any persons of the general public) as the HR service of Cedefop constitutes the counterpart of the general public in selection procedures. The HR team thus provides all relevant information on selection procedures, starting with the vacancy notice to general or specific guidance during the procedure and finally follow-up when a selection procedure has been finalised.

To summarise, Cedefop has consistently respected the fundamental principle of good administration raised above, i.e. there has never been an instance known to the Cedefop management in which a staff member did not identify him/herself to members of the general public. It should be noted that this principle is also enshrined in the 'Code of Good Administrative Behaviour' of Cedefop.

Further to the above clarification, Cedefop would like to inform the Ombudsman that following your visit and the bilateral discussions with the Legal Advisor, a note was prepared by the Legal Advisor in March 2012 to confirm in writing the legal situation. The following legal aspects have been analysed in detail taking into consideration the legal framework and the relevant case-law of the Court of Justice of the EU (please see attached note of 27 March 2012)

1. Under Article 6 of Annex III of the Staff Regulations, the proceedings of the Selection Board shall be secret. This secrecy was introduced with a view to

guaranteeing the independence of Selection Board members and the objectivity of their proceedings, by protecting them from all external interference and pressures whether these come from the EU administration itself or the candidates concerned or third parties. The Court of Justice of the European Union held in many cases that the observance of this secrecy runs counter to divulging the attitudes adopted by individual members of Selection Boards.¹ Cedefop considers that public disclosure of their names without specific preconditions would expose the members of Selection Boards to external pressure in a similar manner as the disclosure of the individual assessments adopted by them. Cedefop is of the opinion that this would be contrary to the purpose of Article 6.

2. According to 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, "personal data" may only be disclosed lawfully and legitimately according to the basic principles governing the right to privacy and the specific provisions governing the processing of personal data. Forenames and surnames are considered "personal data" falling under the provisions of Regulation 45/2001. Third parties have to establish an express and legitimate purpose or need for such a disclosure by virtue of the conditions set out by Articles 8(b), 2(h), 5(d) and 18 of that Regulation and meet the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
3. The term "personal data" undoubtedly covers the name of Selection Board members and their disclosure should meet the conditions laid down by Regulations 1049/2001 and 45/2001. Selection Board members, in accordance with Article 18 of Regulation 45/2001, have the right to object, at any time, on compelling legitimate grounds relating to their particular situation, to the processing of data relating to them, such as the disclosure of their names. Where there is a justified objection, the processing in question may no longer involve those data. Also, Selection Board members have the right to be informed before personal data are disclosed for the first time to third parties or before they are used on their behalf and object to that disclosure.
4. Additionally, if the disclosure of the names of the Selection Board members occurs in the context of access to documents, Article 2 of Regulation 1049/2001 is invoked. This Article stipulates that any citizen of the Union and any natural or legal person has a right to access to documents of any EU institution or body. This Regulation does not impose an automatic and unrestricted obligation to disclose documents or parts of documents. On the contrary, Article 4(1)(b) provides that EU institutions shall refuse access to documents where the disclosure falls under one of the exceptions mentioned therein or undermines the protection of personal data.

¹ Please see Case C-89/79 *Bonu v Council*, paragraph 5, Case C-225/82 *Verzyck v Commission*, paragraph 14, Case C-254/95 *Parliament v Innamorati*, paragraph 24, Case T-560/08 *Commission v Meierhofer*, paragraph 50 etc.

5. The above-mentioned interpretation of the two Regulations was adopted by the Court of Justice of the European Union. In Case C-28/08 *P Commission v The Bavarian Lager Co Ltd.* the Court of Justice of the European Union held on the relation between those two Regulations that the person making the request for public access to documents (i.e. a rejected candidate), according to Article 6(1) of Regulation 1049/2001, is not obliged to state reasons justifying it. But if the required documents include transfer of personal data, such as names, then the person making the request must establish the necessity for the disclosure of such data, under Article 8 (b) or the Regulation 45/2001². Even if that person manages to demonstrate a need for access to documents encompassing personal data, such as names, an analysis of the circumstances surrounding each situation should be made on a case-by-case basis, in order to strike a balance between the right of public access to documents and the protection of personal data.
6. A joint reading, thus, of the legislation on public access to documents, on the protection of personal data and on the secrecy of the procedures of Selection Boards compels that a general disclosure of the names of Selection Board is avoided. Should a policy of unconditional disclosure of the names of Selection Boards members be adopted, it would render it impossible to weigh *ad hoc* the opposing principles and interests. Instead, it would constitute an *in abstracto* and *a priori* acceptance of the need for openness as higher-ranking in relation to the principle of secrecy or the protection of the privacy and integrity of individuals. However, it may be that the need for openness would have to give way in the context of a specific factual situation.
7. Between the principle of transparency and the secrecy of proceedings of Selection Boards a balance needs to be achieved. The principle of transparency foreseen by the EU legislation does not establish an absolute obligation of openness. It rather means that the obligation to grant access to documents is to be considered with due regard to the right to privacy and to principle of secrecy of the procedures of the Selection Board members. Therefore, it does not justify unlimited or unfettered disclosure of personal data.
8. The above is reinforced by case-law of the Court of Justice of the EU. According to settled case-law the principle of secrecy constitutes a specific rule governing a specific matter whereas the principle of transparency constitutes a general rule. The latter may be limited or excluded according to the principle that a special rule derogates from the general rule (*lex specialis derogat legi generali*), where the principle of secrecy is invoked. Thus, it follows that one cannot validly rely on the

² The Bavarian Lager Case C-28/08 concerned access to the names of participants appearing in the minutes of a meeting, whose deliberations were not covered by the principle of secrecy as the proceedings of Selection Boards under the Staff Regulations.

concept of transparency in order to call in question the applicability of the principle of secrecy.³

Further and in relation to the European Ombudsman's comments the following should be noted.

The Ombudsman specifically invokes the case of EPSO and the European Commission. However, the probability of attempts to exert external pressure on members of selection boards is considered much higher in the case of Cedefop. Cedefop as an EU Agency that is small in size organises selection procedures in which one specific post needs to be filled while the Commission/EPSCO usually organises competitions for a high number of suitable candidates to be first put on a reserve list and then possibly offered a post according to the needs of the Commission or other EU institutions. The need for protection is, thus, more imperative due to the smaller size of the Agency and the actual selection of a specific post. Cedefop cannot be compared to EPSO as the inter-institutional body established specifically for the selection of personnel. Due to the vastness of EPSO, the diversity and increased number of applications, the situation and the circumstances for Selection Boards of EPSO are significantly different than the ones for staff members of Cedefop who are appointed as members of Selection Boards.

Additionally, in his draft recommendation the European Ombudsman underlines the importance of the disclosure of the names of the Selection Board members as a guarantee that no conflict of interests occurred in the selection procedure. At this point, it should be mentioned that Cedefop strictly adheres to the provisions of the Staff Regulations in this respect and has also established an internal control system to assure that the selection was based on objective criteria and none of the Selection Board members was subjected to a conflict of interests. For this purpose the Selection Board members are individually informed by the Head of HR of their responsibilities and their need to declare any conflict of interests if applicable. Furthermore, they are obliged to sign a declaration on the absence of conflict of interests.

Conclusions

Cedefop is of the opinion that a differentiation is to be made in this matter.

Cedefop considers that a general public disclosure of the names of the Selection Boards via the internet (either *ex ante* or *ex post*) would not be in compliance with the above-mentioned principles of law, legislation and case-law. The non-disclosure in general terms of the names of Selection Board members aims to protect them from outside pressure. Taking into account the agency's small size as well as the focus on usually filling a specific post with each single selection procedure, staff members would hesitate to participate in selection boards, if their names were disclosed in general terms. The above is in accordance with the principle of secrecy, introduced by Article 6 of Annex III of the Staff Regulations, with a view to guaranteeing the independence of Selection Board members and their protection from all external interference and pressures. It is also founded on Regulation 45/2001 insofar the names of Selection Board members fall within the

³ Please see Case T-371/03 *Vincenzo Le Voci v Council*, paragraphs 121-124, Case T-53/00 *Serena Angioli v Commission*, paragraph 84.

protective scope of the above Regulation. A general disclosure (*ex ante* or *ex post*) of the names of Selection Board members would undermine the interests which are protected by the above-mentioned legislation.

On the other hand, in case of specific requests for disclosure, Cedefop is committed to examine each request in accordance with the relevant legislation and taking into account the relevant case-law, as elaborated above. Cedefop is also obliged to ask for a specific and valid reason to be demonstrated from the part of the applicant in order to disclose personal data to a third party, under Article 8(b) of Regulation 45/2001.



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Encl.: Note of the Legal Advisor of Cedefop, Ref. LEGAL/MF/APAPAV/2012/020.



Legal Advisor

Thessaloniki, 27 March 2012
LEGAL/MF/APAPAV/2012/020**Note for the File**

Subject: Legal Review: Disclosure/publication of the names of Selection Board members in the context of access to information/documents

The European Ombudsman advocates the online publication of the names of members of EU institutions' Selection Boards. According to the Ombudsman, this practice enhances transparency.¹

However, the practice of EU Agencies is different. The vast majority of Agencies do not make the names of the Selection Boards members publicly available via internet or via other means.

Online publication of the names of Selection Board members: Legal review of compliance with EU law

The Ombudsman developed his line of reasoning in the context of cases concerning the disclosure of the names of the members of the Selection Board to a rejected candidate and not with regard to a general disclosure of the latter members' identities. In this specifically defined context, the Ombudsman has held that, whereas Article 6 Annex III of the Staff Regulations introduced secrecy with regard to the deliberations of the Selection Boards, the right to keep the individual views of Selection Board members secret does not require maintaining the secrecy of their identities.² He has further argued that it is a fundamental principle of good administration that any member of the public who deals with a civil servant is entitled to know the name of that civil servant.³

However, publication of the names of the Selection Board members on the web raises serious questions of compliance with EU law, more precisely with the Staff Regulations

¹ See for instance, First letter from the European Ombudsman concerning his visit to the European Centre for the Development of Vocational Training - OI/4/2012/CK.

² Draft recommendation to the European Commission in the own initiative inquiry 1004/97/PD; Decision of the European Ombudsman closing his inquiry into complaint 2586/2010/(ML)TN against the European Personnel Selection Office (EPSO); See also, case 89/79 *Bonui v Council* [1980] ECR I-553.

³ Draft recommendation to the European Commission in the own initiative inquiry 1004/97/PD; see also, Special report from the European Ombudsman to the European Parliament following the own-initiative inquiry into the secrecy which forms part of the Commission's recruitment procedures (1004/97/(PD)GG).

provisions on Selection Boards and Regulations 1049/2001 and 45/2001 for public access to documents and protection of personal data.

In this regard, even though a right to secrecy of the Selection Board members' identities is not similar to the right to keep the individual views of Selection Board secret, a general public disclosure of the names of all the members of Selection Boards via internet or via other means could in fact make them more vulnerable to external interference and pressure, the prevention of which is the underlying purpose of Article 6 Annex III Staff Regulations.

In addition, a general (ex ante or ex post) publication of the identity of the members of Selection Boards on the internet raises issues of conformity with EC Regulation 1049/2001 for public access to documents and EC Regulation 45/2001 on access to personal data and the protection of such data.

More specifically, according to Article 4(1)b EC Regulation 1049/2001 for public access to documents, EU institutions shall refuse access to a document where disclosure would undermine the privacy and integrity of the individual in accordance with EU legislation on the protection of personal data. Forenames and surnames are considered personal data falling under the scope of EC Regulation 45/2001 on the protection of personal data and access to such data. It follows that public access to the members of the Selection Boards' names is possible only if the conditions laid by EC Regulation 45/2001 for such a disclosure have been met.⁴ Thus, interested third parties are entitled to receive knowledge of the members of Selection Boards' names on the conditions that: a) the third party demonstrates a need to this aim (Article 8(b) EC Regulation 45/2001), b) there is no reason to assume that the data subject's legitimate interests would be prejudiced (Article 8(b) EC Regulation 45/2001), c) the data subject has unambiguously given his/her consent (Articles 2(h) and 5(d) EC Regulation 45/2001) and d) the right of the data subject to object is taken into account (Article 18 EC Regulation 45/2001).⁵

This view was upheld in recent case-law of the Court of the European Union (Case-28/08 P) concerning the interrelation between the two Regulations and according to which forenames and surnames fall under the scope of EU legislation on protection of personal data.⁶ It should be noted that this case concerned access to the names of participants appearing in the minutes of a meeting whose deliberations were not covered by a requirement for secrecy similar to the one found under the Staff Regulations with regard to the Selection Board procedures.

⁴ See Bavarian Lager case C-28/08 on the interrelation between EC Regulation 1049/2001 on public access to documents and EC Regulation 45/2001 on access to personal data and protection of such data; also on the protection of names as personal data falling under the scope of the EC Regulation 45/2001.

⁵ The members of the Selection Boards, as data subjects, have, in accordance with Article 18 EC Regulation 45/2001, the right to object "at any time, on compelling legitimate grounds relating to their particular situation, to the processing of data relating to them" and the right "to be informed before their personal data are disclosed for the first time to third parties and to be expressly offered the right to object ...to such disclosure or use".

⁶ Case -28/08 P, para 69, "communication of [surnames and forenames] falls within the definition of "processing", for the purposes of that [i.e. EC45-2001] Regulation".

According to the Court, when access to information requires transfer of personal data, such as names, Article 6(1) EC Regulation 1049/2001 which provides that applicants are not obliged to state reasons for their request for access is set aside. In such cases, the person that makes the request must demonstrate a specific need for the disclosure of the personal data, in accordance with Article 8(b) EC Regulation 45/2001. In this regard, since the Selection Board only delivers its decision as a collegial body (i.e. its members do not decide individually), there will be no need, in principle, for a rejected candidate to receive knowledge of the names of the individual members who processed his/her application.

Even in the rare case where a rejected candidate were to be in a position to demonstrate a need for access to the names, a balancing test would have to take place between, on the one hand, the need of the rejected candidate in question for receiving knowledge of the names and, on the other hand, the legitimate interests of the staff members in question (Article 8(b) EC Regulation 45/2001). Thus, an assessment should be made in each individual case on whether such a disclosure would really be necessary or, on the contrary, the right to information/access to documents requested is guaranteed by partial access e.g. disclosure of a decision of the Selection Board with regard to the applicant with the names erased.

In addition, in accordance with the respective provisions of Regulations 1049/2001 and 45/2001 and in conformity with the recent case-law of the Court, with regard to the transfer of their personal data, the members of the Selection Board have the right to object "at any time, on compelling legitimate grounds relating to their particular situation, to the processing of data relating to them". If this objection is justified, the processing of this data will no longer be possible. Also, the members in question have the right "to be informed before their personal data are disclosed for the first time to third parties and to be expressly offered the right to object ...to such disclosure or use" (Article 18 Regulation 45/2001 in combination with Article 4(1)b Regulation 1049/2001). Under article 5(d) EC Regulation 45/2001, processing of personal data is possible only if the data subject has unambiguously given his/her consent (5(d) EC Regulation 45/2001). Therefore, lack of an expressed and informed consent or an objection by the member of the Selection Board concerned as to the disclosure of his/her identity must also, necessarily, be taken into account.

Conclusions

In a more generic context, a general disclosure of all names of members of the Selection Boards via internet or other means is regarded as excessive and contrary to the above Regulations, in as much as it makes personal data available to any third party irrespectively of the consent or objection of these members or the need for such a disclosure.

Publication of the names of the members of the Selection Boards via internet or other means raises issues of compliance with the Staff Regulations and EU legislation on public access to documents and data protection. Disclosure of names of the members either to rejected candidates or to other third parties is only possible following the informed and free consent of the members in question, a demonstrated need for such a disclosure by the person who makes the request, and under the condition that the disclosure does not run contrary to the legitimate interests of the member in question.