

Opinion on a notification for Prior Checking received from the Data Protection Officer of Council on a Pilot Project on Individual Productivity Monitoring: Further processing of personal data in Workflow

Brussels, 1 October 2008 (Case 2008-436)

1. Proceedings

On 8 September 2006, the EDPS received an e-mail from the Data Protection Officer (DPO) at the Council requesting comments and suggestions on the report of 30 June 2006 of the Think Tank on Individual production Data at the Council. On 24 October 2006, the EDPS sent a note to the Chairman of the Think tank group outlining some of the legal issues raised concerning the processing of personal data (EDPS Case 2006-0388). The note invited the Council to notify the processing for prior checking by the European Data Protection Supervisor (EDPS).

On 22 July 2008, the EDPS received from the DPO at the Council a notification for prior checking relating to the processing of personal data in the frame of a pilot project on Individual Productivity Monitoring.

The EDPS requested further information on 25 July 2008. This was provided on 1 August 2008.

The draft Opinion was sent to the Council for comments on 19 September 2008 and these were received on 29 September 2008.

2. The facts

In view of providing Heads of Language Units and individual members of staff with individual performance indicators, the Council intends to set up a pilot project on Individual Productivity Monitoring. The expected duration of the pilot project is 9 months/1 year. Ten Language Units will be involved in the pilot project.

General translation statistics are regularly used by the Heads of Language Units. The general statistics focus on the volume of the translations per unit and not on individual production. At present Heads of Language Units have no individual statistics at their disposal. However, according to the controller, such individual performance indicators are considered essential management tools contributing to a fairer assessment of staff, in particular during the reporting exercise, and to improved planning.

The proposed tool should enable

1. Individual members of staff to monitor their own production.

2. The head of the data subject's unit to monitor the production of any given member of their unit.
3. The head of the data subject's unit to monitor the production of all members of their unit in one simple operation.
4. Individual members of staff to compare their own production with the unit's average.
5. Better planning and monitoring (as recommended in the Court of Auditors Special Report N° 9/2006 concerning Translation expenditure incurred by the Commission, the Parliament and the Council, in particular §88, §109 thereof).

On the basis of actual output as compared to the actual working time spent on translation and revision (core activities) an objective picture of individual performance can be established on the basis of:

1. Comparable statistical data regarding the core activity of linguists, i.e. translation and revision, so that the average translation and revision output of each individual linguist can be compared with the unit average
2. A break-down of the actual use of working hours on the one hand by individual linguists and on the other hand at the unit level.

The productivity of persons participating in the pilot project will be monitored using statistical data already in the Workflow system¹ and data from the PersonaGrata system².

The following data are extracted from the Workflow system: individual average translation/revision output per month, quarter, half-year, year, calculated on the basis of the person's actual availability for translation/revision work, in net pages - unit average translation/revision output per month, quarter, half-year, year calculated on the actual working hours spent exclusively on translation/revision in the unit, in net pages.

The following data are extracted from PersonaGrata: - total working hours per month, quarter, half-year, year - actual individual working hours per month, quarter, half-year, year³ - individual working time spent on other tasks (terminology, etc) as a percentage of the total - "numéro pivot"⁴.

Further data collected and processed include: Document number - Document title (as the only indication of the nature of the document, which will help in assessing the difficulty) - Source language - Target language - Date & time when attributed to the person. - Date & time when finished - Net pages - Translator(s), reviser(s) who worked on the document - Staff availability for translation/revision work⁵.

Currently data collected in the PersonaGrata system is retained active in the Workflow system for three days after completion of the document. After this period, the data is in principle rendered inaccessible except by special IT procedure. The pilot project intends to provide for a derogation to this so as to give access to DGA V (Workflow team) to the following data: data on documents (including data on number of physical/net pages) produced by persons participating in the pilot project; initials; and the time taken to translate/revise for the purpose

¹ "Workflow" is essentially designed to trace a document in the translation service

² "PersonaGrata" is a management tool to assess the availability of staff of DGA III.

³ This refers to the total time available for translation/revision work.

⁴ This number prevents the use of the personal number and enables the connexion with the contact data base (Amphore).

⁵ This refers to the total time a member of staff is engaged in actual translation/revision as opposed to time present in the unit. The time a staff member spends on activities other than translation/revision will be deducted from the individual's total working time in order to obtain the individual member of staff's "availability for translation/revision activity".

of producing output statistics on behalf of DGA III. The access to the data by DG V is to re-activate the data and to facilitate the checking/monitoring of individual output. The access by GD V (Workflow team) is not put in place for the purposes of monitoring individual productivity per se.

The personal data will then be processed automatically by DGA V (Workflow team) to provide output information for comparative purposes on the various constituent groups of the language unit (i.e. the general body of translators and revisers). The productivity reports will be generated monthly, quarterly, half-yearly and yearly. They will be made available to the head of the data subject's unit in electronic form. The head of the data subject's unit will provide copies to the data subjects concerned.

The productivity reports will produce per period of reference: total number of pages for translation/person; total number of pages for translation retour/person; Unit average (pages per translation/person/day); individual average (pages for translation/day); total number of pages for revision/person; total number of pages for revision retour/person; Unit average (pages for revision/person/day); total pages for editing/person; unit average (pages for editing/person/day); individual average (pages for editing/day); other activities (expressed in hours), taken from PersonaGrata; actual individual availability in hours; actual individual availability in %; actual individual absences in %; actual individual misc.(other tasks) in %; total unavailability in %/unit.

The data produced in this way will be used by the head of the data subject's unit and the individual members of staff as one element in the assessment of the production of each member of staff.

Information will be provided in due course to those participating in the pilot project (staff of the language units concerned and heads of the data subject's unit) by individual note. The note will inform those persons of the monitoring schemes envisaged in the pilot project, of the access by the DGA Workflow team to the data for the purposes of producing output statistics on behalf of DGA III and further automatic processing to provide output information for comparative purposes. They will also be informed of the fact that the processing operation has been notified to the DPO and that it is subject to prior checking by the EDPS.

Data subjects are also provided with the following additional information: a) identity of the controller, b) purposes of the processing operation: monitoring of individual production, c) recipients: DGA V (Workflow team) will have access to personal data for the development and maintenance of the software only; DGA V (Workflow team), acting as the agent for DGA III, using an additional functionality of Workflow, will process the relevant data by automatic means for the purpose of the pilot project; d) each person participating in the pilot project has a right of access to, and a right to rectify, the data concerning him or her; e) the conservation period; f) persons participating in the pilot project have the right to have recourse at any time to the European Data Protection Supervisor; g) the data will be contained in the historical part of the Workflow tool.

The persons concerned will be provided with the reference document for the processing operation: Outline Report from the Think Tank on Individual Production Data (30.06.2006).

The individual personal data will normally be accessible for the automatic further processing of data for a period of two years after the completion of a document (covering each reporting exercise). Exceptionally in the event of appeals by individuals the data will be kept until the

end of the appeals procedure. At the end of the retention period the data will be rendered anonymous.

[...]

A full implementation of the final processing is envisaged around September 2009 after the successful completion of the pilot project.

3. Legal aspects

3.1 Prior checking

Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The pilot project on Individual Productivity Monitoring involves personal data relating to identified persons. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by a Community institution in activities which fall within the scope of Community law.

Regulation 45/2001 shall apply 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 or are intended to form part of a filing system. In this case the processing is carried out both manually and automatically.

Regulation 45/2001 therefore applies.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27(2)(b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct*". The output of the pilot project will be used by the head of the data subject's unit as one element in the assessment of the production of each member of staff notably during the reporting exercise and the processing of data is therefore intended to evaluate the efficiency of staff members. The case therefore typically qualifies for prior checking.

Moreover, given the characteristics of the present processing activity Article 27(2)(c) of the Regulation has to be analysed. Indeed, it provides for prior checking of processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes. This provision is intended above all to avoid data collected for different purposes being linked. The risk of linking data is that quite different information may be deduced by means of the link, or the original purpose be distorted. Linkages not provided for under national or Community legislation thus may entail certain

risks with regard to data protection where the end purposes differ. The pilot project will extract data both from Workflow and from the PersonaGrata system. It therefore allows links between these two data bases which are not provided for by the national or Community legislation.

The pilot project will extract data notably from the PersonaGrata system. The processing of personal data in PersonaGrata has been subject to prior checking by the EDPS (Case 2006-0359).

The pilot project has not yet been initiated. The EDPS reminds the Council that the project may not commence before the implementation of the recommendations made by the EDPS in the present opinion. Furthermore, the end of a pilot project does not automatically trigger the full deployment of the system, so that it can be implemented right away. Indeed, it is necessary to analyse the results produced by the pilot phase before starting a full deployment of the system. The results of the pilot project must be communicated to the EDPS prior to the launch of the general project and the EDPS must be informed of any modifications in the general system which are likely to have an impact on the processing of personal data. The EDPS will subsequently analyse the results of the pilot project and any data protection implications prior to the launching of general system.

The notification of the DPO was received on 22 July 2008. The case was suspended for 7 days for further information and for 9 days for comments. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than 9 October 2008.

3.2 Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that 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 or in the legitimate exercise of official authority vested in the Community institution or body..."*. According to the recitals of the Regulation (§27), "processing of personal data for the performance of tasks carried out in the public interests of the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies.

The legal basis for the processing of personal data in the pilot project on Individual Productivity Monitoring is Article 207 of the EC Treaty, under which the Council decides on the organisation of the General Secretariat and adopts its Rules of Procedure. Article 23 of the Council Decision of 22 March 2004 adopting the Council's Rules of Procedure stipulates that the Council shall decide on the organisation of the General Secretariat. The Staff Regulations further provide that each institution must organise a reporting exercise. The Individual Productivity Monitoring is used as a support tool for this reporting exercise.

It must however be examined whether and to what extent the processing can be considered as necessary for the management and functioning of the Council. It may be considered legitimate for Heads of unit to monitor the individual productivity of staff members working for them, however this should not be the sole tool for evaluation and sufficient guarantees must be provided for staff members concerned to rectify inaccurate data or to provide justifications for certain figures.

The EDPS is satisfied that the data processing operations performed during the pilot phase of the project are necessary support for the reporting exercise as provided for in the Staff Regulations and that the processing is therefore legitimate under Article 5(a) of Regulation 45/2001. Having said this, should the pilot project become a full fledged project at the term of the pilot project, the EDPS would nevertheless welcome a legal decision/instrument providing a specific legal basis for the processing of personal data. This legal decision should provide for adequate guarantees for staff members concerned to rectify inaccurate data or to provide justifications for certain figures.

3.3 Processing of special categories of data

Article 10(1) of Regulation 45/2001 establishes that "the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and of data concerning health or sex life, are prohibited".

The initial project, as described in the Think Tank report of 30 June 2006 included data relating to health of the data subjects in the information relating to "absences". The EDPS welcomes the fact that this information has been removed and that no special categories of personal data are included in the pilot project.

3.4 Data Quality

According to Article 4(1)(c) of Regulation 45/2001 *"personal data must be adequate, relevant and not excessive in relation to the purposes for which collected and/or further processed"*.

The data collected and processed in the pilot project are adequate, relevant and not excessive in view of assessing individual and team production.

Article 4(1)(d) provides that personal data must be *"accurate and, where necessary, kept up to date"*. The pilot project must guarantee that the data are accurate and kept up to date. The issue of the accuracy of the reference to "net pages" was raised in the Outline report from the Think Tank on Individual Production Data of 30 June 2006 (see page 4). Indeed in some cases, the "net" pages are not a fair reflection of the amount of text for translation. Granting a person the right of access and rectification will contribute to ensuring the accuracy of the data (see below 2.2.7 Right of access and rectification).

Article 4(1)(a) also provides that personal data must be "processed fairly and lawfully". Lawfulness has already been discussed (see point 2.2.2) and fairness will be dealt with in relation to information provided to data subjects (see point 2.2.8).

3.5 Conservation of data

Article 4(e) of Regulation 45/2001 states 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"*.

The individual personal data will normally be accessible for the automatic further processing of data for a period of two years after the completion of a document (covering each reporting exercise). Exceptionally in the event of appeals by individuals the data will be kept until the end of the appeals procedure. At the end of the retention period the data will be rendered anonymous. The EDPS considers that this period of conservation is adequate in the light of

the purposes of the processing of the data but he should be informed as to the measures used to make the data anonymous at the end of the two year retention period.

3.6 Compatible use

According to Article 4§1(b) personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes". As mentioned in the facts, the Workflow system is essentially designed to trace a document in the translation service. "PersonaGrata" is a management tool to assess the availability of staff in view of organising work among translators/revisers. The proposed pilot project therefore further processes the data collected in both those systems for the purpose of individual productivity monitoring. The EDPS does not consider this further processing as incompatible providing staff members involved are adequately informed of the processing of personal data which must be considered as a separate operation performed on already existing data.

3.7 Transfer of data

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.

The output data generated by DGA V (Workflow team) are communicated to the data subject and to the Head of the data subject's unit. This communication to the Head of the data subject's unit must be examined in the light of Article 7. The data are transferred to the Head of unit as an element of support in the frame of the reporting exercise. The data are therefore transferred for the legitimate performance of the tasks covered by the competence of the recipient. Indeed, it is legitimate for the Heads of Unit to be informed of the work carried out by the staff under their supervision. As to whether the transfer of the specific data on individual production is necessary, this relates to the issue of legitimacy of the processing as discussed above (see 2.2.2 Lawfulness of the processing).

Data are not transferred outside the institution to any other parties.

3.8 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.

According to the notification, data subjects are afforded a right of access and rectification in Section 5 of the Council decision of 13 September 2004 implementing the data protection regulation. As mentioned above the data included in the data base may be inexact (see notably issue of "net" pages). Data subjects will need to be provided with effective means to modify data by addressing themselves to the data controller.

3.9 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.

In this case, the data are not collected directly from the data subject but are collected from two existing systems. Information must be provided according to Article 12 of the Regulation. According to the notification staff members participating in the pilot project are informed by individual note. The information includes all the items listed in the provision save information on the categories of data collected and further processed. The information note should therefore be completed to include such information.

3.10 Automated Individual Decisions

According to Article 19 of the Regulation, "the data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or which 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 EDPS. 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".

The productivity reports are produced automatically to provide output information for comparative purposes on the various constituent groups of the language unit submitted to the Heads of Unit notably for evaluation purposes. Guarantees must therefore be put into place so as to ensure that the data subject's legitimate interests are taken into account. As mentioned above, data subjects are offered a general right of rectification as provided for in Section 5 of the Council decision of 13 September 2004 implementing the data protection regulation. The EDPS would however welcome the possibility of a specific revision procedure by data subjects who wish to contest the accuracy of the reports prior to the evaluation exercise.

3.11 Security measures

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller 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. The EDPS has no reason to believe that the Council has not implemented appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the considerations are fully taken into account. In particular,

- Should the pilot project become a full fledged project at the term of the pilot project, a legal decision/instrument providing a specific legal basis for the processing of personal data must be adopted;

- The information note should be completed to include information on the categories of data collected and further processed;
- The controller informs the EDPS as to the measures used to make the data anonymous at the end of the two year retention period;
- The possibility of a specific revision procedure by data subjects who wish to contest the accuracy of the reports prior to the evaluation exercise should be examined.

Done at Brussels, 1 October 2008

(signed)

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