



Opinion on the notification of a prior-check received from the Data Protection Officer of the European Court of Justice on ‘the procedure for dealing with professional incompetence’.

Brussels, 21 April 2010 (case 2009-860)

1. Procedure

By letter received on 21 December 2009, a notification within the definition of Article 27.3 of Regulation 45/2001 (hereinafter the Regulation) was received from the Data Protection Officer (DPO) of the European Court of Justice (ECJ) about the procedure for dealing with professional incompetence.

Questions were raised in an email on 15 February 2010 and replies given on 8 April 2010. The draft opinion of the EDPS was sent to the DPO on 14 April 2010 for comments, and these were received on 20 April 2010.

2. The facts

On 6 May 2009, the ECJ issued a decision on the procedure for dealing with professional incompetence. This decision put in place the support programme, subsequent programme monitoring reports and the final decision to be taken by the Appointing Authority (AA) when an ECJ official is alleged to be incompetent.

The aim of the procedure is to establish a regulatory framework for cases of professional incompetence. This ECJ decision was presented for a prior check of the way in which data are processed when implementing this procedure.

When an official’s staff report, produced under Article 43 of the Staff Regulations, contains grade F (insufficient) for one or more of the analytical assessments, the assessor sets in motion the procedure for dealing with professional incompetence. This procedure is set out in Article 51 of the Staff Regulations and it involves identifying, dealing with and remedying situations of incompetence in a timely and appropriate manner.

The procedure for dealing with professional incompetence consists of introducing a support programme, established by the assessor, for a 9-month period, aimed at improving the performance of the official in question. If the support programme does not sufficiently resolve the problems, the assessor has the possibility of extending it (for 6 months). During the support programme, the Personnel and Financial Directorate (PFD) is kept informed by the assessor of the different stages of the programme.

Should this programme fail, i.e., should the ability, efficiency or conduct in the service of the official in question not improve following the programme (or, where appropriate, the extended programme), the assessor informs the AA. In such a case, the Joint Advisory Committee for Professional Incompetence issues an opinion and the AA then takes a decision. The procedure set out in Article 51 paragraphs 3 to 5 of the Staff Regulations may be applied with a view to dismissing, downgrading or classifying the official in a lower function group at the same grade or a lower grade.

Other information emerging from the notification

Categories of data processed:

- surname, first name, personal number,
- outcome of the analytical assessment of ability, efficiency and conduct in the service of the official in question contained in their last staff report before the start of the procedure and, where appropriate, the results of the analytical assessment of their ability, efficiency and conduct contained in the subsequent staff report.

The people concerned are informed by means of an information notice on personal data processing available on the Court's vade-mecum (Intranet) site. In addition, the official is informed of the way in which his or her personal data will be processed at the start of the support programme, along with the length of time his or her individual file will be held and all other information as stipulated in Articles 11 and 12 of Regulation 45/2001. The official in question also has the right to obtain his or her complete personal file and to take copies of all documents relating to the procedure (Article 51.3 of the Staff Regulations).

The official in question has the following rights: they may access all data relating to them, have them rectified, blocked or erased and receive assurance from the data protection officer that third parties to whom the data have been disclosed are notified of these changes.

The procedures are manual and there is a specific file for each case. The documents in question are stored as a hard (paper) copy in the relevant file in a locked cabinet (key to be held either by the assessor or the PFD). The support programme is produced in printed form and appraisal sheets are pre-printed and filled in by the assessor and, where appropriate, by the official in question.

The following people may receive this information: the assessor, the supervisor, members of the Joint Advisory Committee for Professional Incompetence, the PFD, the person mandated by the Court to represent it before the Joint Advisory Committee for Professional Incompetence, the Appointing Authority (Court administrative committee, Registrar). All transfers of information between the above stated recipients are in the form of paper documents in sealed envelopes marked 'confidential'. The following may also be recipients: the Court of Justice, the Tribunal and the Civil Service Tribunal, the EDPS, the DPO of the ECJ and the European Ombudsman.

With regard to data retention, at the end of the procedure the assessor sends his copy of the file to the PFD, which destroys it. The copy of the file held by the PFD is archived for six years as from the date of completion of the procedure, when it is then destroyed. In addition, the documents noted in Articles 1 to 5 of the Administrative Committee's decision of 6 May 2009 on procedures for dealing with professional incompetence are then filed in the personal file. In the case of resignation, contract termination or transfer of the official in question, the file is held for one year following date of resignation, contract termination or transfer, when it is then destroyed.

Security measures [...].

3. Legal aspects

3.1. Prior check

The notification about procedures for dealing with professional incompetence, in the letter received on 21 December 2009, describes the processing of personal data (*'any information relating to an identified or identifiable natural person'* – Article 2.a of the Regulation). The data processing referred to is conducted by a European, formerly a 'Community', institution and is undertaken in the exercise of activities falling within the scope of application of what was formerly 'Community' law (Article 3.1 of the Regulation). The processing of the procedure for professional incompetence is manual and the content must be retained on file. Article 3.2 is thus applicable to this particular case. This processing operation consequently falls within the scope of application of Regulation 45/2001.

Article 27.1 of Regulation 45/2001 requires a prior check by the EDPS for any *'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'*. This processing operation also falls within the scope of the provisions of Article 27.2.b: *'processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct'*, as is the case here.

In principle, the check conducted by the EDPS should have been prior to implementation of the processing. The EDPS observes that the Court's decision was adopted on 6 May 2009 and regrets the fact that the information was not forwarded prior to its date of adoption in order to undergo the correct prior check. By virtue of events, the check has become ex-post. This in no way affects the implementation of the recommendations made by the EDPS.

The notification from the DPO of the ECJ was received on 21 December 2009. By email dated 15 February 2010, questions were raised with the DPO of the ECJ and replies were provided on 8 April 2010. On 14 April 2010, the draft opinion of the EDPS was sent to the DPO for comments. These were received on 20 April 2010. The EDPS shall therefore issue its opinion no later than 1 May 2010.

3.2. Lawfulness of the processing

The lawfulness of the processing must be examined in the light of Article 5.a of Regulation 45/2001 which stipulates that, *'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 or body'*.

The procedure for dealing with the professional incompetence of ECJ staff, which involves the collection and processing of personal data relating to its officials, falls within the context of the legitimate exercise of official authority vested in the institution. The lawfulness of the proposed processing is thus satisfied.

The legal basis on which the data processing relies is in

- Article 51 of the Staff Regulations on procedures for dealing with incompetence and the decision passed by the Court on this basis,
- Article 9.6 of the Staff Regulations, which states that *'the opinion of the Joint Advisory Committee on professional incompetence shall be sought for the application of Article 51'*,
- Section 5, Article 12 of Annex II to the Staff Regulations,

- and Article 43 of the Staff Regulations on staff appraisals.

The legal basis of the Staff Regulations of Officials of the European Communities supports the lawfulness of the processing. Nevertheless, the EDPS recommends that all the texts that form the legal basis be mentioned in the information notice.

3.3. Quality of the data

Article 4 of Regulation 45/2001 sets out certain obligations regarding the quality of personal data. Data must be '*adequate, relevant and not excessive*' (Article 4.1.c). The processed data described at the beginning of this opinion must be deemed to satisfy these processing conditions. The data required are of an administrative nature and necessary to enable the good implementation of the different stages of the professional incompetence procedure. The EDPS considers that Article 4.1.c of Regulation 45/2001 is complied with in this regard.

In addition, the data must be processed '*fairly and lawfully*' (Article 4.1.a of Regulation 45/2001). The lawfulness of processing has already been analysed (see 3.2 above). As for fairness, this relates to the information provided to the data subjects. See 3.8 below in this regard.

Finally, the 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).

The system as described reasonably admits one to assume that the facts are accurate and up-to-date, the data protection officer having an obligation to check the accuracy of the data and to keep it updated. Access and rectification rights are available to the data subject, in order to make the file as complete as possible. This represents a second way of ensuring the accuracy of the data. With regard to the two rights of access and rectification, see 3.7 below.

3.4. Data retention

Article 4.1.e of Regulation 45/2001 states 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*'.

With regard to data retention, a copy of the file is held in the archives for a six-year period as from the date of completion of the procedure, after which it is destroyed, the assessor's file being destroyed immediately at the end of the procedure. In the case of resignation, termination of contract or transfer of the official in question, the file is held for one year following the date of resignation, termination of contract or transfer, after which it is destroyed. In addition, the appraisal report, the support programme, the post-support appraisal report and, finally, the AA's decision are held in the personal file of the official in question.

The EDPS considers that there is compliance with Article 4.1.e of Regulation 45/2001.

3.5. Data transfer

The processing must be considered in the light of Article 7.1 of Regulation (EC) 45/2001. Processing in the terms of Article 7.1 relates to transfers 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*'.

This relates to the case of a transfer within the same institution (assessor, appeal assessor, supervisor of the official in question, AA, Personnel and Financial Directorate, Joint Advisory Committee on professional incompetence (committee internal to the Institution). In case of dispute, the file is sent to the ECJ's legal department. This also relates to the case of a transfer between institutions, insofar as the official may also take the decision to the Court of Justice (Article 91 of the Staff Regulations) and s/he also has the possibility of an appeal to the EDPS (Article 90.3 of the Staff Regulations) or to the European Ombudsman.

It is therefore necessary to ensure that the conditions of Article 7.1 are satisfied, which is the case since the data collected are necessary to the processing and the data are moreover '*necessary for the legitimate performance of tasks covered by the competence of the recipient*'. In this case, this task is the responsibility of the institution itself or the institutions concerned and thus there is compliance with Article 7.1.

3.6. Processing that includes the personal number or identifier

In the case in question, the ECJ uses the personal number. The use of an identifier is, in itself, simply a way – a legitimate one, in this case – of facilitating the work of the data protection officer; nevertheless, this use can have significant consequences. It is, moreover, what caused the European legislators to control the use of identifiers by means of Article 10.6 of the Regulation, which anticipates the intervention of the EDPS. It is not a matter of here establishing the conditions under which the ECJ can process the personal number but of highlighting the attention that must be given to this point in the Regulation. In this case, the ECJ's use of the personal number is reasonable as the use of this number is a way of facilitating the work of processing.

3.7. Right of access and rectification

Article 13 of Regulation (EC) 45/2001 stipulates the rights of access – and the formalities – that the data subject can request. Article 14 of Regulation (EC) 45/2001 stipulates the right of rectification for the data subject.

The rights of the data subject are guaranteed and outlined in the information notice given to any data subject. Overall these provisions ensure compliance with all the conditions of Articles 13 and 14 of Regulation (EC) 45/2001.

3.8. Informing the data subjects

Some personal data are provided directly by the data subject, or are provided by other people involved in the appraisal process. Consequently, the provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on data obtained from the data subject are applicable in this case. It is the same for the provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*).

Informing data subjects is assured by means of an information notice on the processing of personal data available on the Court's Intranet. In addition, the official is informed of all processing of his or her data at the start of the support programme.

The EDPS considers that Articles 11 and 12 are complied with but would, however, like the different elements of the legal basis to be stated, as mentioned in 3.2 above.

3.9. Security

In accordance with Article 22 of Regulation (EC) 45/2001 on security of processing, *‘the controller shall implement 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 EDPS believes that all the security measures taken can be considered adequate within the meaning of Article 22 of the Regulation.

Conclusion

The proposed processing, as described, does not seem to infringe the provisions of Regulation (EC) 45/2001, provided the above observations are taken into account. This means, in particular, that the ECJ should:

- clearly state the different elements of the legal basis in the information notice, as indicated in point 3.2 above.

Done at Brussels, 21 April 2010

(Signed)

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