

Opinion on a notification regarding a prior check sent by the Data Protection Officer of the European Parliament concerning the procedure for appointing director-generals, directors and heads of unit

Brussels, 20 May 2010 (Case 2010-0270)

1. Procedure

On 7 April 2010, the European Data Protection Supervisor (**EDPS**) received a notification from the Data Protection Officer (**DPO**) of the European Parliament (**EP**) regarding a prior check concerning the procedure for appointing director-generals, directors and heads of unit.

The notification was accompanied by a note from the DPO concerning the procedure, internal rules relating to the appointment and confirmation of the position of head of unit (Decision of 5 October 2005), the notification to the DPO pursuant to Article 25 of the Regulation and the Decision of the Bureau of 7 July 2008 laying down the internal rules relating to the confirmation of the position of head of unit, director and director-general and repealing the rules of 5 October 2005.

The draft opinion was sent to the DPO for comment on 10 May 2010, and the comments were received from the DPO on 19 May 2010.

2. The facts

This dossier relates to the procedure for appointing director-generals, directors and heads of unit within the European Parliament, in accordance with Articles 44 and 46 of the Staff Regulations of Officials of the European Communities (the **Staff Regulations**) and Article 7(4) of its Annex XIII. The processing operations are supervised by the head of the Personnel Management Unit, internal organisation and human resource planning.

The *purpose* of data processing is to evaluate the services of the officials and temporary agents with a view to confirming, at the end of the probationary period, the appointment of the official or of the temporary agent as director-general, director or head of unit. To this end, a probationary period report is drawn up at the end of the probationary period with a view to confirmation or otherwise of the appointment.

The *processing of the data* is not automated and can be described as follows:

The services are evaluated on the basis of precise objectives, set by the assessors¹ and the official in a probationary period when the latter takes up an appointment. It relates to the skills of the

¹ The evaluators of the official in the probationary period are his first assessor and his final assessor as defined in the General provisions relating to the assessment procedure

latter in the area of leadership, management, communication and initiative. The evaluation is carried out throughout the probationary period by the first assessor. As it proceeds, the latter records the items of information and evaluation in line with the objectives set for the probationary period.

If difficulties arise at any point in the probationary period, the first assessor speaks to the official immediately and informs the final assessor of this. The latter calls the official to an interview in the presence of the first assessor, by a written memo specifying the subject of the interview. The AA (Appointing Authority) and the staff Director-General are sent a copy of it. During the interview, the assessors and the official undergoing the probationary period draw up an action programme for the remaining months. The final assessor sends the action programme to the AA and keeps it regularly informed of the situation during the remaining period. The AA can intervene at any time giving appropriate instructions. If it considers it to be necessary, it will speak with the assessors and the interested party.

The evaluation gives rise to a final report being prepared by the first assessor and after having interviewed the official; this report is produced on a form provided for this purpose. The report is countersigned by the final assessor who adds his proposal to the AA regarding the confirmation or otherwise of the interested party in his post. If the report proposes that the official should not be confirmed in his post, an interview must take place between the interested party and the final assessor. The proposal of non-confirmation must be substantiated. The report is sent to the interested party, with an acknowledgement of receipt, at the latest one month before the end of the probationary period. In a period of 8 working days as from the date of acknowledgement of receipt, the interested party must send the signed report to the final assessor, if necessary with his observations. The final assessor sends the report to the AA. After receiving the final report, the AA can extend the probationary period if the interested party is prevented from continuing his duties following illness or an accident, parental or family leave or for military service, maternity leave or leave on personal grounds. On expiry of this extension, a new final report is drawn up. The new report is sent to the interested party who can make his comments in writing within a period of 8 working days. The report is then sent to the AA.

The final decision is taken by the AA. As part of the decision-making procedure, the AA can also interview the interested party.

It is important to emphasise that people outside the EP can apply for high-level posts such as the posts of director or director-general. In this case the recruitment procedure applies in addition to the confirmation procedure under examination².

The *categories of data processed*: A final report form has been drawn up. Furthermore the official or temporary agent may submit a CV. The final report form includes: (i) information on the official, namely: surname and first name(s), registration, grade, department/office/political group; unit; interruptions in service (duration and reasons); (ii) surname, first name(s), position of the first assessor; date of the interview with the official/temporary agent; opinion of the first assessor: satisfactory/unsatisfactory and the reason in case of dissatisfaction (iii) Proposal of the final assessor to the AA: identity of the final assessor (surname, first name, position), and, if applicable, the date of the interview with the official/temporary agent; proposal of the final assessor; extension of the probationary period; reassignment to a job outside middle/senior management; dismissal/cancellation of the contract (for trainee officials or trainee temporary agents); Observations (obligatory in the event of non-confirmation) (iv) comments of the official/temporary agent. Article 11 of the Decision of the Bureau of 7 July 2008 states that the

² As far as the prior check of the EDPS relating to the recruitment procedures is concerned, see the opinions of the EDPS of 13 March 2008 (dossiers 2004-207 and 2007-323)

Secretary General is authorised to amend the confirmation report form to take account of the technical requirements.

As far as the **storage periods** are concerned, the electronic version of the documents produced during the probationary period is destroyed immediately after the final report has been filed in the personal file. The paper version is stored for a period of six months. If the official lodges an appeal under Title VII of the Staff Regulations, the storage period of the documents can be extended until a final decision is taken. The storage period of the final report is the one set for the storage of the personal file, namely 10 years as from the date on which the official or his legal successors can exercise their rights to the pension or as from the date of the last payment of the pension.

Storage for historical, statistical or scientific purposes is not planned.

The interested parties *are informed* of the processing of their data in the context of the procedure under examination through the decision of the Bureau of 7 July 2008 (in particular Article 9 – Data protection) and on the Parliament’s intranet³.

As regards the *rights of the people concerned*, Articles 8 to 13 of the Decision of the Bureau of the European Parliament of 22 June 2005 relating to implementing rules for the provisions of Regulation (EC) No 45/2001 (the “Bureau’s decision”) give people the right to access personal data which concerns them, to rectify them, lock or erase them, as well as the right to object to their being processed. The Bureau’s decision and the rules for exercising these rights can be consulted on the Parliament’s intranet site.

The data processed as part of the evaluation may be *disclosed* to the following: (i) the assessors; (ii) the AA; and (iii) the services responsible for managing the human resources of the DGs and the Internal Organisation Unit/Competition Unit as well as the Bureau of the EP. The appointment decision is published in accordance with Article 25(3) of the Staff Regulations.

As for the *security measures* [...].

3. Legal aspects

3.1. Prior check

Applicability of Regulation (EC) No 45/2001 (“the regulation”): the appointment procedure of the director-generals, directors and heads of unit within the EP involves the processing of personal data (“*any information relating to an identified or identifiable natural person*”- Article 2, point a) of the regulation). The processing of data presented is carried out by a formerly “Community” European institution and is carried out in the exercise of activities which fall within the scope of the law formerly known as “Community” law (Article 3.1 of the regulation). The processing of personal data in the procedure of procedure for appointing director-generals, directors and heads of unit is manual but the content is intended to form part of a filing system. Article 3.2 is therefore applicable here. Consequently Regulation No 45/2001 is applicable.

Justification of the prior check: under the terms of Article 27, paragraph 1 of the regulation, “*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 shall be subject to prior checking by the European Data Protection Supervisor*” Article 27, paragraph 2, of the regulation lists the processing operations likely to present such risks. This list includes Article 27, paragraph 2, point b): “*the processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*”. The appointment procedure of the director-

³ http://www.epintranet.ep.parl.union.eu/intranet/ep/site/refin/lang/fr/procedure_confirming_heads_of_unit

generals, directors and heads of unit is certainly part of the evaluation of the services of the officials or temporary agents concerned and is consequently evidently such a processing operation subjected to the prior check of the EDPS.

Prior check carried out a posteriori: as the object of the prior check is to examine situations likely to present certain risks, the opinion of the EDPS should be given before the beginning of the processing. In the present case, it is unfortunate that the Bureau's decision of 7 July 2008 was adopted before the opinion of the EDPS. In any event the recommendations of the EDPS must be implemented.

Deadlines: the notification from the DPO was received on 7 April 2010. In accordance with Article 27, paragraph 4 of the regulation, the EDPS must issue his opinion within the two months following receipt of the notification. The procedure was suspended for a total period of 9 days. Consequently the present opinion must be issued on 16 June 2010 at the latest.

3.2. Lawfulness of processing

Article 5 of Regulation No 45/2001 lists the criteria to be respected in order to guarantee the lawfulness of the processing of personal data. According to one of the criteria provided for in Article 5, point a), the processing must be "*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 or in the legitimate exercise of official authority vested in the Community institution or body*". The processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes "*the processing of personal data necessary for the management and functioning of those institutions and bodies*" (recital 27).

The evaluation of the initial services of the officials and temporary agents is part of the legitimate exercise of the official authority conferred on the Parliament. The legal basis provided for under Articles 44 and 46 of the Staff Regulations and under Article 7(4) of its Annex XIII confirms the lawfulness of the processing.

According to Article 5, point a) of the regulation, the processing must be "*necessary for the performance of a task*". It is consequently relevant to check whether the processing performed as part of the procedure for appointing director-generals, directors and heads of unit in the European Parliament is "*necessary*" for the performance of a task – in the case in point, the evaluation at the end of the probationary period.

As indicated above, the Parliament is authorised by the Staff Regulations and the complementary legislation to adopt procedures in order to evaluate officials and temporary agents in order to confirm their appointment as director-generals, directors and heads of unit or otherwise. To put this provision into practice, it is necessary to collect and then process personal data on the candidates. The EDPS notes that the data processing performed in the context of the procedure for appointing director-generals, directors and heads of unit is necessary for carrying out the evaluation of the candidates.

3.3. Processing of special categories of data

According to Article 10, paragraph 1 of the regulation, "*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*". This prohibition is lifted if the reasons appearing in paragraphs 2 and 3 justify it; these reasons include in particular the consent of the person concerned (point a of paragraph 2).

The notification does not specify that data falling into the categories referred to under Article 10, paragraph 1, are not processed in the context of operations subjected to the prior check. Taking account the global objective pursued by the EP when it performs processing of data to evaluate the officials or temporary agents in order to confirm them as head of unit, director or director-general, the EDPS understands that it is not the intention to collect special categories of data in this context. However, the end of the probationary period report form provides for the fact that the people concerned must, if there is an interruption in their service, mention the duration of this and the reasons for this interruption. These reasons may be of a medical nature and hence must be qualified by data relating to health. Furthermore, the proposal of the final assessor to the AA provides for the fact that, if the probationary period is extended, the final assessor must stipulate the reasons for this extension and in particular if it is due to reasons relating to sick leave or due to an accident. The processing of this data can be justified in the light of Article 10 paragraph 2, point b), according to which the prohibition does not apply when “*processing is necessary 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 Treaties establishing the European Communities or other legal instruments adopted on the basis thereof*”.

Furthermore, the candidates may give information on a handicap or other types of special categories of data. If necessary, these candidates should be considered to have given their consent for the data to be processed, which would be in line with Article 10, paragraph 2, point a).

3.4. Quality of the data

Adequacy, relevance and proportionality: pursuant to Article 4, paragraph 1, point 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 information collected in the report at the end of the probationary period would seem to meet these requirements. The data processed are of administrative nature and are necessary for evaluating the services of the officials and temporary agents in order to confirm their appointment as director-generals, directors and heads of unit or otherwise.

As regards the heading of the report “Interruption in service (duration and reasons)”, in the blank fields the EDPS recommends that a generic answer of the “sick leave”, “maternity leave” type should be provided for with options which the official or temporary agent would choose.

Furthermore, Article 11 of the Bureau’s decision of 7 July 2008 provides for the fact that the Secretary General is authorised to amend the confirmation report form to take account of the technical requirements. The EDPS points out that any amendment of the form should be made taking into account the provisions of Article 4, paragraph 1, point c).

Accuracy: Article 4, paragraph 1, point d, of the regulation stipulates that the personal data must be “*accurate and, where necessary, kept up to date*” and that “*every reasonable step must be taken to ensure that data which are inaccurate or incomplete [...] are erased or rectified*”. As indicated above, most of the data processed in the procedure are supplied by people other than the interested party (except for his comments). In this respect it is important that the people concerned can make use of their right of access and rectification in order to ensure the accuracy of the personal data concerning them which are processed (cf. point 3.7 in detail).

Fairness and lawfulness: Article 4, paragraph 1, point a), of the regulation, also provides for the fact that the data must be “*processed fairly and lawfully*”. The question of lawfulness has already

been dealt with (point 3.2) and that of fairness will be dealt with in the point on information of the people concerned (point 3.7).

3.5. Data retention

Article 4, paragraph 1, point e) of the regulation, states that *“the personal data will 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 EDPS views the data storage periods set favourably in that they are in line with the recommendations in similar situations.

3.6. Transfer of data

In accordance with Article 7 of the Regulation , the personal data can be transferred between institutions or Community bodies or within them *“if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient”* (paragraph 1). The recipient can process the data *“only for the purposes for which they were transmitted”* (paragraph 3).

The EDPS is of the opinion that all the internal transfers are necessary for the legitimate performance of tasks arising from the recipient’s mandate. Consequently, Article 7, paragraph 1 of the Regulation has been complied with.

In order to ensure full conformity with Article 7, paragraph 3 of the Regulation , the EDPS recommends reminding all internal recipients of the EP of their obligation not to use the data received for purposes other than those for which they were transmitted. This is not necessary for each individual evaluation. It may be sufficient, for example, to send a memo to the assessors and other competent recipients pointing out their obligations regarding data received for evaluation purposes.

3.7. Right of access and rectification

Pursuant to Article 9 of the Bureau’s decision of 7 July 2008, the official or temporary agent can exercise his right of access and rectification by contacting the staff Director-General and complying with the rules laid down by the internal rules. Furthermore, as indicated above, each official or temporary agent receives a copy of the report, which gives them interactive access to the information contained in the latter.

As far as the right to rectification is concerned, officials or temporary agents are asked to insert their observations directly into the report in such a way that they are clearly visible. The EDPS is pleased about the fact that the people concerned are authorised to make comments on the evaluation data (subjective by nature) supplied by the assessors and the AA. In order to ensure full conformity with Article 14 of the Regulation, the EDPS proposes that the people concerned can also have any item of administrative data or purely factual data which is inaccurate or incomplete contained in the report changed. To this end it would be desirable for an explicit reference to be made in the report to the right to rectify the personal data concerning them, the procedure for which is laid down in Article 10 of the decision of the Bureau of the European Parliament of 22 June 2005.

3.8. Information from the data subject

Pursuant to Articles 11 and 12 of the Regulation, those who collect personal data are obliged to inform the interested parties that data concerning them have been collected and processed.

The interested parties also have the right to be informed, among other things, of the purposes of the processing, of the name of the recipients of the data and of the special rights granted to them as data subjects.

As indicated beforehand, the data subjects will receive the following various items of information:

- the decision of the Bureau of the European Parliament of 7 July 2008, available on the intranet;
- the decision of the Bureau of the European Parliament of 22 June 2005 relating to the implementing rules of Regulation (EC) No 45/2001, available on the intranet;
- information on the confirmation procedure for heads of unit, directors and director-generals on the intranet.

The data subjects are also informed of the identify of the person in charge of the processing whom he or she can contact in order to exercise their rights of access and rectification; of the purposes of the processing; of the recipients or categories of the recipient of the data; of the existence of a right of access and rectification; of the legal basis of the processing; of the storage period and of the possibility of lodging an appeal with the EDPS. The EDPS is consequently satisfied regarding the content of the information supplied to the data subjects even if he points out that it would be desirable to make an explicit reference in the report to the right to rectify the personal data concerning them, the procedure for which is fixed in Article 10 of the decision of the Bureau of the European Parliament of 22 June 2005 (see point 3.7. above).

Furthermore, as has been mentioned in the facts, people external to the European Parliament can apply for high-level posts such as the posts of director or director-general. In this case, these people do not have access to the information appearing on the intranet of the European Parliament and it is consequently necessary to provide them with the information through other means. The EDPS consequently recommends that the Parliament puts provisions in place aiming to ensure that external persons subject to the confirmation procedure examined are adequately informed.

3.9. Security measures

In accordance with Article 22 of the Regulation, *“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”*. These measures are taken *“in particular 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.”*

[...]

There is nothing to prevent the EDPS from concluding that these measures and the additional measures implemented are appropriate regarding Article 22 of the Regulation.

4. Conclusion:

The processing proposed does not appear to infringe the provisions of Regulation (EC) 45/2001 provided that account is taken of the observations made above. This means in particular that:

- the heading of the report “Interruption in service (duration and reasons)” contains a generic response;
- in the event of a change being made in the confirmation report form pursuant to Article 11 of the Bureau’s decision of 7 July 2008, it is pointed out that any change in the form must be made taking into account the provisions of Article 4, paragraph 1, point c) of Regulation (EC) 45/2001;
- the EP reminds all internal recipients of the EP of their obligation not to use the data received for purposes other than those for which they have been transmitted;
- the EP provides an explicit reference in the confirmation report to the right to rectify the personal data concerning them, the procedure for which is set in Article 10 of the decision of the Bureau of the European Parliament of 22 June 2005;
- the EP puts in place provisions aiming to provide adequate information for external people who are subject to the confirmation procedure.

Done at Brussels on 20 May 2010

(Signed)

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