



## **Opinion on the notification for prior checking received from the Data Protection Officer of the European Commission concerning the "end-of-probation procedure" case**

Brussels, 10 March 2009 (Case 2008-720)

### **1. Procedure**

By e-mail received on 27 November 2008, a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was made by the Data Protection Officer of the Commission concerning the "end-of-probation procedure" case.

A number of questions were put to the controller on 16 December 2008. The Commission replied on 26 January 2009.

The draft opinion was sent to the controller for comments on 2 March 2009. The comments were received on 6 March 2009.

### **2. The facts**

Under Article 34 of the Staff Regulations of Officials of the European Communities (hereinafter "Staff Regulations"), "Officials shall serve a nine-month probationary period before they can be established. Where, during his probationary period, an official is prevented, by sickness, maternity leave under Article 58, or accident, from performing his duties for a continuous period of at least one month, the appointing authority may extend his probationary period by the corresponding length of time". Articles 14 and 84 of the Conditions of Employment of other Servants of the European Communities (CEOS) contain similar provisions for temporary and contract staff respectively.

The aim of the processing operation under examination is to evaluate the performance of the official or other staff member in order to decide whether to establish the official, keep the temporary or contract staff member in their post, or to extend the probationary period. For that purpose, a probation report is drawn up. The probation report may also be used in the context of the data subject's staff assessment.

The probation report is drawn up by the probationer and his assessor (probationer's immediate superior) and is validated by the Countersigning Officer (assessor's immediate superior<sup>1</sup>) in the Sysper2 application. The administrative data are entered in Sysper2 including, in particular, the name, personal number, administrative contact details, function group and grade. The data are then filled in by the probationer and their assessor: description of tasks, probationer's self-evaluation, assessor's evaluation, possible comments from the assessor's superior, possible comments from the probationer in response to this evaluation. Data concerning possible

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<sup>1</sup> For contract staff, the Sysper 2 probation report is signed only by the probationer and their assessor, with the assessor's immediate superior having to give his opinion on the conclusion in the report and attach his comments in the form of an additional note when the probationary period of a contract staff member is not satisfactory, after a second discussion with the contract staff member concerned.

absences of the probationer (maternity leave, parental leave, illness or accident) are included, where appropriate, so that the probationary period can be extended if necessary.

If the probation report recommends establishment, the Appointing Authority/AECE, in this case ADMIN A4, prepares and signs the instrument of appointment/decision to keep the temporary/contract staff member in the post.

If the probation report recommends an extension or non-establishment owing to inaptitude, the probation report is forwarded to the Reports Committee<sup>2</sup> (CDR) in the case of officials and contract staff<sup>3</sup>. A CDR meeting is thus held (with or without hearing the probationer) and CDR's opinion is forwarded to the Appointing Authority/AECE (Admin A4) and to the probationer.

If the report draws a negative conclusion, a copy of the opinion (but not of the minutes) of the Reports Committee (where appropriate) is forwarded to the probationer. The original copy of the Appointing Authority/AECE decision is then forwarded to the probationer, with an acknowledgement of receipt (AR), via their human resources department, as well as to their superior (as a copy). The pay-roll department concerned (Relex K4 for contract staff in the delegations or PMO) and the Chairman of the Reports Committee (if the Committee was involved in the procedure) also receive a copy. The original of the decision is sent to the Personal File Unit.

If the report is positive, the original of the decision/act of appointment is sent to the Personal Files Unit for inclusion in the individual's personal file by ADMIN A4, while the acknowledgement of receipt (whereby the probationer acknowledges receipt of the original of the act/decision) is sent to the personal file by Human Resources in the DG concerned. As regards contract staff in particular, no documents are sent to the personal file (the positive outcome of the probation is visible to authorised persons in Sysper2).

If there is an intervention by the CDR, the minutes of the meeting (as well as the hearing of the probationer where necessary) remain secret under Article 11 of Annex II to the Staff Regulations and the judgment of the Court of First Instance of the European Communities in the Kupka-Floridi/ESC case (T-26/91, ECR.P. II-1615). The CDR may also choose between an oral procedure (which involves hearing the probationer and which is used in particular when the report recommends dismissal) and a written (without a hearing).

The data are stored electronically in Sysper2. According to the Sysper2 notification, in general personal data are stored until the end of activity in the Commission. Only persons with the authority to read the probation report may access it in Sysper2.

As regards the paper version, if the report is positive and there is no dispute, no paper document is kept in ADMIN A4. Where the report draws a negative conclusion (whether there is a dispute or not), the probationer's files are kept [...] in ADMIN A4 for five years and until any dispute is resolved. On the other hand, as has already been specified, in every case (whether the report is negative or positive) the original of the decision is sent for inclusion in the probationer's personal file.

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<sup>2</sup> Members of the Report Committee shall be appointed each year by the Appointing Authority and the Staff Committee, each appointing the same number from among officials of the institution in function group AD (Article 10 of Annex II to the Staff Regulations).

<sup>3</sup> The Reports Committee procedure applies only to officials and contract staff 3A and not for temporary staff or contract staff 3B.

A specific privacy statement stipulating the conditions for processing personal data is to be found on the pages concerning probations on the Commission's intranet site. Probationers can also consult the information on Sysper2. The specific privacy statement contains information on the purpose of the processing operation; the data collected; the legal bases for the processing operation; the identity of the data controller; the recipients of the data; the length of time the data are kept by ADMIN A4; the existence of a right of access and of rectification; the contact address for any questions relating to data protection and the opportunity to have recourse to the European Data Protection Supervisor at any time.

The data subject has the right to request access to his data contained in the probation report. He also has the opportunity to make comments in the probation report and be heard by the Reports Committee if it is deemed necessary.

[...]

### **3. Legal aspects**

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

The prior checking relates to the processing of personal data ("any information relating to an identified or identifiable natural person", Article 2(a) of the Regulation) in the context of the procedure set up for the end of the probation period. The processing consists of operations to collect, consult, store, etc. data. It is carried out by a European institution in the exercise of activities which fall partially within the scope of Community law. The processing of personal data is to a large extent automated (Article 3(2) of the Regulation) in the Sysper2 application. This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Article 27(1) of the Regulation 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. Under Article 27(2)(b) of the Regulation, data processing operations "intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" are also subject to prior checking by the EDPS. In the case in point, the data processing operation clearly intends to evaluate the efficiency and conduct of the data subjects and is therefore affected by Article 27.

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 operation has already begun. The recommendations made by the EDPS should therefore be adopted where necessary.

Notification from the DPO was received on 27 November 2008. According to Article 27(4), the present opinion must be delivered within a period of two months. The procedure was suspended for 41 days + 4 days for comments. The opinion will therefore be adopted no later than 13 March 2008.

#### **3.2. Legal basis and lawfulness of the processing operation**

Article 5(a) of the Regulation (EC) 45/2001 stipulates that processing of personal data can be carried out only if "*necessary for the 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*".

As already outlined in the facts, Article 34 of the Staff Regulations and the corresponding articles in the CEOS require a probationary period be served. The procedure set in place serves precisely to close this probationary period and can therefore be considered as being necessary for the performance of a task carried out in the public interest on the basis of the legal measures mentioned above. The lawfulness of the processing operation is therefore justified.

### **3.3. Processing of special categories of data**

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 except where legal grounds are identified in Article 10(2).

As mentioned earlier in the facts, data concerning possible absences of the probationer (maternity leave, parental leave, illness or accident) may be included in order to enable the probationary period to be extended if necessary. A special box is provided for this purpose in the probation report (Interruptions in service and reasons). Some of these data are considered to be data relating to health insofar as they can give information on the data subject's health. In this case the processing operation will be justified by its necessity for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the legislative acts adopted on the basis of the Treaties establishing the European Communities (Article 10(2)(b)). That being said, the EDPS highlights the necessity to mention only data which are strictly necessary to justify a possible extension of the probationary period. Consequently, only general data and data without any medical details can be mentioned in the box provided for this purpose in the probation report. General headings could be included for this purpose.

### **3.4. Data quality**

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

The EDPS is satisfied that the headings set out in the probation report form are necessary and adequate in order to evaluate the performance of an official or other staff member.

Furthermore, the processed data must be "*accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that 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*" (Article 4(1)(d) of the Regulation). Despite the fact that the processing operation contains data relating to staff assessment with the system as described allowing access for the various participants concerned, it is a reasonable assumption that the data are accurate and up-to-date. Furthermore, the opportunity for the data subject to make comments in the probation report and to be heard by the CDR also enables data quality to be ensured (see section 3.8 below. Right of access and rectification).

The data must also be processed fairly and lawfully (Article 4(1)(a)). The lawfulness of the processing has already been discussed (see section 3.2 above). As for fairness, this relates to the information which must be transmitted to the data subject (see section 3.9 below).

### **3.5. Data storage**

The Regulation lays down that the 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" (Article 4(1)(e)).

As outlined in the facts, the data are stored electronically in Sysper2 and on paper in the personal file. According to the Sysper2 notification, in general personal data are stored in Sysper2 until the end of activity in the Commission. As regards the paper version, if the report is positive and if there is no dispute, no paper document is kept in ADMIN A4. Where the report draws a negative conclusion (whether there is a dispute or not), the probationer's files are kept [...] in ADMIN A4 for five years and until any dispute is resolved. On the other hand, as already specified, in every case (whether the report is negative or positive), the original of the decision is sent to the Personal File Unit.

There is therefore a difference in the storage period for paper and electronic resources. The EDPS recommends that the data are kept in Sysper2 only when it is strictly necessary for the established purpose. The EDPS therefore invites the Commission to examine whether all data contained in the probation report should be kept in Sysper2 until the end of the person's career knowing, on the one hand, that the probation report only serves to support a decision of establishment/appointment and that, on the other hand, a copy of this final decision is kept in the personal file. According to the EDPS, it is necessary to examine whether all of the data should be kept in Sysper2 beyond the deadline for lodging an appeal or until the end of the evaluation procedure in case of use in this context (see above).

Regarding the storage of data in a paper file by DG ADMIN A4, the EDPS is satisfied that the data storage period is fixed at five years and that in case of dispute they are only kept until the dispute has been resolved.

### **3.6. Change of purpose**

Under Article 6(1) of the Regulation, personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body.

In the present case, according to the notification, the probation report can also be used in the context of the data subject's staff assessment. The EDPS does not consider that there is a change of purpose since the end-of-probation procedure and the staff assessment procedure both constitute an evaluation of the data subject's performance. Article 6(1) is therefore complied with.

### **3.7. Transfer of data**

According to the facts set out above, data are only transferred within the same institution or between institutions or Community bodies. These transfers must therefore be examined in the light of Article 7(1) of the Regulation: "*Indeed, personal data shall only be transferred within or between Community institutions and bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

In principal, the recipients mentioned are competent to receive the data in the context of their specific tasks. Recipients are reminded that under Article 7(3) of the Regulation, they must only process the data for the purposes for which they were transmitted. This does not however have

to be done for each probation report but, for example, in the general instructions for the assessors.

### **3.8. Right of access and rectification**

Under Articles 13 and 14 of Regulation (EC) No 45/2001, data subjects have a right of access to, and rectification of, personal data concerning them.

As outlined in the facts, data subjects have access to their probation report and are able to submit comments in the light of Articles 34 and 45 of the Staff Regulations and Articles 14 and 84 of the CEOS. Article 26 of the Staff Regulations also provides for the right of access to personal files. On the other hand, in the event of an intervention by the CDR the minutes of the meeting (as well as the hearing of the probationer where necessary) remain secret under Article 11 of Annex II to the Regulations. This was confirmed by the judgment delivered by the Court of First Instance in the Kupka-Floridi (T-26/91) case. The EDPS considers that this restriction is legal by virtue of the restrictions stipulated in Article 20(1)(c) of Regulation (EC) No 45/2001.

As regards the right of rectification, as already said, it is difficult to speak of accuracy of data relating to the evaluation of persons. However, the EDPS is satisfied that the persons assessed have the right to add comments to their reports. The data subjects also have the right to rectify purely factual or administrative data in Sysper2.

### **3.9. Information to be given to the data subject**

Under Articles 11 and 12 of the Regulation, whenever personal data are processed, data subjects must be sufficiently informed of the operation. This information should usually be given at the latest when the data are collected from the data subject, if the data subject has not already been informed.

According to the notification, a specific privacy statement stipulating the conditions for processing personal data and containing the information set out in Article 11 is to be found on the pages concerning probations on the Commission's intranet site. The EDPS considers that the information supplied meets the requirements of Regulation (EC) No 45/2001. However, as regards data storage, and in the interest of transparency, the EDPS wonders if the data subjects should be informed that, even if the data are not kept by ADMIN A4 in the event of a positive report or the absence of a dispute, some data are nevertheless kept in the data subject's personal file (only the original of the Appointing Authority/AECE's decision is sent to the Personal File Unit). The length of time the data are stored in the personal file should also be stated.

### **3.10. Security**

Article 22 of the Regulation lays down that technical and organisational measures must be taken to ensure a level of security appropriate to the risks represented by the processing and by the nature of the personal data to be protected.

On the basis of the information available, the EDPS does not have any reason to believe that the Commission has not complied with the security measures set out in 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. This means in particular that:

- measures should be taken to ensure that only data which are strictly necessary to justify a possible extension of the probation period appear in the probation report, i.e. only general data and data without any medical details can be mentioned in the box provided for this purpose in the probation report;
- the Commission should assess whether the probation report should be kept in Sysper2 on the ground that the data should only be kept for the period of time strictly necessary for the established purposes;
- recipients should be reminded that, under Article 7(3) of the Regulation, they must only process the data for the purposes for which they were transmitted;
- in the interest of transparency, the controller should inform the data subjects that, even if the data are not kept by ADMIN A4 in the event of a positive report or in the absence of a dispute, certain data are nevertheless kept in the data subject's personal file. The length of time the data are stored in the personal file should also be stated.

Done at Brussels, 10 March 2009

(signed)

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