

## **Opinion on a notification for prior checking received from the Data Protection Officer of the European Commission on the "Assessment of the ability to work in a third language (application of Article 45(2) of the Staff Regulations)"**

Brussels, 4 September 2007 (Case 2007-0088)

### **1. Procedure**

Notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 regarding the "Assessment of the ability to work in a third language (application of Article 45(2) of the Staff Regulations)" and the related draft Commission decision was given by the Data Protection Officer (DPO) of the European Commission by e-mail on 9 February 2007.

The note of 13 April 2005 addressed to the European Data Protection Supervisor (EDPS) states that EPSO has decided to take the Commission's DPO as its own Officer and to use his services in order to ensure consistent interpretation of the Regulation and also on account of a lack of resources. That is why the Commission's DPO gave the notification on EPSO's behalf.

Questions were put to the European Commission DPO in an e-mail dated 12 March 2007. The replies were received on mail dated 20 April 2007. Additional questions were put by e-mail on 16 May 2007 and the answers were received on 29 August 2007. On 31 August 2007 the draft opinion of the EDPS was sent to the DPO for comment. The reply was received on 3 September 2007.

### **2. Facts**

The European Communities Personnel Selection Office (EPSO) was established by Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002<sup>1</sup>. The way in which EPSO is organised and operates was laid down in a decision adopted by the Secretaries-General of those institutions (Decision 2002/621/EC) on 25 July 2002.

Provision for the assessment of officials' ability to work in a third language before the first promotion after their recruitment is made in Article 45(2) of the new Staff Regulations, which entered into force on 1 May 2004. Under that provision "*officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language among those referred to in Article 314 of the EC Treaty. The institutions shall adopt common rules by agreement between them for implementing this paragraph. (...).*"

Moreover, Article 85(3) of the Conditions of Employment of Other Servants (CEOS) states that "*contract staff in function group IV shall before renewal of a contract for an indefinite period be required to demonstrate the ability to work in a third language among those referred to in Article 314 of the EC Treaty. The common rules on access to training and the*

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<sup>1</sup> The EDPS was established at the end of 2003 and is not one of the signatory institutions; the EDPS sits as an observer on the Management Board and will be a full member after the basic Decision has been revised.

*modalities of the assessment mentioned in Article 45(2) of the Staff Regulations shall apply by analogy."*

Lastly, under Article 7(2)(d) of Annex III to the Staff Regulations it is EPSO's task to "*assume general responsibility for the definition and organisation of the assessment of linguistic ability in order to ensure that the requirements of Article 45(2) of the Staff Regulations are met in a harmonised and consistent manner.*"

Thus, the legal bases for the assessment of the third language are:

- firstly, Article 45(2) of the Staff Regulations, Article 7(2)(d) of Annex III to the Staff Regulations and Article 85(3) of the CEOS;
- secondly, the common rules laying down the procedure for implementing Article 45(2) of the Staff Regulations adopted by all institutions (including those referred to in Article 1a of the Staff Regulations) at the end of December 2006. Article 14 of the common rules states that "*these rules shall enter into force on the first day of the month following that in which the common agreement between the institutions provided for in Articles 45(2) and 110(2) of the Staff Regulations is recorded by the President of the Court of Justice of the European Communities.*"

## **2.1 Main aspects of the implementation of Article 45(2)**

- The official can choose one of the 23 official languages of the European Union (EU): Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Slovak, Slovene, Spanish and Swedish, plus Bulgarian, Irish and Romanian, which also became official EU languages on 1 January 2007. The third language may not be the official's main language or the language chosen for the competition or the selection procedure on the basis of which he or she was recruited.
- The level of knowledge required has been set by reference to the scale defined by the Common European Framework of Reference (CEF) of the Council of Europe, i.e. B2 or "Advanced independent user" on the CEF scale (or level 6 of interinstitutional language courses). However, during a transitional period until 31 December 2008, CEF level A2 (Basic User/Waystage) will be sufficient (level 4 of interinstitutional language courses).
- The ability to work in a third language is assessed in the light of the following four skills: oral comprehension, written comprehension, oral expression and written expression.
- Knowledge of the third language is assessed on the basis of certificates/diplomas or of tests:
  - Assessment based on certificates/diplomas: if the person concerned has an official certificate showing that they have successfully completed an interinstitutional language course at the requisite level, they do not need to take a test. In addition, EPSO keeps an indicative list of diplomas and certificates that demonstrate a sufficient level of attainment. If the person concerned already has such a diploma, testing is waived. Under the common rules, the assessment committees are responsible for both aspects of assessment. However, by way of derogation, the rules also provide (second subparagraph of Article 7(2)) that the certificate/diploma-based assessment may be carried out by the individual institutions. In that case, the assessment process is the exclusive responsibility of the institution, which informs the candidate and EPSO of the outcome. However, if an official produces a diploma that does not appear on EPSO's list, the decision as to whether it meets the requirements will be taken by the assessment committee for the language in question.

- Assessment based on tests: the language tests are to be organised by external specialist bodies (under a framework contract which is currently being finalised)<sup>2</sup>. There is no limit on the number of times a member of staff may take such tests. Candidates who fail the test may therefore apply for the subsequent session.
- The test-based assessment procedure must be completed by the end of December each year.

#### **A. Main stages of the procedure**

For each yearly promotion exercise, EPSO publishes in advance on its Intranet site, which is accessible by all staff of the institutions, the practical arrangements for implementing Article 45(2) (including an indicative timetable of test-based assessments). The declaration of confidentiality regarding the processing of personal data will be an integral part of the information published on the Intranet.

A distinction has to be made between staff directly concerned by the current year's promotion exercise and those whom Article 45(2) affects generally and who wish to have their ability to work in a third language assessed at the earliest opportunity with a view to future promotion.

##### *1. Officials and other servants concerned by the current promotion exercise*

- The individual institutions are responsible for collecting and forwarding the data in this context; they are asked to send EPSO in advance the list of officials and other servants who are concerned by the current promotion exercise and whose ability to work in a third language requires assessment (on the basis of certificates/diplomas or tests). The information is forwarded in a standard Excel file, which contains the following data for each staff member concerned: name, forename, personnel number, place of employment, first and second languages chosen for the competition or the selection procedure on the basis of which he or she was recruited, third language chosen for the purposes of Article 45(2), title of the certificate/diploma being submitted for assessment by the assessment committee, need (yes/no) for language testing. It should be pointed out that each institution is responsible for prior checking that the choice of third language is not the same as the first or second languages chosen for the competition and thus guarantees the accuracy of the information sent.
- Assessment based on certificates/diplomas: staff are asked to e-mail to EPSO (dedicated mailbox<sup>3</sup>) a copy of the certificate/diploma needing to be assessed under Article 45(2). The information is then referred to the assessment committee appointed for the third language concerned (processor), which will examine it and decide whether or not it should be recognised for the purposes of Article 45(2). If the diploma is accepted, EPSO notifies the candidate, adds the candidate's name to the list of persons who have been positively assessed and forwards the list to the candidate's institution of origin. If the diploma is not accepted, EPSO notifies the candidate concerned and adds the candidate's name to the list of officials and other servants who automatically fall under the test-based assessment procedure (see below).

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<sup>2</sup> To meet assessment needs in the meantime, EPSO will use the framework contract provided to DG ADMIN for interinstitutional language courses. This is a temporary solution, which will be used pending finalisation of the specific framework contract for implementing Article 45(2).

<sup>3</sup> EPSO-TROISIEME-LANGUE@ec.europa.eu

- Test-based assessment: EPSO forwards the candidates' names, forenames, places of employment, e-mail addresses and the third languages to be tested to the contractor (processor), which will notify candidates and organise the tests. Tests will be held at least twice yearly for each of the languages where testing is required, mainly in Brussels and Luxembourg but also, if the need arises, in other locations in which European institutions or agencies are established. Tests will take place at the contractor's premises<sup>4</sup>. The results of the tests taken by the staff concerned are to be communicated exclusively to EPSO. EPSO will then inform staff individually of the outcome of their assessment and adds the names of those who have received a positive assessment to the relevant list, which will be sent to the official's institution of origin. A candidate who has failed to meet the required level may apply for the subsequent session.

2. *Officials and other servants to whom Article 45(2) applies but who are not concerned by the current promotion exercise*

- Members of staff wishing to have their ability to work in a third language assessed for the purposes of a future promotion exercise may (via EPSO's dedicated mailbox) submit either (a) a request to be tested as part of the test-based assessment procedure for the purposes of Article 45(2) or (b) a copy of a certificate/diploma for assessment by the relevant assessment committee. In either case the request should be sent together with a standard Excel file (which will be available on the EPSO Intranet site) containing the following information for the staff member concerned: name, forename, personnel number, place of employment, first and second languages chosen for the competition or the selection procedure on the basis of which the member of staff was recruited, third language chosen for the purposes of Article 45(2), title of the certificate or diploma being submitted for assessment by the assessment committee. EPSO will ask each institution of origin to verify and to confirm that the third language selected by the staff members concerned is not the same as the first and second languages chosen for the competition.
- Assessment based on certificates/diplomas: once the above information has been confirmed by the institution of origin, EPSO will forward the copy of the qualification to the assessment committee for the language concerned. The procedures for assessing the certificate/diploma and notifying the outcome under A.1 above will apply.
- Test-based assessment: it should be pointed out as a preliminary that priority will be given as a matter of course to staff concerned by a current promotion exercise. Consequently, the testing of staff to whom Article 45(2) applies but who are not concerned by the current promotion exercise will take place only if the contractor has resources available for the language concerned. The procedures for assessing the test and notifying the outcome set out under A.1 above will apply.
- EPSO also gives staff who so wish the option of enrolling directly with external bodies of their choice which are authorised to issue the officially recognised language diplomas on EPSO's list. The enrolment fees are then refunded to the official concerned on the basis of a decision of the EPSO Director (as with the reimbursement of competition candidates' travel expenses). Staff then formally submit a copy of the language diploma obtained to EPSO, which forwards it to the relevant assessment committee. This is the same as the general procedure for assessing language diplomas. It should be noted that, with this

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<sup>4</sup> This notwithstanding, tests may also be held at the premises of the institution concerned if the need arises. Moreover, during the transitional period, while EPSO is using the DG ADMIN framework contract, most tests will take place at EPSO/Commission premises.

option, any personal data required by the chosen testing organisation in order for it to arrange tests are transferred solely by the officials themselves, under their responsibility and on the basis of the specific contractual relationship established for the purpose between those officials and identified private bodies.

External bodies with which staff sit tests to obtain diplomas officially included on EPSO's indicative list and recognised as sufficient proof of their ability to work in a third language do not represent a third category of processors, since they have no contractual relationship with EPSO. Generally speaking they are not the same bodies as those which organise tests on EPSO's behalf on the basis of a framework contract.

When examining an official's request for prior authorisation to take a test with an external body, EPSO will check the following three points only:

- that the choice of third language for the test meets the requirements of the common rules (i.e. is not the same as the first and second languages chosen for the competition on which recruitment was based);
- that the testing body of choice does in fact issue the official certificate/diploma on the indicative list (it should be stressed here that since there is no exhaustive list of bodies which issue officially recognised diplomas/certificates, each case is examined on its merits);
- whether EPSO's budget can cover the subsequent reimbursement of the enrolment fees up to a maximum of EUR 200.

The external testing option does not involve any transfer of data (or indeed any contact) between the external body and EPSO; it is purely an option which all staff may take up if they wish.

## **B. Assessment:**

1. *Assessment on the basis of certificates/diplomas:* this procedure involves either simply checking diplomas submitted against EPSO's indicative list, or, if diplomas are not listed, application by the assessment committee of a set of indices based on its own pre-established minimum conditions, in order to ascertain whether a given certificate/diploma meets the requirements under the common rules. For example, the committee will check whether the diploma makes direct reference to the CEF scale, whether the four required language skills have been assessed, how many hours training were followed to obtain a certificate issued by an external language training body, etc. The assessment committee will also, where necessary, aim to define the CEF level at which a given diploma can be recognised. Decisions to refuse recognition of diplomas/certificates will be substantiated.

2. *Test-based assessment:* tests conducted by external contractors must without fail comprise assessment of the four skills referred to in the common rules (written comprehension, oral comprehension, written expression and oral expression). Such tests are specifically designed to match the requirements of the predefined levels on the CEF scale.

The assessment committees' sole task will be to record/validate the results obtained in the tests taken with the contractor(s) concerned, i.e. to confirm (i) whether the official has proved his/her ability to work in a third language and (ii) the CEF level attained.

In order to ensure that assessment committees remain independent and can operate efficiently, free from all outside pressure, the principle of the secrecy applying to selection board proceedings (Article 6 of Annex III to the Staff Regulations) will be fully applicable to them.

### **C. Composition and operation of assessment committees**

Article 8(1) of the common rules requires EPSO to set up one assessment committee per language. The assessment committee - a single variable-geometry joint inter-institutional body - is made up of five members: three permanent members irrespective of language (the chair, one representative of the administration and one staff representative) and two rotating members for each language (one representing the administration and one representing the staff). The presence of the permanent members helps maintain the stability of the committees' work and ensure a harmonised and coherent assessment. The members are proposed by the institutions and the staff committees, then appointed by EPSO for a renewable two-year term.

The assessment committees are responsible for ensuring that the levels of the language courses organised in Brussels and Luxembourg and in other decentralised places of employment are equivalent, and for checking the validity of diplomas and certificates against the indicative list established by EPSO, except where this has been done, by derogation, by the institutions. They are also responsible for assessing any diplomas or certificates submitted by an official which are not included on the EPSO list. They record and validate the results of outside tests taken with specialist bodies, examine and decide on ad hoc matters and propose to EPSO any non-regulatory changes in connection with the implementation of the common rules. Finally, they act as an appeal body when this falls within their sphere of competence.

Assessment committees meet at varying intervals depending on the needs arising from the start of promotion exercises and candidates' choice of languages.

## **2.2 Processing of personal data during assessment of the ability to work in a third language**

### **A. Declaration on the protection of personal data**

The declaration states that personal data disclosed will be processed in accordance with Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000. The declaration is permanently available on the EPSO Intranet site, which is accessible to staff in all institutions (on the page providing information on assessment of the third language). When the individual institutions are initially collecting information on their own officials and other servants, EPSO asks each Appointing Authority to e-mail the declaration of confidentiality to all staff to whom Article 45(2) applies for the current year's promotion exercise. The standard Excel form completed by staff seeking advance assessment explicitly recommends that they consult the declaration. This represents the information given to the data subject.

Pursuant to Articles 11 and 12 of the above Regulation, EPSO provides the candidate beforehand with the following information:

- the identity of the controller;
- the purpose of the processing operation;
- the data concerned;
- the nature of the data being processed:
  - personal data identifying the official (name, forename, personnel number, e-mail address, institution of origin);

- data provided by the official to enable the assessment on the basis of certificates/diplomas and/or tests to be organised (place of employment, first and second languages chosen for the competition or the selection procedure on the basis of which the official was recruited, choice of third language, candidate's choice between the two methods for proving ability to work in a third language, and, where applicable, copy/copies of the diploma(s) or certificate(s) to be examined by the assessment committee);
- results of the test-based assessment (where applicable);
- the legal bases;
- the recipients of the processed data (i.e. if the test or diploma-based assessment of ability to work in a third language is positive, the individual Community institutions (and where applicable the agencies) receive information on their own officials and other servants only, to enable their Appointing Authorities, if appropriate, to promote the officials concerned or to renew the open-ended contracts of the contract staff concerned);
- the lawfulness of the processing operation;
- the date as of which the data are to be processed: i.e. date of EPSO's receipt from the individual institutions of the annual lists of officials to whom Article 45(2) applies or the date of EPSO's receipt of the forms completed by officials or other servants wishing to provide early proof of their ability to work in a third language;
- length of time that data are to be stored: i.e. two years for officials and other servants with positive diploma or test-based assessment of their ability to work in a third language. The data on staff whose assessment (on the same bases) had a negative outcome will be stored until the promotion exercise during which they obtain a positive assessment, but for no more than five years (thereafter the two-year rule applies). During the first year in which the data are stored they may also be used for statistical purposes. EPSO confirms that data kept for statistical uses will be duly depersonalised. Thus, calculations and statistical analyses are carried out on data kept in anonymous form;
- rights of access and rectification: officials or other servants concerned may send a reasoned request to EPSO at [eps0-PDP@ec.europa.eu](mailto:eps0-PDP@ec.europa.eu) for changes to be made to the following personal data: family name, forename, place of employment, institution of origin, e-mail address. The other required personal data (first and second languages chosen for the competition/recruitment procedure, choice of third language, copies of diplomas/certificates) may not be changed, as they have been validated by the institution of origin. If need be, data subjects may obtain a copy of their personal data kept on EPSO files by sending a written request accompanied by a copy of their ID.

In addition, officials and other servants may have recourse to the European Data Protection Supervisor at any time ([edps@edps.europa.eu](mailto:edps@edps.europa.eu)).

## **B. Nature of the personal data collected and processed - justification of the operation**

For the reasons provided below, the following data have to be collected in connection with organising the diploma or test-based assessment of candidates' ability to work in a third language:

1. Family name <sup>1</sup>
2. Forename <sup>1</sup>
3. Personnel number <sup>1</sup>
4. Institution of origin <sup>2</sup> - institution of origin, place of employment, e-mail address: the institution of origin is needed in order to be able to send the candidate's Appointing

- Authority the outcome of the assessment; notification of assessment tests is send by e-mail; place of employment has to be taken into account for the organisation of assessment tests
5. Work e-mail address <sup>2</sup>
  6. Place of employment <sup>2</sup>
  7. First and second languages chosen for the recruitment competition<sup>2</sup>, choice of third language for the purposes of Article 45(2): information needed for checking whether the choice of third language is valid, for the organisation of the diploma or test-based assessment of the third language, and for statistical analysis of the choice of third language
  8. Third language chosen for the purposes of Article 45(2) <sup>2</sup>, choice between the two proposed methods for proving ability to work in a third language, copy of diplomas/certificates for assessment for the purposes of Article 45(2): information needed to allow the practical organisation of tests on the basis of the choice made and to enable assessment committees to check the formal and substantial aspects of the diplomas
  9. Choice between the two proposed methods for proving ability to work in a third language <sup>2</sup>
  10. Copies of certificates/diplomas for assessment for the purposes of Article 45(2) <sup>2</sup>

Key to above list:

1. Data identifying the official or other servant in the procedure for assessing the ability to work in a third language.
2. Information given by the candidate for the purposes of organising the certificate/diploma- and/or test-based assessment.

The reasons provided in the above list show that the data are collected and processed solely to enable EPSO to carry out its task of assessing candidates' ability work in a third language.

### **2.3 Other information emerging from the notification**

Information to be given to the data subject:

- the declaration of confidentiality will be permanently available on the EPSO Intranet site, which can be accessed by the staff in all institutions (on the page providing information on the assessment of the third language);
- when the individual institutions are initially collecting information on their own officials and other servants, EPSO asks each Appointing Authority to e-mail the declaration of confidentiality to all staff to whom Article 45(2) applies for the current year's promotion exercise;
- the standard Excel form completed by staff seeking advance assessment (whether on the basis of certificates/diplomas or of tests) refers directly to the declaration of confidentiality and recommends staff to consult it.

Right of access and rectification

Candidates have access to all the data that they have themselves provided (whether to EPSO directly or to their institution of origin).

Tests in the third language remain the contractor's property and, in most cases, are subject to commercial confidentiality. Staff cannot therefore obtain copies of their tests, irrespective of whether they have passed or failed. However, they will have access to their results in those cases where they are awarded an overall mark in addition to their CEF level of attainment and where an individual mark is given for each of the skills tested. The right of rectification, however, is not applicable to those results. Rights to review are governed by Article 12 of the common rules laying down the procedure for implementing Article 45(2) of the Staff Regulations; that Article covers any " (...) *decision taken within the context of the assessment provided for in Articles 7 and 8 (...)*" and therefore applies especially to assessments on the basis of diplomas or of tests.



Where the testing is done by contractors, data subjects considering that their interests have been harmed by their results in a language test may ask for a review using the procedure laid down in Article 12. EPSO will follow up the matter with the contractor. It should also be stressed that the testees will be able to consult their corrected tests on the contractor's premises.

#### Allocation of personal data processing roles between EPSO, the assessment committee members and the contractor(s)

EPSO is responsible for defining and organising the procedure for assessing the language abilities referred to in Article 45(2) and ensures that the procedure is applied in a harmonised and consistent manner. This includes the administrative processing of candidates' files, organising the assessment process and informing staff of the outcome of their assessment.

The main tasks of the individual language assessment committees are to assess any diplomas/certificates submitted by the officials or other servants to whom Article 45(2) applies, and to take the necessary decisions. Assessment committees are considered to be processors as far as the administrative aspects of the processing of personal data are concerned.

A contractor carrying out test-based assessments is also regarded as a processor while it is organising and conducting the tests. The results are transmitted to EPSO only; EPSO will then forward them to the assessment committee responsible for the language concerned.

To ensure that the members of the committee carrying out the assessment and any individual assessors are properly informed and can abide by the rules safeguarding the security and confidentiality of candidates' personal data, at their first meeting they all (members and assessors) receive a note setting out the relevant obligations, which they are asked to sign; the document will be kept by EPSO and they will receive a copy.

Lastly, it should be remembered that the institutions themselves may process the candidates' personal data under their sole responsibility; in such cases they will be making use of the derogation under Article 7(2) of the common rules, which authorises them to carry out certificate/diploma-based assessments themselves and to inform the candidates and EPSO of the results.

#### Establishing the list of officials or other servants who have been positively assessed (on the basis of certificates/diplomas or tests)

EPSO draws up a list of each institution's staff who have been positively assessed. The institutions are sent that part of the list which relates to them, so that their Appointing Authorities can proceed with promotions.

#### Blocking and erasure rights

EPSO will reply to any request to block or erase data within 15 working days of the date on which the letter is received by the relevant department, which may, however, send a duly justified holding reply in accordance with the conditions laid down in point 4 of the Code of Good Administrative Behaviour.

The time-limit for blocking or erasing data held in electronic form is a maximum of 10 working days, a period which commences on the date on which the competent authority takes

its final decision on the request to block or erase data (i.e. an administrative decision taken by EPSO or, in the event of dispute, a decision taken by the EDPS or the competent court).

#### Manual/automated procedure

The procedure is not automated, as EPSO does not use any specific data-processing application for this task. However, consideration is being given to the development of secure data-processing software which would enable staff to enter their applications for tests or diploma-based assessment directly on-line (the resources required and the timetable for introducing such software have not yet been decided). The procedure is manual, with the data required for organising diploma or test-based assessments being collected according to two different methods, depending on whether the staff fall under the current annual promotion exercise or whether Article 45(2) applies to them in the context of a future promotion exercise.

In the first case, data are collected directly by the individual institutions and sent to EPSO in a consolidated Excel file.

In the second case, staff seeking early assessment of their ability to work in a third language send the requisite personal data directly to EPSO in a standard Excel file, which can be found on EPSO's Intranet site.

The standard Excel file which is completed by the staff member him/herself with the information which is the subject of this notification (name, forename, personnel number, institution of origin, place of employment, first and second languages chosen for the competition which lead to recruitment, choice of third language for the purposes of Article 45(2) and title of the diploma or certificate being submitted for assessment by the assessment committee) and is sent to EPSO.

The consolidated Excel file is compiled by EPSO from the individual files which share the same third language choice; it contains exactly the same information on each member of staff and is sent to the members of the assessment committee dealing with the language concerned (the purpose being to provide the committee with a single document giving an overview of all applications for a given language rather than with numerous separate individual files). The consolidated Excel file, however, contains an extra column in which EPSO enters its proposal to the assessment committee for each diploma. EPSO's proposed decisions are based on prior examination of each diploma in the light of the general criteria and principles which the committees themselves have defined for recognising diplomas<sup>5</sup>. In case of doubt, or where a diploma/certificate does not fulfil the objective criteria, EPSO does not submit any proposal to the assessment committee. Such proposals are without prejudice to the committee's final decision, for which it has sole responsibility.

The staff concerned receive the results in the first place via a password-protected zip file, the personal password being communicated individually by 'phone and by no other means. EPSO envisages ultimately setting up a special secure site on which all Commission staff members will be able to access their individual results using a password (use of the ECAS system<sup>6</sup>). If

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<sup>5</sup> These general criteria are duly published on the EPSO Intranet site, which can be consulted by the staff of the institutions; all staff members concerned are therefore acquainted with them.

<sup>6</sup> ECAS (European Commission Authentication System) is a log-in and password operated system used by the Commission to allow access to its on-line computer systems. It is part of the Commission's electronic infrastructure and comes under DG Informatics. ECAS could be extended to the other institutions to enable their staff (and retired officials and other entitled persons) to access on-line services managed by the PMO.

possible, similar arrangements will also be made with the other institutions (ECAS is not yet an inter-institutional system).

Lastly, the public procurement procedure to identify contractors for the organisation of third-language tests under Article 45(2) is still going on (contract notice published in OJ 2007/S 97 - 118625). There is nothing in the tender documents (specifications and terms of reference) to rule out the possibility of proposing tests which would, at least partially, involve automatic procedures. Before the contract is awarded, EPSO is unable to say whether one or more contractors will in fact automate the marking of tests. However, EPSO also confirms that should a tenderer propose automatic marking procedures, it will be required to demonstrate beforehand the system's quality and security and that candidates will be able to access their personal data. (See in this connection the right to consult corrected tests referred to on page 9.)

#### Data storage media and security measures

Data are stored in password-protected Excel files on CD-ROMs kept in a secure cupboard. In addition, access to the dedicated e-mailbox used for Article 45(2)-related communications is strictly limited to staff dealing with the matter and only insofar as they need access in order to do their work.

Ultimately, officials will be able to consult their own results on a special secure site (access via ECAS).

[...]

In the long-term, a secure dedicated site may be set up to store the results (accessible via ECAS). The institutions will receive only the results of their own staff, who in turn, will be able to access their own results only via ECAS.

[...]

All changes to Excel file data will be traceable, either through the generation of different dated versions of a file or by the addition of a special column recapitulating the processing operations carried out in respect of each staff member.

The contract for organising test-based assessments stipulates that the contractor must apply in full the personal data protection rules which apply in the institutions. The terms of reference, which are part of the call for tender referred to earlier, specify that the contractor selected must safeguard the confidentiality of the personal data processed by the contractor for the exclusive purposes of performing the framework contract, as required by Regulation (EC) No 45/2001. That obligation will be incorporated into the finalised version of framework contract.

The confidentiality undertaking signed by each assessment committee member also sets out the rules applying to personal data protection.

The roles of the actors in the process are separated and their access to personal data is strictly limited to the necessary essentials, i.e. on the basis of the "need-to-know" principle. Access to electronic files and any paper documents is restricted exclusively to EPSO staff and assessment committee members whose need to know can be substantiated.

[...]

### **3. Legal aspects**

#### **3.1. Prior checking**

The notification received on 9 February 2007 relates to the processing of personal data in connection with the procedure for assessing the ability to work in a third language ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data processing in question is carried out by an institution in the exercise of activities which fall within the scope of Community law (Article 3(1)).

The data processing carried out during the procedure for assessing the ability to work in a third language is "processing otherwise than by automatic means" under Article 3(2) of Regulation (EC) No 45/2001. This is manual processing, but the content is intended to be held in a (computerised) file, in particular when the information is encoded using Excel files (standard Excel file for EPSO filled in by the official, and consolidated Excel file filled in by EPSO and forwarded to the assessment committees). Article 3(2) is therefore applicable.

The processing thus falls within the scope of Regulation (EC) No 45/2001.

Under Article 27(1) of Regulation (EC) No 45/2001, processing operations likely to present specific risks to the rights and freedoms of data subjects are subject to prior checking by the EDPS. Article 27(2) contains a list of processing operations likely to present such risks. Among those, Article 27(2)(b) refers to "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*".

The procedure for assessing the ability of staff in the EU institutions to work in a third language is a personal data-processing operation covered by Article 27(2)(b) and, as such, is subject to prior checking by the EDPS.

Since the procedure itself had not yet commenced (draft Commission Decision on joint rules laying down the procedure for implementing Article 45(2) of the Staff Regulations) when the notification was received, this was a genuine case of prior checking. EPSO was therefore supposed to receive and act upon the recommendations of the EDPS before it began implementing the procedure for assessing the ability to work in a third language. The procedure was nonetheless launched in February 2007 (EPSO confirms that processing was carried out as described in the notification); this does not alter the fact, however, that the EDPS's recommendations should be implemented.

The formal notification was received by e-mail on 9 February 2007. An e-mail requesting additional information was sent on 12 March 2007. Pursuant to Article 27(4) of the Regulation, the two-month period within which the EDPS must deliver an opinion was suspended. The replies were received by mail on 20 April 2007, resulting in a suspension of 39 days. Additional questions were sent by e-mail on 16 May 2007, and the replies received on 29 August 2007, i.e. a suspension of 105 days. The EDPS's draft opinion was sent to the Data Protection Officer for comment on 31 August 2007. The DPO's reply was received on 3 September 2007. The EDPS will therefore deliver his opinion by 4 September 2007 (10 April plus a 147-day suspension).

### 3.2 Lawfulness of processing

Whether the processing is lawful has to be considered in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that personal data may be processed if "*processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution ...*"

The procedure for assessing the ability of staff of the European institutions to work in a third language, which entails the collection and processing of personal data, is an aspect of the legitimate exercise of official authority vested in the institutions. The processing operation is therefore lawful.

The legal basis for processing the data for assessing the ability to work in a third language comprises:

- the Staff Regulations of officials of the European Communities, i.e. Council Regulation (Euratom, ECSC, EEC) No 259/68, as last amended by Council Regulation (EC, Euratom) No 23/2005, in particular Article 45(2) of the Staff Regulations and Article 7(2)(d) of Annex III thereto, and Article 85(3) of the Conditions of employment of other servants of the European Communities (CEOS);
- Decision 2002/620/EC of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee, the Committee of the Regions and the European Ombudsman of 25 July 2002 establishing a European Communities Personnel Selection Office;
- the common rules adopted by each institution laying down the procedure for implementing Article 45(2) of the Staff Regulations.

The legal basis is valid and supports the lawfulness of the processing operation.

### 3.3 The controller and the processor

Pursuant to Article 2(d) of Regulation (EC) No 45/2001, the controller is "*the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data*". The controller is responsible for ensuring that the obligations laid down in the Regulation are met (information to be given to the data subject, ensuring the rights of the data subject, choice of processor, notification of the data protection officer, etc.). The processor is the "*natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller*" (Article 2(e)).

In accordance with Regulation (EC) No 45/2001, for the purposes of the procedure for assessing the ability to work in a third language EPSO is the controller.

The language assessment committees' main task is to individually assess officials concerned on the basis of the various examinations and to take the necessary decisions in that connection. They are considered to be processors as far as the administrative aspects of the processing of personal data are concerned. Contractor(s) appointed to carry out test-based assessments are also considered to be processors when organising and conducting assessments on the basis of tests. The assessment results are sent to EPSO alone, which forwards them to the assessment committees responsible for the individual languages.

External bodies with which staff sit tests to obtain diplomas/certificates do not constitute a third category of processors, since they have no contractual relationship with EPSO. There is no transfer of data (or indeed any contact) between EPSO and such external bodies; the use of their services is simply an option which staff are offered.

In any event, the role of the various processors, as such, is to help EPSO make a proper appraisal in its procedure to assess officials' ability to work in a third language. Article 2(e) of the Regulation therefore applies.

### **3.4 Data quality**

Article 4 of Regulation (EC) No 45/2001 lays down obligations with regard to the quality of personal data, which must be "*adequate, relevant and not excessive*" (Article 4(1)(c)). The processed data described at the beginning of this opinion are to be considered as meeting those conditions regarding the processing operation. The data required are administrative in nature and are necessary to ensure that the various stages of the procedure for assessing the ability to work in a third language progress smoothly. The EDPS therefore considers that Article 4(1)(c) of the Regulation is complied with.

The data must also be processed "*fairly and lawfully*" (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing operation has already been discussed (see section 3.2 above). The question of fairness relates to the information given to the data subjects and is dealt with in section 3.10 below.

Under Article 4(1)(d) of the Regulation, data must be "*accurate and, where necessary, kept up to date*". From the description of the system, it can be reasonably assumed that the data are accurate and kept up to date given that the controller is under the obligation to verify the former and ensure the latter. Data subjects can exercise the rights of access and rectification in order to ensure that the files are as complete as possible. Those rights, which are the second means of ensuring data quality, are discussed in section 3.9 below.

### **3.5 Data retention**

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that 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 were collected or for which they are further processed*".

It will be remembered that data of officials and other servants whose certificate or test-based assessments were positive are kept for two years. The data of staff receiving negative certificate or test-based assessments will be kept until the promotion exercise during which the assessment is positive but for no more than five years (the two-year rule will apply thereafter). During the first year of storage, data may also be used for statistical purposes. EPSO confirms that personal data used for statistical purposes will be depersonalised. Statistical calculations and analyses are made, therefore, on the basis of data that have already been made anonymous.

The EDPS welcomes the fact that the data of successful candidates will be stored for two years only, and of unsuccessful candidates for no more than five years, the latter period being justifiable in that candidates may wish to re-sit the tests. The EDPS considers it acceptable in this case to store the data in order to avoid having to re-enter them into the system.

With the data used for statistical uses scheduled to be depersonalised, EPSO fulfils all the requirements under Regulation (EC) No 45/2001.

### 3.6 Change of purpose/Compatible use

Data are entered into or extracted from the staff databases. The processing operation under discussion does not entail any general change in the purposes of those databases, since assessment is only one of them. Article 6(1) of Regulation (EC) No 45/2001 does not therefore apply in this case and, given that the use of the data is compatible with the purpose for which it was collected, the processing complies with Article 4(1)(b).

### 3.7 Transfer of data

The processing operation has also to be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

The data in question will be passed around within EPSO, in particular to the assessment committees for the third language concerned. Personal data may be transferred within an institution only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient. In this case the transfer of data to the various parties mentioned is in line with the legitimate performance of their tasks.

When staff members' ability to work in a third language is recognised, those data are obviously transferred to Community institutions, bodies, offices and agencies so that the Appointing Authorities can conduct their promotion exercises. Such transfers of data are also in accordance with the legitimate performance of the various parties' tasks.

Moreover, Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted.*" There must be explicit guarantees that no-one receiving and processing data as part of the procedure for assessing staff's ability to work in a third language will be able to use those data for other purposes. In this case, the EDPS recommends that the data should be disclosed only to human resources departments managing promotion procedures.

Moreover, although this is not mentioned, the Civil Service Tribunal <sup>7</sup> may receive copies of items from such files at its request in the event of proceedings before it. The Ombudsman and the EDPS may also receive such data. Transfers of this type are legitimate because they, too, are necessary for the legitimate performance of the recipient and the intermediary's tasks.

Lastly, the transfer of data to persons outside the institutions also concerns - where the assessment is test-based - the relevant contractors. This processing has to be examined in the light of Article 8 ("*transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC*"). In this case, the transfers are covered by Article 8(a) in that - to the extent that the processor is acting on EPSO's behalf - "*the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*".

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<sup>7</sup> Jurisdiction lies with the European Union Civil Service Tribunal, set up by Council Decision of 2 November 2004 (2004/752/EC, Euratom), in place of the Court of First Instance. The Court of First Instance is the appeal body.

### 3.8 Processing including the identifying number

In the case under discussion EPSO uses the personnel numbers of the staff being assessed for their ability to work in a third language. This use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the controller, but it may have significant consequences. This was why the European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation, which makes provision for action by the EDPS.

The use of identifying numbers can enable data being processed in different contexts to be interconnected. The point here is not to establish the conditions under which EPSO may process identifying numbers, but rather to emphasise the attention that must be paid to this point in the Regulation. In the present case, EPSO's use of identifying numbers is reasonable, as its purpose is to identify the individual concerned and to keep track of the file, thereby facilitating the processing task. The EDPS considers the use of this number permissible as part of the procedure for assessing the ability to work in a third language.

### 3.9 Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access at the data subject's request and sets out the rules for exercising it. In this case candidates can access all the data that they have themselves provided (whether directly to EPSO or to their institutions of origin using Excel files).

Under Article 14 of the Regulation the data subject has a right of rectification. In the same way that the data subject has a right of access, he or she may also directly change personal data or have it changed, if necessary.

The members of staff concerned may send EPSO a reasoned request for the following personal data to be changed: family name, forename, place of employment, institution of origin and e-mail address. The other personal data required (first and second languages chosen for the competition, choice of third language, copies of diplomas/certificates) cannot be changed, since they have undergone prior validation by the institution of origin. However, the choice of third language and the details regarding diplomas/certificates forwarded may subsequently be changed provided that the institution of origin gives EPSO prior confirmation that another third language can be chosen (in practice this flexibility reflects the fact that some officials, having submitted diplomas which are ultimately rejected, then decide to submit others for different languages to the relevant assessment committee).

It will be remembered that staff cannot obtain copies of their tests, regardless of whether or not they have passed them. EPSO justifies this approach on the grounds that tests to assess a candidate's third language are the contractor's property and in most cases covered by commercial secrecy. However, where they are awarded an overall mark in addition to their CEF level of attainment and where an individual mark is given for each of the skills tested, the staff concerned will be allowed access to their results.

The EDPS welcomes the fact that EPSO has accorded rights of access to and rectification of personal identification data and a right of access to test results (overall mark and individual marks if any), all of which constitute personal data <sup>8</sup>.

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<sup>8</sup> Data are personal data if, for instance, they concern a person's identity, characteristics or conduct or are used to determine or influence the way in which that person is treated or evaluated; this is clearly the case where assessment committee conclusions regarding the ability to work in a third language are concerned, which is a process of evaluation.



Where the testing is done by contractors, data subjects considering that their interests have been harmed by their results in a language test may seek a review, using the procedure laid down in Article 12 of the draft common rules laying down the details for implementing Article 45(2) of the Staff Regulations (see page 9 above). EPSO will follow up the matter with the contractor. It should be added that testees will be able to consult their tests after marking, on the contractor's premises.

This system is acceptable in that it respects both the right of access, albeit somewhat restricted (in accordance with Article 20(1)(c), the right being safeguarded in this case is the processor's intellectual property right) and the right of rectification.

In order to preserve assessment committees from outside pressure and enable them to work independently and efficiently, the principle of the secrecy of Selection Board proceedings laid down in Article 6 of Annex III to the Staff Regulations will be fully applicable and will be applied to them by EPSO.

### **3.10 Information to be given to the data subject**

Regulation (EC) No 45/2001 stipulates that the data subject must be informed if his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and some from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case: inasmuch as candidates for assessment personally supply the information requested of them, they provide the data themselves as data subjects.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since information is obtained from the different participants in the process (assessment committees, outside contractor, other institutions).

It will be remembered in this case that data subjects receive information via the declaration of confidentiality. The declaration is permanently available on the EPSO Intranet site, which can be consulted by staff in all the institutions (on the page giving information on assessment of the third language). It is also distributed to each official on the list finalised by the Appointing Authority. When the individual institutions are at the initial stage of collecting information from their own officials and other servants, EPSO asks each Appointing Authority to e-mail the declaration of confidentiality to all those to whom Article 45(2) applies in the current promotion exercise. The standard Excel form completed by staff seeking advance assessment explicitly recommends that they should consult the declaration.

Nowhere in the information given in the declaration of confidentiality is there mention of whether replies to the questions are compulsory or voluntary, or of the implications of failure to reply (Article 11(1)(d)). All members of staff concerned are, however, informed by their institutions of origin (not by EPSO) that they are under an obligation to reply and of the possible consequences of failing to do so, when those institutions are preparing the Excel files (to be sent to EPSO) of staff to be assessed as a priority for the promotion exercise.

That being so, the provisions of Articles 11 and 12 of Regulation No 45/2001 are complied with.

### **3.11. Processing of personal data on behalf of the controller**

Under Article 23 of the Regulation, where a processing operation is carried out on the controller's behalf, it must choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required under the Regulation. Processing operations carried out by processors must be governed by a contract or legal act binding the processor to the controller and stipulating, in particular, that the processor shall act only on instructions from the controller and that the obligations with regard to the confidentiality and security of processing personal data shall also be incumbent on the processor.

In this case, EPSO has fulfilled its obligation, since the terms of reference of the invitation to tender state that the contractor will be required to safeguard the confidentiality of the personal data processed by the contractor for the exclusive purposes of performing the framework contract, in keeping with Regulation (EC) No 45/2001. That obligation will be reproduced in the framework contract which is to be finalised.

Mention should also be made of Article 23(2)(b) (processing of personal data on behalf of controllers) of Regulation (EC) No 45/2001. The EDPS recommends that the contract between EPSO and the processor should explicitly state that the processor must comply with the provisions of its own national law implementing Article 16 and Article 17(3) of Directive 95/46/EC on the confidentiality and security of processing.

All members of assessment committees (carrying out assessments on the basis of diplomas/certificates) receive a note on the subject of confidentiality informing them of their duty to comply with the provisions of Regulation (EC) No 45/2001 on the protection of personal data. Each assessment committee member must return the note dated and signed.

### **3.12 Automated individual decisions**

Article 19 of the Regulation lays down the conditions attaching to automated individual decisions: *"The data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken."*

Automated individual decisions result when processors use automatic means to mark the candidates' tests. The data subject's rights under Article 19 must be respected. The review procedure provided for in Article 12 of the draft common rules laying down the procedure for implementing Article 45(2) of the Staff Regulations (see page 9 under "Facts") must also cover the results of automatic marking methods.

The EDPS recommends that EPSO ensure that automatic marking is, as planned, subject to review.

### 3.13. Security

In accordance with Article 22 (Security of processing) of Regulation (EC) No 45/2001, the controller implements "*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.*"

The European Data Protection Supervisor considers that the security measures taken as a whole (see pages 11 and 12) and the other organisational and technical measures adopted to ensure maximum processing security may be regarded as appropriate within the meaning of Article 22 of the Regulation.

#### Conclusion

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. Specifically, that means that EPSO:

- should disclose the data only to the departments managing the promotion procedures;
- explicitly state in the contract with the processor that the latter must comply with the provisions of its national law implementing Article 16 and Article 17(3) of Directive 95/46/EC on the confidentiality and security of processing;
- see to it that automatic marking is genuinely subject to review.

Done at Brussels, 4 September 2007

(signed)

Joaquín BAYO DELGADO  
Assistant European Data Protection Supervisor