



OPINION on a NOTIFICATION for PRIOR CHECKING received from the Data Protection Officer of the Court of Justice of the European Communities on the assessment of the work of freelance translators

Brussels, 12 July 2005 (Case 2004/286)

1. Proceedings

On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested notification of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.

After receipt and analysis of the inventories, the EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking to be addressed. Staff evaluation is one of these priority themes.

Following the request for notification sent by the EDPS on 20 December 2004, the Data Protection Officer of the Court of Justice notified by letter on 21 April 2005, the prior checking regarding the assessment of work done by freelance translators in the Court of Justice. This case falls under the priority theme of evaluation, as explained above.

The dossier consists of the formal notification to the EDPS and three annexes. Annex one is a blank copy of a paper quality sheet called "*fiche de contrôle de traduction freelance*". Annex two is a blank printout of the (electronic) Excel assessment forms, called "*Collaborateurs Freelance*". Annex three is a copy of the "*Contrat de prestation de services de traduction*", including the general conditions.

On Tuesday 19 May 2005, the EDPS made a telephonic request for further information. This request was partially answered by telephone on 27 May 2005. On 30 May 2005, additional information was sent by fax.

A second demand for information was made on 7 June 2005 to Mr. Johan Bodenkamp, who gave part of the answer by fax on 8 June 2005 and sent the rest by mail on 17 June 2005.

2. Examination of the matter

2.1. The facts

2.1.1. The assessment of the work of freelance translators

The freelance translators work on the basis of a contract. Contrary to freelance interpreters, they are not considered as agents of the institution of employment for the duration of their contract. During the contracting period, the work of the freelance translators is assessed after each assignment.

As regards the procedure of assessment of the work of freelance translators, it has to be noted that two different processing operations are concerned. One is the manual processing of the paper quality sheet. The other is the transferring of the data in an Excel-programme.

In each Linguistic Division, Lawyer Linguists or Revisers assess the work of the freelancers with the help of a paper quality sheet called "*fiche de contrôle de traduction freelance*". The results of this assessment are put in an Excel file called "*Collaborateurs freelance*" by the Management Assistant or the Secretary of the Head of Division in each division. The paper quality sheet is then sent to the General Services Division in order to proceed with the payment of the bills.

The paper sheet mainly contains information about the translation. The form consists of five boxes. Box A contains general information (division, deadline, name and number of the freelancer, type of document). Box B is used for tests at random (general quality appreciation, date and name of the reviser). Boxes C and D provide information about the technical and substantial quality of the translation. Also costs and the number of working days are mentioned. The evaluation consists of information about the initial text, about the rigour of execution of the translation and about the respect for reference documents. Also, the weak points of a translation are mentioned and finally, a general appreciation (very good, good, mediocre or not useful) is given. The last box decides on the level of payment (100%, less or nothing) and is to be completed with the signature of the Head of Division.

The Excel programme resumes the data of the paper quality sheet. All the information about the quality of the translation (Boxes C and D) is transferred into the Excel form (rigour, respect for reference document, weak points...). The programme is entered by the number of a case. First, the number and the type of document are mentioned, as well as the number of pages and the status of the work. Below, six sub-sheets can be opened. Besides the information about the quality of a translation, the Excel-subsheets contain information about the revisers, the bills and the deadlines. The name, initials, languages, costs and workflow (pages/day) of the freelance translator working on the case are also mentioned. The Excel programme does not contain any new information. It merely processes the data collected via the paper form for reasons of efficient management (timing and budget).

The distinction between the paper form and the Excel-programme is relevant in the light of the access to the data collected.

As regards the Excel-programme, only the people directly involved in the management of freelance translators (namely the Heads of Division and their respective Management Assistants or Secretaries) have access to the programme. The Heads of Division (and their Management

Assistants or Secretaries) can only consult the data on the freelance translators in their own division. They cannot consult the data of freelancers working for other divisions. The Translation Director has no direct access to the system, but he/she can ask the Heads of Division for copies or print-outs. The security measures are limited to the use of a log-in and a password on the PC.

As regards the paper form, different people have access. For starters, the Lawyer-Linguists and Revisers have to fill out the form. Then, the Management Assistants or the Secretaries of the respective Heads of Division transfer the data to the Excel-programme. Afterwards, the paper form is internally sent under closed envelope to the General Services Division. The E-part of the form decides on the level of payment to be executed by the General Services Division. This can be a 100% of the agreed amount, less or nothing. Although the General Services Division only deals with payments, the whole form, including the specific evaluation, the quality control etc.. is sent over. After payment, the paper form is put into a file that is then put into a locked cupboard. Only the people responsible for the payment of bills have access.

The assessment of freelance translations is done for different reasons. First, the quality of translations by the Court of Justice must be guaranteed. Second, insufficient quality of a translation can give rise to a reduction of the payment. The assessment ensures a high quality level of the services provided as well as a correct use of the Freelance credits on the budget.

Usually, the freelance translators receive feedback about the quality of their translation. Most Heads of Unit do it systematically after each assessment, but sometimes, feedback is only given when the quality of the work transpires to be insufficient. The feedback is done either by sending the freelance translators a copy of the revised translation, or a copy of the "*fiche de contrôle de traduction freelance*", or both.

No time limits have been set, neither for the storage of the paper forms, nor for the transferred data into the Excel-sheet. The data are not used for historical, statistical or scientific procedures.

2.1.3. The use of freelance translators under the new procedure

The assessment subject to prior checking in this opinion is the assessment of each translation delivered by freelance translators for reasons of quality and payment.

In the future, there will possibly not only be an assessment of the work of freelance translators, but also of the freelancers themselves. Currently, a new procedure is being established for the use of freelance translators. So far, there was no ranking of the freelance translators under contract with the Court. The new system foresees a ranking after a procedure of tendering. The initial ranking is made on the basis of quality and price. This ranking can change following the assessment of freelance translators under contract. The procedure to do this has not been established yet. It is possible that the Excel-file "*Collaborateurs freelance*" will be used for this purpose. However, since the procedure for the assessment of free-lance translators has not yet been established, it cannot be the subject of this prior checking. The EPDS will prior check the processing of personal data under the new procedure as soon as the DPO of the Court of Justice has officially notified.

2.2. Legal aspects

2.2.1. Prior checking

The assessment of the work of freelance translators can be considered as within the scope of Regulation (EC) 45/2001 since it involves the processing of personal data, whether or not by automatic means. Processing of personal data otherwise than by automatic means, is covered by the scope of the Regulation, providing that the personal data form part of a filing system. In this case, the assessment is first done on paper and afterwards transferred into an Excel-programme. These processing operations both fall within the scope of the Regulation.

Article 27 of Regulation (EC) 45/2001 states that processing operations presenting specific risks to the rights and freedoms of data subjects are to be subject to prior checking by the European Data Protection Supervisor. Article 27(2) sets out a list processing operations likely to present such risks. One such type of operation, referred to in Article 27(2)(d) refers to processing operations for the purpose of excluding individuals from a right, benefit or a contract. This is the case for the assessment of translations delivered by freelance translators. In Article 3.3 of the general conditions attached to their contract, it is stated that:

"La Cour se réserve le droit de réduire les honoraires au cas où elle estime que la traduction ou révision n'est pas satisfaisante ou si le délai d'exécution n'a pas été respecté. La Cour se réserve le droit de refuser la traduction ou révision si elle juge celle-ci inutilisable en raison de sa mauvaise qualité. Dans ce cas, la Cour ne doit aucune rémunération."

This provision indicates that the processing of data, following the assessment of the work of freelance translators, falls under the scope of Article 27(2)(d).

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 however the assessment procedure for freelance translators 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 21 April 2005. According to Article 27(4) the present opinion must be delivered within a period of two months. However, requests for further information extended the deadline to 12 July 2005.

2.2.2. Legal basis for and lawfulness of the processing

The legal basis of the processing cannot be found in the Staff Regulations. Contrary to the freelance interpreters, these Regulations are not applicable to freelance translators. They are external personnel, hired on the basis of a contract.

The legal basis of the processing is therefore to be found in the contract between the freelance translator and the Court of Justice. In Article 3 of the general conditions¹, attached to the

¹ The general conditions are an integral part of the contract, as is stated explicitly in the *contrat de prestation de services de traduction*: "Le présent contrat de prestation de services de traduction est conclu aux conditions générales ci-jointes qui en font partie intégrante."

information about the quality of a certain translation. This corresponds with the purposes of quality control and efficient management.

2.2.5. Transfer of data

Processing must also be examined in the light of Article 7, point 1, of Regulation (EC) 45/2001, since the data circulate among a number of different people at the Court of Justice. Personal data may be transferred between institutions or *within them* only if they "are necessary for the legitimate performance of tasks covered by the competence of the recipient".

The EDPS is of the opinion that the transfer to the electronic Excel-database is necessary for the legitimate purpose of tasks covered by the competence of the recipient. It falls within the competence of the Heads of Division to ensure a high level of quality and to manage the financial sources for external translation.

As regards the physical paper processing sent to the General Services Division, the EDPS thinks that most of the data on the paper form are not necessary for the legitimate performance of tasks covered by the competence of the recipient. The General Services Division only needs to know the percentage of the amount to pay. It is not necessary for this Division to have access to the complete content of the assessment. The General Management Division should only have access to the decision on the amount to pay. Of course, also in that case, the data can only be used for the purposes for which they were transmitted and this must be mentioned explicitly.

Article 7, point 3 of the Regulation stipulates that the recipient must process the personal data only for the purposes for which they were transmitted. In this light, a special word needs to be said about the transfer of data from a Head of Division to the Director of the Translation service. The Director does not have direct access to the data. If he or she wants information about a translation, the concerned Head of Division will have to provide it to him, hereby respecting all data protection criteria discussed in this opinion with regard to purpose, security, data retention etc.

2.2.6. Data retention/conservation of data

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".

It is not clear for how long the data is retained. No time limits have been set, neither for the paper sheet nor for the Excel-file.

As regards the data in the Excel programme, the EDPS is aware that a database on the quality of the work delivered by freelancers is a useful tool to guarantee the quality of the translations in the Court of Justice. Nevertheless, there is no reason to keep the data indefinitely. Given the fact that the Excel-database is a system to evaluate translations and not translators, a time limit should be established in relation to the period during which the data subject can react to the assessment of his/her work. However, a prolongation of the delay for retention can be accepted for reasons of efficient time- and budget management.

contract ("*Conditions générales des contrats de prestation de services de traduction/revision*"), it is stated that:

"La traduction ou révision peut être révisée d'office par la Cour. Le contractant peut être invité à fournir sans supplément de prix une version définitive d'une traduction reprenant la révision effectuée par le Cour."

This provision provides a legal basis for the physical paper processing. The lawfulness of this processing is covered by the fact it is necessary for the performance of a contract to which the data subject is party, as provided in Article 5(c) of Regulation (EC) 45/2001. In casu, the "*contrat de prestation de services de traduction*" and the attached general provisions cover the lawfulness of this processing.

As regards the Excel-programme, which is in fact an electronic version of the paper sheet, the legal basis *by analogy* is the same as the one for the paper quality form. Since a Head of Unit has the task to efficiently manage his/her Unit and to guard the quality of the work done in the Court, the processing of information in the Excel-programme is lawful under Article 5(a) of Regulation 45/2001.

2.2.3. Collection of data and 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."

In this case, the data are collected for two reasons. The first reason for the assessment of the work is to guarantee a high quality of translations in the Court of Justice. The second reason is of financial nature. The assessment determines the amount to be paid to the freelancer. The processing operation thus allows efficient management of the budget for external translations.

The Excel-database is used for quality control and for efficient management. The nature of the data collected in the file makes this clear. Besides the name of the free-lance translator and the price he agreed to work for, mainly information regarding the quality of the translation is stored. Nevertheless, the system allows searching the database by acronym or name of the freelance translator. This means that, although the database is intended for the assessment of the work of freelance translators, it is possible to also use it to assess the freelancers as a person (as employees). The EDPS is therefore of the opinion that, at least, it should be explicitly mentioned that people who have access to the programme, are not permitted to use the data for any other purpose than the assessment of translations. Only if the possibility of using the Excel-system for other purposes is explicitly excluded, can the EDPS consider Article 4(1)(b) to be complied with.

2.2.4. Quality of data

After careful consideration, the EDPS is of the opinion that the categories of data processed in the assessment exercise (as described higher in point 2.1.1.) are adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed. The paper sheets, as well as the electronic version in the Excel-programme both mainly contain

As regards the paper form, the EDPS thinks that a relatively short time limit should be established. The form is kept by the General Services Division, which only needs it for reasons of payment.

The data are not collected for historical, statistical or scientific purposes.

2.2.7. Information to the data subject

The Regulations states that a data subject must be informed of the processing of data relating to himself/herself and lists a range of compulsory items of information which must be provided. In this case, the data collected are partially obtained by the data subject and partially obtained elsewhere. Article 11 and 12 of Regulation 45/2001 therefore apply.

Little information is given to the data subject. A freelance translator only knows that his work will be subject of revision by the Court (as is stated in Article 3 of the General Conditions attached to the contract). He/she is not informed about the other aspects of Articles 11 and 12 of Regulation 45/2001

In order to comply with the Regulation, the following information should be given to the freelance translator:

- the identity of the controller
- the purposes of the processing operation
- the recipients or categories of recipients
- the categories of data concerned
- the existence of a right of access and the right to rectify
- further information such as the legal basis, time-limits for storage, the right to have recourse to the EDPS.

The EDPS is of the opinion that the general conditions attached to the contract between the Court of Justice and the freelance translator can easily be used to provide this kind of information.

2.2.8. Right of access and rectification

Under Article 13 of Regulation (EC) 45/2001, the data subject has the right to obtain from the controller, at any time and without constraint, communication in an intelligible form of the data undergoing processing. Under Article 14, the data subject has the right to obtain from the controller rectification without delay of inaccurate or incomplete personal data.

- As regards access to and rectification of the paper form:

Sometimes, the freelance translators receive feedback about the quality of their translation. Some Heads of Unit do it systematically after each assessment, but others only give feedback when the quality of work transpires to be insufficient. The way of giving feedback also varies. Sometimes a corrected version of the translation is sent. Other times, the freelance translator receives a copy of the paper assessment form. The EDPS is of the opinion that -in the light of

the right of access and rectification- feedback should be given systematically by using a copy of the paper assessment form. The translator also should be granted the right to make observations in this perspective.

- As regards access to and rectification of the Excel-sheet:

In the case of the Excel-programme, no reference is made to the right of access and rectification. The fact that the data subject must be informed about the existence of the database as well as of his/her right to access and rectification is mentioned above (see 2.2.7.). With regards to the relationship between the paper form and the Excel-sheet, it is clear that the Excel-sheets should reflect the information collected via the paper form. The freelancer has a right to verify this. The EDPS is of the opinion that a procedure to exercise these rights should be established.

2.2.9. Security measures

According to Articles 22 and 23 of the Regulation (EC) 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.

As regards the Excel-file "*Collaborateurs freelance*", access is restricted to the relevant Head of Division and his or her Management's Assistant or Secretary. The programme is only installed on their computers. A username and password are required to start working with the computer and thus gain access to the Excel-file. The data in the Excel-file is transferred from the paper sheet called "*fiche de contrôle de traduction freelance*". Since the paper sheet is also kept, the data in the Excel-file and on the paper sheet should correspond and can be checked. The EDPS is of the opinion that sufficient measures are taken to ensure the appropriate level of security.

As regards the paper sheet, the data are transferred by internal mail under closed envelope. Once the payment is done, the paper forms are put into a file and retained in a locked cupboard. Only the qualified personnel of the General Services Division has access. The EDPS repeats that the General Services Division only needs to know the decision on the amount to pay to a certain freelance translator. This information should be securely kept in the premises of their Division. The paper quality sheet, containing detailed information on the quality of the translation, should rather be kept for a limited period by the responsible Head of Division, who has to ensure an adequate level of security.

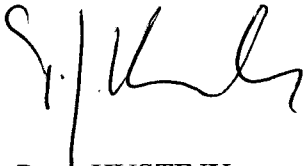
Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account:

- As regards the compatible use, the EDPS is of the opinion that the use of the Excel-database regarding freelance translators for other purposes than the assessment of translations should be explicitly excluded.
- As regards the physical paper processing, the EDPS thinks that most of the data on the paper form are not necessary for the legitimate performance of tasks covered by the competence of the recipient. The General Services Division should only have access to the decision on the amount to pay. It is not necessary for this Division to have access to the complete content of the assessment.
- As regards the transfer of the paper form, it should be explicitly mentioned that the data can only be used for the purposes for which they were transmitted (*in casu* payment).
- As regards the retention of the paper form by the General Services Division, the EDPS is of the opinion that a relatively short time limit should be established, since the data are kept only for reasons of payment.
- Following the EDPS advice to transfer only the decision on the amount to pay to the General Services Division, the EDPS feels that the paper sheet, containing detailed information on the quality of the translation, should rather be kept for a limited period by the responsible Head of Division, who has to ensure an adequate level of security.
- As regards the retention of data in the Excel-programme, the EDPS cannot accept that the data are kept indefinitely. Given the fact that it is a system to evaluate translations and not translators, a time limit should be established in relation to the period during which the data subject can react to the assessment of his/her work. A prolongation of the delay for retention can be accepted for reasons of efficient time- and budget management.
- The following information should be given to the data subject :
 - ✓ the identity of the controller
 - ✓ the purposes of the processing operation
 - ✓ the recipients or categories of recipients
 - ✓ the categories of data concerned
 - ✓ the existence of a right of access and the right to rectify
 - ✓ further information such as the legal basis, time-limits for storage, the right to have recourse to the EDPS.The EDPS is of the opinion that the general conditions attached to the contract between the Court of Justice and the freelance translator can easily be used to provide this kind of information.
- The EPDS is of the opinion that feedback should be given systematically by using a copy of the paper assessment form.

- A procedure should be established in order to allow the freelance translators to exercise their right to access and rectification.

Done at Brussels, 12 July 2005

A handwritten signature in black ink, appearing to read 'P. Hustinx', written in a cursive style.

Peter HUSTINX
European Data Protection Supervisor