



Opinion on a notification for prior checking received from the Data Protection Officer of the European Central bank on the Staff Appraisal procedure

Brussels, 20 April 2005 (Case 2004-274)

1. Proceedings

1.1. On 8 February 2005, Mr SOMMERFELD Data Protection Officer of the European Central Bank requested by letter the prior checking of the staff appraisal procedure by the European Data Protection Supervisor. This notification was the follow-up to a prior inventory of prior checking cases by the European Data Protection Supervisor. To the notification were attached extracts of the ECB Staff Rules, of the Conditions of employment for staff of the ECB (Annex II Salary structure) and a template of a staff member appraisal form.

1.2. On 21 February 2005, the EDPS made a request by electronic mail for further information notably by requesting for the analytical "guide to the ECB Appraisal " and information on data protection in this appraisal procedure on the ECB intranet. This request was answered by electronic mail on 22 February 2005.

1.3. A further request for information was made on 22 February 2005 by the EDPS as concerns the sending of a copy of the ECB Staff rules and Conditions of Employment for Staff of the ECB. This was delivered to the EDPS on the very same day and does not therefore suspend the delay within which the EDPS must deliver his opinion.

1.4. A final request for information concerning the conservation of data was made on 3 March 2005. The DPO replied by e-mail to this request on 15 March 2005.

2. Examination of the matter

2.1. The Facts

According to the "Guide to the ECB Appraisal" all staff members with permanent contracts or with fixed-term contracts of more than twelve months and who joined the ECB on or before the 1 July of the current year are subject to appraisal.

The annual appraisal is a formal communication exercise between an individual staff member and his/her manager. At the end of the exercise the key conclusions are summarised in a pre-formatted appraisal form. The completed forms must be signed by all parties and sent to the Recruitment and Staff Development Division. The first appraiser will be the direct manager (i.e. Head of Section/ Deputy Head of Division or above) although in larger business areas, and subject to the approval of the

responsible Executive Board member, it will be the local supervisor who is familiar with the work of the appraisee. The second appraiser is normally the first appraiser's manager and must be at least a Head of Division. The second appraiser should review appraisals from a consistency perspective and arbitrate in the case of disagreement.

According to the Guide to the ECB Appraisal, the appraiser and appraisee should draft and exchange their respective parts of the form before the discussion. This may be done by exchange of paper files or by electronic mail. The final responsibility for the completion of the form lies with the first appraiser who returns the form to the Directorate of Human Resources. The form should contain the key points and conclusions of the discussion. Once completed it should be signed by all parties and sent to the Recruitment and Staff Development Division (Directorate Human Resources).

The form includes: a review of the appraisee's performance measured against his/her key responsibilities and an evaluation of his/her added value over the past period; a review of achievements against previously agreed specific targets and objectives or ad hoc projects if appropriate; the ECB values (how the values apply and how the staff member has lived up to them); for staff members, a review of skill levels against ECB competencies (at least of the three most relevant core competencies); for managers, managerial competencies; the setting of key responsibilities for the period ahead; the setting of targets, objectives and projects for the period ahead; a training and development section; a final section including the signatures of the first appraiser and the comments/ signature of the second appraiser as well as the signature and final comments of the appraisee.

As mentioned above, once the form has been filled in and signed, it is transmitted to the Recruitment and Staff Development Division and placed in the personal file of the staff member. The forms are confidential and will not be released from the personal file. According to the Guide to the ECB Appraisal, the use of appraisal forms for other purposes would raise data protection issues. Staff members and appraisers are recommended to make a copy for their own records. The Guide also provides that appraisers may keep a copy for their own personal use and reference only.

According to the notification received from the DPO, rules are being established by the "Archives" department according to which Personal files shall be destroyed 10 years after the staff members have left the ECB if there are no pending claims or any other open issues concerning their ECB employment relationship. The personal files of pensioners will be destroyed 10 years after the end of the year in which the last ECB pension payment was made either to the pensioner or one of his entitled dependants, respectively, providing there are no pending claims or other open issues. Personnel records can be disposed prior to the expiration of this 10 year retention period when the content of the record is of purely informative nature (e.g. references, CVs) i.e. when the liability of the ECB is not likely to be involved and that it is not necessary for personnel administrative reasons. A minimum retention period of five years before disposal has to be observed here.

2.2. Legal Aspects

2.2.1. Prior checking

Staff appraisals can clearly be considered as within the scope of Regulation (EC) 45/2001 since they involve the processing of personal data whether or not by automatic means. Processing of personal data otherwise than by automatic means, will be covered by the scope of the Regulation, providing that the personal data form part of a filing system. In this case the staff appraisal forms are kept in paper version, but are kept in a structured system according to the name of the staff member. The processing therefore falls within the scope of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as "processing operations intended to evaluate certain aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). Staff appraisal procedures typically qualify as processing of personal data intending to evaluate personal aspects relating to the data subject and are therefore subject to prior checking.

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 the Staff appraisal procedure has already been established. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 8 February 2004. Further requests for information suspended the deadline for 1+12 days. According to Article 27(4) the present opinion must be delivered within a period of two months following receipt of the notification, that is before the 21 April 2005.

2.2.2. Legal basis and lawfulness of processing

The legal basis of the processing can be found in Article 36.1 of the Protocol on the Statute of the European System of the Central Banks and of the European Central Bank according to which "the Governing Council, on a proposal from the Executive Board, shall lay down the conditions of employment of the staff of the European Central Bank. Article 5 of Annex II of the Conditions of employment for Staff of the European Central Bank provides: "Within the overall limits adopted by the Executive Board, individual salary increases shall be determined by the Executive Board on the basis of an annual appraisal assessing the growth of a member of staff's contributions to the work of the ECB". This provision implies the annual appraisal of staff and does not give rise to any particular issues.

The lawfulness of the processing is covered by the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of an

official authority vested in the Community institution on the basis of Article 5(a) of Regulation 45/2001.

2.2.3. Compatible use

Article 4(1) (b) of the Regulation provides that "personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes".

According to the Guide to ECB appraisal, "the use of appraisal forms for other purposes would raise data protection issues". The Guide goes on to say "Staff members and appraisers are recommended to make a copy for their own records. Appraisers may keep a copy for their personal use and reference only". It is not clear what "for their personal use" refers to. Since the ECB recognises that the use of the appraisal forms for other purposes raises data protection issues, the EDPS recommends that the limitation on any further use by appraisers be made more explicit. The appraisal forms containing staff data may not be used for any other purpose than that of appraisal of the staff member concerned.

2.2.4. Transfers of data

According to the Regulation 45/2001, transfers of data within or between Community institutions or bodies must be compliant with the conditions laid down in Article 7. Personal data may only be transferred if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient. The recipient may only process the data for the purposes for which they were transmitted.

According to the Staff rules (Article 1.3.4), the only recipients of personal file/appraisal forms can be:

- Members of the Executive Board,
- Members of staff who, for professional reasons, need to have access to the information contained in the file and whose access is authorised by the Director of Human Resources.
- A member of staff may authorise the Directorate of Human resources- subject to approval of the Executive Board- to make his/her personal file available to third parties.

This somewhat contradicts the information given to staff in the Guide to the ECB appraisal according to which "the forms are confidential and will not be released from the Personal file". It seems that files are confidential, but that they may be released from the Personal file in some limited and well-defined circumstances.

The EDPS would like to see clear rules set as to the transfer of data in the appraisal form within the institution. Members of staff who are given access to such information are only entitled to this information if necessary for the legitimate exercise of the tasks covered by the competence of the recipient. Furthermore it must be explicitly stipulated that they are not permitted to use the data for any other purpose.

Appraisal forms can also be transferred to the European Court of Justice in the case of the involvement of the Court in a case such as the conflict with a staff member as regards the content of an appraisal or termination of the contract on the basis of unsatisfactory performance. In this context the ECB Staff rules provide for a specific obligation of documentation/evidence of the case and therefore provide for the possible communication of information in appraisal forms to the ECJ. This does not however raise any particular issue as concerns the legitimacy of the transfer of the data.

2.2.5. Information of the data subject

Articles 11 and 12 provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Since in this case information is obtained both by the data subject and by third parties, both articles 11 and 12 apply.

The Guide to the ECB Appraisal provides information on the identity of the controller; the purposes of the processing; the persons involved in the appraisal system. The Guide also informs staff that the forms will be kept in the Personal File. The ECB Staff rules inform data subjects about the persons to whom access to Personal files may be granted including the member of staff concerned (right of access). As soon as the rules on the conservation of the data in Personal files are adopted, the ECB Staff rules will include this information. Staff must be made aware in the Guide of the possibility of access to his appraisal form as a part of the Personal file in accordance with ECB Staff rules.

Furthermore, when filling in the form data subjects must be informed as to whether replies are mandatory or not and the consequences of a possible failure to reply.

The Conditions of Employment for Staff of the ECB state that the regime applicable to the personal files is defined in the Staff rules in accordance with the principles set out in the European Parliament and Council Directive 95/46/EC of October 1994 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The EDPS would like to point out that as concerns Community institutions and bodies it is not the Directive which applies, but the Regulation 45/2001. Indeed according to Article 3.1. of the Regulation, the latter shall apply to the processing of personal data by all Community institutions and bodies. Even if the guiding principles of these two instruments are the same, the accurateness of the reference has its importance.

2.2.6. Right of access

According to Article 13 of the Regulation, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. This provision is respected by the rules on access to Personal files according to which a staff member may have access to his/her personal file (Article 1.3.4 of Staff rules).

2.2.7. Conservation of the data

According to Article 4(1) (e) of the Regulation, 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 are collected or for which they are further processed.

Seeing that the appraisal forms are stored in the staff member's Personal file, the rules applicable to the conservation of Personal files apply. The rules are being adopted presently and forecast a detention period of 10 years and of 5 years for purely administrative data.

The EDPS welcomes the establishment of a time frame within which the data may be stored. This conservation period of 10 years after the moment when the staff member has left or after the last pension payment, has been inspired by German legislation and seems reasonable. Furthermore, in accordance with Article 4 (1) (e), data of purely informative nature no longer necessary for administrative reasons can be disposed of prior to the expiration of the retention period with a minimum retention period of 5 years.

2.2.8. Security issues

According to Articles 22 and 23 of the Regulation 45/2001, the controller and the processor shall implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of the Regulation 45/2001.

Conclusions

The proposed processing operation does not seem in breach of Regulation (EC) 45/2001 provided that the aforementioned considerations are taken into account. This means in particular that:

- The limitation on any further use by appraisers of personal data be made more explicit: the appraisal forms containing staff data may not be used for any other purpose than that of appraisal of the staff member concerned.
- Clear rules are set as to the transfer of data in the appraisal form within the institution: members of staff who are given access to such information are only entitled to this information if necessary for the legitimate exercise of the tasks covered by the competence of the recipient. Furthermore it must be explicitly stipulated that they are not permitted use the data for any other purpose.

- Staff are made aware in the Guide to the ECB Appraisal on the possibility of access to the appraisal form concerning them as a part of the Personal file in accordance with ECB Staff rules.

- As soon as the rules on the conservation of the data in Personal files are adopted, the ECB Staff rules should include this information.

- Data subjects are informed when filling in the appraisal form as to whether replies are mandatory or not and the consequences of a possible failure to reply.

Done at Brussels, 20 april 2005

The European Data Protection Supervisor

Peter HUSTINX