

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Monitoring Center for Drugs and Drug Addition on the evaluation of staff's capacity to work in a third language

Brussels, 20 May 2008 (Case 2008-159)

1. Proceedings

On 11 March 2008, the European Data Protection Supervisor (hereinafter 'EDPS') received from the Data Protection Officer (hereinafter 'DPO') of the European Monitoring Center for Drugs and Drug Addition ('EMCDDA') a notification for prior checking regarding the data processing operations that take place in the context of evaluating the EMCDDA staff's capacity to work in a third language ('the Notification').

On 30 April 2008, the EDPS sent the draft Opinion to EMCDDA for comments. EMCDDA responded on 13 May 2008.

2. Examination of the matter

Article 45.2 of the Staff Regulations¹ states that officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language. In accordance with Article 11 of Annex III of the Staff Regulations this obligation applies to all first promotions after recruitment which take effect after 30 April 2006² ('concerned staff' or 'EMCDDA staff').

2.1. The Facts

The *purpose* of the data processing operations is to assess the EMCDDA staff's capacity to work in a third language.

The *primary responsibility* for the data processing lies within the Administration Unit of EMCDDA. In particular, within this Unit, most data processing activities are carried out by the human resources management sector ('HRMS').

The data processing operations that take place in the evaluation of EMCDDA staff's capacity to work in a third language are both manual and electronic and can be summarised as follows:

¹ Staff Regulations of Officials of the European Communities, adopted on 1.05.2004 (referred to as 'Staff Regulations').

² For the promotion exercise governing the year 2007 the procedure towards enforcement of Article 45.2 of the Staff Regulations will also apply by analogy to other servants (temporary agents and contract agents).

(i) HRMS informs concerned staff of what is considered to be their first and second language and invites them to choose a third language.

(ii) HRMS collects from concerned staff the selected language and chosen method to demonstrate the necessary level. There are two possible methods: by providing a copy of a diploma already obtained or by taking a test.

(iii) HRMS assesses diplomas and certificates received from concerned staff for the purpose of establishing if they are appropriate to prove the requested level of proficiency in the selected language. In case of doubt, EMCDDA forwards a copy of the diploma/certificate to EPSO, which will refer it to the appropriate EPSO assessment committee³.

(iv) If individuals choose to pass a test, EMCDDA sends their identification information to an outside company, based in Portugal, hired by EMCDDA for the purposes of organizing the tests ('contractor'). It remains possible for individuals to pass the test through different organizations. If so, it will be up to them to enrol with the chosen organization and provide the relevant personal information.

(iv) Once the ability to work on a third language of a concerned staff has been demonstrated, either by diplomas and certificates or by the results of the test, HRMS will remove the comment 'excluded from promotion' from their promotion files. Concerned staff who fail to demonstrate that level will not be subject to be promoted.

The **types of data subjects** whose data are collected include staff concerned.

The **categories of data** collected and further processed include the following: (i) Identification data, including surname, first name, personnel number, telephone number, email address; (ii) Education data, including first and second languages chosen for the competition or selection procedure leading to recruitment, third language chosen for the purposes of the evaluation under Article 45.2 of the Staff Regulations and choice of the method for proving the ability to work in a third language, including the diplomas/certificates and outcome of the test (if applicable).

As far as the **conservation** of the data is concerned, according to the Notification, the data will be stored for two years if the assessment has been positive. If it is negative, it will be stored until the promotion exercise in which a positive assessment is obtained. The data are stored in paper form only. It is stored in the personnel file of the staff concerned.

The data will be used for statistical purposes during the first year of storage.

According to the Notification, the data controller may **transfer personal data**, in particular copies of certificates/diplomas, to EPSO, which will forward it to the appropriate EPSO Assessment committee for the purposes of assessing whether a given diploma/certificate adequately proves the necessary language skills. In addition, identification information may also be sent to an external company or contractor that organizes language tests and who act as data processor.

As far as the **right to information** is concerned, the Notification explains that the privacy statement is given to staff concerned together with the forms that they are supposed to

³ See *Avis sur la notification d'un contrôle préalable reçue du Délégué à la protection des données de la Commission européenne a propos du dossier "Evaluation de la capacité à travailler dans une troisième langue (application de l'article 45.2 du Statut)"*, Bruxelles, le 4 septembre 2007 (Dossier 2007-088).

complete regarding their choice of third language. In addition, the full version of the privacy statement is also available on the EMCDDA intranet.

A copy of the privacy statement providing the relevant information was annexed to the Notification. The privacy statement contains information on the identity of the controller, purposes of the processing, types of data processed, legal basis for the processing, recipients of the data, lawfulness of the processing, storage periods and the existence of the right of access and rectification.

As far as ***access rights and rectification*** are concerned, as described in the privacy statement, these rights for individuals are recognised and concerned staff is informed that these rights can be exercised by contacting the data controller. The privacy statement specifies that certain information can not be amended once it has been validated. This includes the third language chosen and the certificates/diplomas.

As far as ***security measures*** are concerned, the data controller acknowledges that it has put technical measures in place to ensure the level of security appropriate to the risks and to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss or alteration, and to prevent all other unlawful forms of processing. In particular, it is explained that such measures are set within the framework of the EMCDDA security policy. Documents are kept in the personnel file of the staff concerned and, therefore, subject to the same security measures as the latter.

2.2. Legal Aspects

2.2.1. Prior Checking

Applicability of the Regulation. Regulation (EC) No 45/2001 applies to the "*processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system*" and to the processing "*by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law*"⁴. According to the facts described below, all elements that trigger the application of the Regulation are present here:

First, the assessment of EMCDDA staff's capacity to work in a third language entails the collection and further processing of *personal data* as defined under Article 2(a) of Regulation (EC) No 45/2001. Indeed, as described in the Notification, personal data of individuals such as their certificates/diplomas proving their language skills are collected and further processed. Second, as described in the Notification, the personal data collected undergo "*automatic processing*" operations, as defined under Article 2(b) of Regulation (EC) No 45/2001 as well as manual data processing operations. Indeed, most of the personal information is collected electronically directly from concerned staff. Information is used for evaluation purposes, sometimes transferred and it is kept in paper form. Finally, the processing is carried out by a Community institution or body, in this case by the European Monitoring Center for Drugs and Drug Addiction in the framework of Community law (Article 3(1) of Regulation (EC) No 45/2001). Therefore, all the elements that trigger the application of the Regulation are present in the evaluation of staff's capacity to work in a third language.

Grounds for Prior Checking. Article 27(1) of Regulation (EC) No 45/2001 subjects to prior checking by the EDPS "*processing operations likely to present specific risks to the rights and*

⁴ See Article 3(2) of Regulation (EC) No 45/2001.

freedoms of data subject 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. This list includes, under paragraph (b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. The processing operations that occur in the context of assessing EMCDDA staff's capacity to work in a third language aim at evaluating the proficiency of each member of staff concerned to work in a third language. In order to carry out such an evaluation, the data controller will perform various assessment activities such as judging the certificates/diplomas submitted to them for the purposes of proving the language skills, also judging the performance of concerned staff in language tests. Taking the above into account, the EDPS considers that the data processing operations fall within Article 27(2) (b) and must therefore be prior checked.

Ex-post 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, however, the processing operations have already been established. This is not an insurmountable problem provided that all recommendations made by the EDPS are fully taken into account and the processing operations are adjusted accordingly.

Notification and Due Date for the EDPS Opinion. The Notification was received on 11 March 2008. The period within which the EDPS must deliver an opinion was suspended for a total of 14 days to allow for comments on the draft EDPS Opinion. The Opinion must therefore be adopted no later than 23 May 2008.

2.2.2. Lawfulness of the Processing

Personal data may only be processed if legal grounds can be found in Article 5 of Regulation (EC) No 45/2001. As pointed out in the Notification, the grounds that justify the processing operation are based on Article 5(a), pursuant to which data may be processed if the processing is "*necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*".

In order to determine whether the processing operations comply with Article 5(a) of Regulation (EC) No 45/2001, two elements must be taken into account: first, whether either the Treaty or other legal instruments foresee a public interest task, and second, whether the processing operations carried out by the data controllers are indeed necessary for the performance of that task.

Legal Basis. In ascertaining the legal grounds in the Treaty or in other legal instruments that legitimise the processing operations that take place in the context of assessing EMCDDA staff's ability to work in a third language, the EDPS takes note of Article 45.2 of the Staff Regulations. Pursuant to this provision officials shall be required to demonstrate before their first promotion after recruitment the ability to work in a third language. Article 11 of Annex III of the Staff Regulations establishes that this applies to all first promotions after recruitment which take effect after 30 April 2006. Thus, Article 45.2 of the Staff Regulations requires the European institutions, in this case the European Monitoring Center for Drugs and Drug Addiction, to engage in an assessment of the language skills to work in a third language of staff concerned for the purposes of enabling them to be eligible for their first promotion after recruitment.

The EDPS is satisfied that Article 45.2 of the Staff Regulations and Article 11 of its Annex III provide a legal basis for EMCDDA to engage in the data processing operations under examination.

Necessity Test. According to Article 5(a) of Regulation (EC) No 45/2001, the data processing must be "*necessary for performance of a task*" as referred to above. It is therefore relevant to assess whether the data processing is "*necessary*" for the performance of a task, in this case, for assessing the skills of concerned staff to work in a third language. As outlined above, under the Staff Regulations, staff concerned must be required to demonstrate their skills in a third language. To put into practice this provision, it is necessary for EMCDDA to collect and further process personal information that proves such proficiency. Unless the EMCDDA collects such information, it would not be possible for EMCDDA to comply with Article 45.2 of the Staff Regulations. Thus, the EDPS considers that the data processing complies with the necessity test.

2.2.3. Data controller and data processor

According to Article 2(d) of Regulation 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 data processor, according to Article 2(e) is "*the natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller*".

The EDPS notes that in this case EMCDDA is the data controller insofar as EMCDDA is the entity that determines the purposes and means of the processing of EMCDDA staff data for the purposes of assessing their capacity to work in a third language.

The EDPS also notes that in this case EMCDDA uses an outside company ('contractor' to organize the language tests of those individuals who want to be tested on the basis of the outcome of test (as opposed to diplomas/certificates). For the purposes of organizing the tests EMCDDA will transfer identification information of the concerned staff to the outside company. Under Article 2(e) of the Regulation 45/2001 the contractor is a data processor. The contractor will transfer the results of the tests to EMCDDA (see section 2.2.6).

In the event that members of staff concerned decide to use another company to pass language tests that lead to diplomas/certificates, the selected company should not be deemed as a data processor. This is because there is no relationship between this company and EMCDDA by virtue of which both entities have agreed that one would carry out a processing of personal data on behalf of the other.

2.2.4. Data Quality

Adequacy, Relevance and Proportionality. Pursuant to Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. This is referred to as the data quality principle.

The type of information requested from individuals concerned includes mainly identification information, certificates and diplomas that show the level of proficiency of staff concerned to work in a third language. The EDPS considers that the information collected and further processed complies with Article 4(1)(c) of Regulation (EC) No 45/2001.

Fairness and Lawfulness. Article 4(1)(a) of the Regulation requires that data must be processed fairly and lawfully. The issue of lawfulness was analysed above (see Section 2.2.2). The issue of fairness is closely related to what information is provided to data subjects which is further addressed in Section 2.2.8.

Accuracy. According to Article 4(1)(c) of the Regulation, personal data must be "*accurate and, where necessary, kept up to date, and "every reasonable step must be taken to ensure that the data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified"*". In this case, an important part of the data has been provided by the applicant himself/herself. This procedure itself helps to guarantee the accuracy of the personal data. However, other information is not provided directly by the individual but generated by the contractor. In this regard, as further developed below, it is important for the concerned staff to be able to exercise the right of access and rectification insofar as it enables individuals to control whether the data held about them is accurate. In this respect, see also Section 2.2.7.

2.2.5. Conservation of Data

Pursuant to Article 4(1)(e) of Regulation (EC) No 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

The EDPS is satisfied with the 2 years conservation period foreseen by EMCDDA for candidates whose capacities have been deemed positive. The EDPS also finds appropriate to store negative assessments until the promotion exercise in which a positive assessment is obtained, insofar as EMCDDA needs to keep the information that justifies the reason why an individual has not been eligible for promotion.

The data will be used for statistical purposes during the first year of storage. In this regard, the EDPS recalls that the data must be anonymised.

2.2.6. Transfers of Data

Articles 7, 8 and 9 of Regulation (EC) No 45/2001 set forth certain obligations that apply when data controllers transfer personal data to third parties. The rules differ depending on whether the transfer is made to (i) Community institutions or bodies (based on Article 7), (ii) to recipients subject to Directive 95/46/EC (based on Article 8), or (iii) to other types of recipients (based on Article 9).

According to the Notification except for the transfers to the contractor in its role of data processor, addressed below, the rest of the transfers are made to Community institutions and bodies, thus, Article 7 of the Regulation applies. Article 7 of Regulation (EC) No 45/2001 requires personal data to be transferred "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary.

According to the Notification, the data controller may ***transfer personal data***, in particular copies of certificates/diplomas to EPSO which will forward it to the appropriate EPSO Assessment committee for the purposes of assessing whether a given diploma/certificate proves adequately the necessary language skills. The EDPS considers that this data transfer complies with the first requirement. Indeed, the recipient has the competences to perform the

task for which the data is transferred, i.e. to assess the adequacy of the certificate/diplomas. The EDPS also considers that the transfer is necessary since unless the transfer takes place it will not be possible for EPSO/Assessment committee to verify the adequacy of a particular diploma/certificate. The EDPS emphasises, however, that pursuant to Article 7(3), the recipients shall process the personal data they received from EMCDDA only for the purposes for which they were transmitted. EMCDDA should specify this to EPSO.

As described in the facts, information about individuals concerned may be transferred to the contractor, the organisation that will organise the language tests. The contractor is a recipient subject to Directive 95/46/EC as implemented by Portugal. It is therefore bound by Portuguese data protection legislation, thus Article 8 of Regulation (EC) No 45/2001 applies. In this regard, the EDPS considers that Article 8a of Regulation (EC) No 45/2001 is complied with insofar as the data sent to the contractor is necessary for the performance of a task, i.e. to organise the language tests and assess the capacity of the individuals tested.

In addition, the EDPS notes that the contractor is a data processor as defined under Article 2 (e) of Regulation (EC) No 45/2001. A contract must be signed with the contractor which, among others, imposes upon the contractor the obligation to adopt appropriate technical and organisational security measures to protect the personal data.

2.2.7. Right of Access and Rectification

According to Article 13 of Regulation (EC) No 45/2001, 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. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

As described in the privacy statement, individuals are recognised the right of access. However, the privacy statement is silent regarding the scope of the right and particularly whether individuals will also have access to possible notes/remarks contained in corrected tests. The EDPS recalls that staff concerned should be able to have access to the entire outcome of the test comprising the assessment notes concerning them.

Regarding the right of rectification they are informed that they can be exercised by contacting the data controller. The privacy statement specifies that certain information can not be amended once they have been validated. This includes the third language chosen and the certificates/diplomas. The EDPS understands the limitations to the right of rectification of certain data, after the deadline for validation by the HRMS is necessary to ensure objective, certain and stable conditions for the all the staff concerned, and essential to the fairness of processing. Thus the restriction can be recognised as a necessary measure under Article 20(1)(c) of the Regulation for the protection of the rights and freedoms of others.

2.2.8. Information to the Data Subject

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed. Individuals are further entitled to be informed of, *inter alia*, the purposes of the processing, the recipients of the data and the specific rights that individuals, as data subjects, are entitled to.

In order to comply with this obligation, information is provided to staff concerned together with the forms that they are supposed to complete. The full version of the privacy statement is also available in the EMCDDA intranet.

The EDPS considers the provision of information through the email together with the forms to be completed appropriate. This is because the information is sent directly to staff concerned and also because this is also flagged in the form that will serve to collect the information. Thus, individuals will have the real and effective possibility to read how their information will be processed. Furthermore, the technical set up also allows individuals to save or print out the privacy statement so that staff concerned can go back to it as many times as they wish, directly on the intranet or in their saved/printed copies.

The EDPS also reviewed the content of the privacy statement to verify whether the content satisfies the requirements of Articles 11 and 12 of Regulation (EC) No 45/2001. The EDPS considers that the privacy statement contains most of the information required under Articles 11 and 12 of the Regulation. However, he considers that several amendments would contribute to ensure full compliance with Articles 11 and 12, in particular:

(i) In order to ensure full transparency and fair processing it would be appropriate to add a contact address (that of the data controller or the data protection officer) where individuals could send questions regarding the privacy statement and the overall data processing.

(ii) Individuals should be properly informed that, the case being, their data will be transferred to the contractor/data processor, the company that organises the language tests. The privacy statement is silent on this point.

(iii) The information regarding the right of access (and the procedures to exercise it) vis-à-vis the information held by the contractor, particularly regarding the outcome of the tests, should be properly described.

(iv) It would be appropriate to include a reference to the right to have recourse to the European Data Protection Supervisor.

2.2.9. Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must 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 unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing. EMCDDA acknowledges that it has adopted the security measures required under Article 22 of the Regulation (EC) No 45/2001.

3. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 providing the considerations in this Opinion are fully taken into account. In particular, EMCDDA must:

- Anonymise the data that will be used for statistical purposes during the first year of storage.
- Specify to EPSO that the data received from EMCDDA can only be used for the purposes for which it was transferred.

- Ensure that a contract is signed between EMCDDA and the contractor that organises language courses pursuant to which the contractor undertakes, among others, to adopt appropriate technical and organisational security measures to protect the personal data received from EMCDDA.
- Ensure that staff concerned have access to the data held by the contractor, mainly the results of the language tests.
- Amend the privacy policy as recommended in this Opinion.

Done at Brussels, 20 May 2008

(signed)

Peter HUSTINX
European Data Protection Supervisor