



## **Opinion on the notification for prior checking from the Data Protection Officer of Parliament regarding the "*Management and Evaluation of external translation carried out by DG TRAD*".**

Brussels, 4 June 2010 (Case 2009-0827)

### **1. Proceedings**

On 10 December 2009, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the processing of personal data for the purpose of management and evaluation of external translation carried out by the DG TRAD from the Data Protection Officer (**DPO**) of the European Parliament (**EP**)

Questions were raised on 18 December 2009 to which the EP replied on 21 January 2010. Further information was requested on 18 February 2010 and the answers were received on 16 April 2010. On 5 May a summary of the procedure with some questions was sent to the controller for clarifications. The questions and confirmation of facts were answered on 17 May 2010. The draft opinion was sent to the DPO for comments on 20 May 2010. The EDPS received a reply on 31 May 2010.

### **2. Facts**

The External Translation Unit of DG TRAD uses external contractors (selected through calls for tender) and a FreeLance Unit Internal Database (FLUID) to ensure the management of the outsourcing of translation assignments and monitor the quality of external translations.

#### **Data subjects**

The data subjects are the following: the external translators and revisers<sup>1</sup>, who are carrying out the external translation work, the contractors, i.e. the translation agencies contracted by the EP and the staff members of the External Translation Unit, who introduce the results of the evaluations of the translation quality provided by the contractors. The evaluations are performed by the respective in-house staff of the translation Unit.

#### **Purpose**

The purpose of the processing operation in question is to organise and monitor the external translation work and to assess the performance and output quality of external contractors.

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<sup>1</sup> According to the General Specifications of the calls for tenders, a translation must be "*revised by a person different from the translator(s) before its delivery*" and the "*The contractor shall provide the participating institution with the names of translator(s) and reviser(s) when delivering an assignment*". The revisers performing this task are considered externals if they work for an external contractor.

## **Legal basis**

- i) The Rules of procedure - Rule 146: Decision of 17 November 2008 (code of conduct on multilingualism) defines the use of languages and establishes the administrative route of documents (order of priority, categories of documents to be translated in-house and externally, deadlines, length of texts submitted for translation);
- ii) An internal note from the Director-General defines the outsourcing policy establishing in detail the type of documents that can be outsourced, the internal service responsible for the decision of outsourcing and the internal procedure;
- iii) The Council Regulation 1605/2002 of 25 June 2002 on the financial Regulation applicable to the general budget of the E.U and
- iv) The Commission Regulation 2342/2002 of 23 December 2002 on the implementation of the Financial Regulation.

Moreover, the EDPS has been provided with a copy of a template contract to be signed between the EP and the contractor undertaking the translations. This template contract is entitled "*Multiple framework ranking contract for the provision of translation services into ...*". This framework contract (according to Article 1.2) lays down the basic conditions for placing orders for specific translation assignments. These assignments shall be executed on the basis of order forms which shall be governed by the terms and conditions of the contract. The order form shall specify the volume of work to be carried out, the deadline by which it is to be completed and the remuneration due; it shall thus constitute the specific contract (Article 1.3). The assignments to be translated are available on the E-STEP web portal in the source language(s) and the contractor must download the text and then upload the translation through E-STEP (Article 4.1.1). Each assignment shall be carried out in full accordance with the specific instructions given by the EP (Article 4.5.2).

Furthermore, Article 4.5.7 of the contract provides that "*the contractor shall provide the institution with the names of translator(s) and reviser(s) when delivering an assignment. In accordance with Regulation 45/2001, tenderers are informed that this information will be processed for the purpose of monitoring the quality of the services provided by the contractor*".

There is also a clause regarding confidentiality (Article 7) stating that "*the contractor undertakes to keep strictly confidential all information acquired in the course of execution of this contract and to ensure that staff or subcontractors employed by the contractor are bound by the same undertaking ...*".

Article 14 of the contract explains that the applicable law is both the law of Luxembourg (for institutions based in Luxembourg) and the Belgian law (for institutions based in Brussels).

## **Procedure**

The processing operation is carried out partly by automatic means through the FLUID database.

The purpose of FLUID, apart from registering the assessment of contractors' performance is also to automate certain other operations concerning the execution of the translation contracts, namely selecting the contractor, issuing order forms, controlling availability of financial resources etc.

According to the information provided, there are four main teams within the External Translation Unit;

1. contract team (in charge of registering the data of the contractor, the price of the contract etc),
2. placement team (responsible for placing translation requests according to the type and language of the translation),
3. quality team: (they organise the quality controls performed by the in-house translators and are in contact with the contractors regarding the quality of the subject,
4. finance team which ensures the verification of invoices.

The placement team of the External Translation Unit receives the translation requests and places them with the contractor: the FLUID database will select a contract according to the target language. Once the contractor has accepted the translation, the placement team will issue the order form by grouping the placed translation requests (assignments) and instructing FLUID to print the order form. The purpose is to ensure that following a translation request, the orders are placed with a contractor with a valid contract and that the price paid is correct.

A specific translator and reviser are linked to each translation. The names of translators and revisers are stored in FLUID. The purpose is to ensure a better control of contractual obligations, i.e. that the translator has been approved by the European Parliament, that the translator and the reviser of a translation are different persons, etc. Their names are however protected by codes and they are only available to a very limited number of people, namely the staff members of the contract team who are responsible for updating this information. The quality team may request information about the identity of a translator in case of a quality problem related to a specific translation.

The in-house translators evaluate the translations provided by the contractors periodically<sup>2</sup> using a Standard assessment sheet entitled "*External translation evaluation procedure*". They do not have access to FLUID. The data collected, which are not registered on FLUID, are the following:

- document name,
- language combination,
- number of pages in the original, number of characters evaluated and time spent on evaluation,
- overall evaluation (acceptable or unacceptable),
- evaluator's name,
- correct format delivered (yes or no),
- use of tools, i.e. macros (correct or incorrect),
- formatting instructions (respected or not respected),
- summary of the evaluation (number of errors per category): i.e. failure to understand the source text, omission or addition of elements not in the original, wrong terminology, failure to use reference documents, style, existing material, clarity, inadequate formulation, grammar, punctuation, spelling,
- evaluation table indicating page, line, original, unrevised or revised translation, comments/back translation and/or explanation of unrevised translation in EN or FR and error category,
- comments,
- second evaluation indicating overall evaluation (acceptable or unacceptable), evaluator's name, time spent on evaluation.

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<sup>2</sup> Quality controls are normally performed at least every time 500 pages are delivered. Sometimes, they are delivered more often, especially in case of doubts over the quality of a delivered translation.

Following the above evaluation procedure, the only data registered on FLUID include:

- evaluation request period
- evaluation type (requested or not),
- final result (acceptable or not),
- translation version,
- linguistic combination,
- status of translation,
- pages revised,
- contractor's name,
- job's page number.

Moreover, the quality team registers the penalties for unacceptable translations or late delivery of an assignment on FLUID. The purpose is to monitor the performance of the contractor, namely that the translations delivered fulfil the quality requirements established in the contract. One of the reasons which may lead to the termination of the contract is an offence concerning professional conduct or for grave professional misconduct. In case of persistent bad quality, the contract team of the Unit may check if there is a connexion between the poor quality translation and one specific translator or reviser.

There is no direct contact between the external translators and the EP. The EP has only contract with its contractors, who are responsible for all contacts with their own staff.

### **Recipients**

The contractors concerned receive the result of all evaluations (acceptable or unacceptable), either in electronic or paper format. The evaluations include the completed standard assessment sheet and the translated text with the errors indicated. The names of the evaluators are deleted before the evaluations are sent to the contractors.

There are also some other teams outside the External Translation Unit who have access to FLUID:

- DG TRAD ex-ante team verifies all financial transactions before they are executed. They have read-only access to financial data, to data related to contracts and to information related to the correct delivery of a translation.
- Financial team of DG TRAD which is the General Coordination Unit for translations - it has full access to the financial data in FLUID.

Furthermore, for the technical maintenance of FLUID, the DG TRAD service desk is responsible for the first and second level IT assistance and the TMA Team (Tierce Maintenance Applicative) is responsible for the development, maintenance and third level IT assistance.

### **Right of access and rectification**

The staff members of each team of the Unit, as described above, have individual access to FLUID according to their relevant tasks. The user name of the staff member entering or modifying data is registered in the application. In certain cases there is visibility of the data entered or processed by members of other teams who have read-only access.

The external contractors and translators do not have access to FLUID. Where the contractors want to have access to their data and exercise rectification (i.e. phone number, address, e-mail), they must submit their requests to the External Translation Unit by e-mail. The translators have to pass through the contractors.

In cases where the contractors disagree with the evaluations, they can contact the External Translation Unit and re-submit the translation to the Unit for a second opinion.

### **Right of information**

According to the notification and the relevant documents attached, there is no specific information on this aspect. The controller informed the EDPS that the External Translation Unit is in the course of preparing a relevant privacy notice.

### **Retention policy**

All documents sent for translation, the translations, data related to penalties and evaluation are kept for a period of 5 years after the relevant discharge, since all invoices for the execution of the contract are paid in accordance with the legal and budgetary commitments in the context of the budgetary discharge, in accordance with Article 49 of the Financial Regulation Implementing Rules.

The controller has provided the EDPS with a copy of "*Guidelines regarding the storage and retention period of original supporting documents by authorised officers*" ("*Guidelines*"). Point 6 of the Guidelines provides that after the expiry of the relevant minimum period, of five years from the date on which the EP grants discharge for the budgetary year to which the documents relate, authorising officers by delegation may apply to the President of the European Parliament, via the Secretary-General, for permission to destroy the supporting documents concerned. Authorising officers shall retain the supporting documents until the President's written permission has been obtained.

The controller has also stated that in the case of penalties and data related to evaluation, when the request to destroy old documents is approved, the Unit will then keep statistical data in anonymous form.

### **Security measures**

All data considered as sensitive in paper format are kept in a locked room of the unit in light of the above Guidelines. The controller has also confirmed that the External Translation Unit keeps a file for each contractor with all relevant data including the contractor's contest and arguments and the Unit's contest. The data related to penalties are kept on FLUID.

Each staff member of the teams has access to FLUID by a username and password. They can modify data according to their relevant tasks and responsibilities. Access to FLUID is granted, removed and modified at the request of the Head of Unit of the External Translation Unit. The Service desk of DG TRAD is responsible for the management of the access to FLUID and it maintains the list of individual access rights.

The EP evaluators do not have access to Fluid. Once they have performed their evaluation, the document is automatically stored in a folder of a server to which they do not have access. They cannot see nor modify the document. They do not know the names of the external translators and revisers who have performed the translation. Only the linguistic coordinator and the Head of Unit in the respective translation units are informed about the penalties, not the evaluators. Log files are largely present in FLUID showing who modified a piece of information, together with the date and time.

### 3. Legal aspects

#### 3.1. Prior checking

**Applicability of Regulation 45/2001 ("the Regulation"):** The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a European institution, the Parliament, in the exercise of activities which fall within the scope of EU law<sup>3</sup>. The processing of the data is done partly by automatic means (database FLUID) and when the processing is manual (documents, such as information sheets regarding translators, invoices) it forms part of a filing system. Therefore, Regulation 45/2001 is applicable.

**Grounds for prior checking:** Article 27 (1) of Regulation 45/2001 subjects to prior checking 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*" by the EDPS. Article 27(2) of Regulation 45/2001 contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subjects*" (Article 27 (2) (b) of Regulation 45/2001).

The processing in question consists of evaluating the performance (ability and efficiency) of external translators on the basis of specific criteria and therefore assessing the quality level of external translation work which is outsourced by the EP to different contractors. Consequently, the processing is subject to a prior checking analysis on the basis of Article 27 (2) (b) of Regulation 45/2001.

**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 operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

**Notification and due date for the EDPS Opinion:** The notification of the DPO was received on 10 December 2009. According to Article 27 (4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 103 days for further information from the controller and 11 days for comments. Consequently, the present opinion must be delivered no later than on 7 June 2010.

#### 3.2. Lawfulness of the processing

The lawfulness of the processing operations has to be examined in light of Article 5 of Regulation 45/2001. Pursuant to Article 5 (a) of Regulation 45/2001, the processing is lawful if it 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 institutions or body*". The processing of personal data for performance of tasks carried out in the public interest includes "*the processing necessary for the management and functioning of those institutions and bodies*" (recital 27).

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<sup>3</sup> The concepts of "Community institutions and bodies" and "Community law" can not be any longer used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in light of the Lisbon Treaty.

It follows that the first issue under Article 5 (a) is to determine whether there is a specific legal basis for the processing and the second issue is to verify whether the processing in question is necessary for the performance of a task carried out in the public interest.

The assessment of the performance of external translators which involves collection and processing of personal data is part of the legitimate exercise of the official authority vested in the EP. The legal basis confirming the lawfulness of the processing can be found in the following provisions: i) the Rules of procedure - Rule 146: Decision of 17 November 2008 (code of conduct on multilingualism), ii) an internal note of the Director-General regarding outsourcing policy, iii) the Council Regulation 1605/2002 of 25 June 2002 on the financial Regulation applicable to the general budget of the E.U and the Commission Regulation 2342/2002 of 23 December 2002 on the implementation of the Financial Regulation.

As concerns the condition of necessity under Article 5(a), the EP processes data in order to ensure that outsourcing some of its translation work has a level of quality that can meet the institution's criteria and can thus be in conformity with the Financial Regulation. The EDPS therefore considers that the EP carries out processing of data which is indeed necessary for the performance of its mission in the public interest according to Article 5 (a) of the Regulation.

### **3.3. Data Quality**

**Adequacy, relevance and proportionality:** According to Article 4 (1) (c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The administrative and evaluation data described in the facts seem to be relevant and not excessive to the purpose for which they are collected and processed. The EDPS considers them necessary for the purpose of examining the performance of the external translators and assessing the quality of their work on the basis of the EP's criteria. Article 4 (1) (c) of Regulation 45/2001 is therefore respected.

**Accuracy:** Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*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.*" According to the facts, the External Translation Unit carries out the external translation evaluation procedure using various data related to a translation made by an external translator (i.e. number of pages, errors, grammar omissions etc). The Unit also keeps a specific file for each contractor with all relevant data. In this way, the EP ensures that the data processed are accurate, complete and up to date under Article 4(1)(d) of the Regulation.

Moreover, the possibility to make use of the rights of access and rectification is another mechanism to ensure the quality of data (see point 3).

**Fairness and Lawfulness:** Article 4 (1) (a) of Regulation 45/2001 provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 3.2.) and fairness will be dealt with in relation to information provided to data subjects (see point 3.7.).

### **3.4. Conservation of data**

Article 4 (1) (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*".

All documents sent for translation, the translations, data related to penalties and evaluation are kept for a period of 5 years after the relevant discharge in accordance with Article 49 of the Financial Regulation Implementing Rules. The EP adopted "*Guidelines regarding the storage and retention period of original supporting documents by authorised officers*".

This retention period is in line with Article 4 (1) (e) of the Regulation.

### **3.5. Transfer of data**

The processing operation should also be examined in light of Article 7 (1) of Regulation 45/2001. The processing covered by this Article is the transfer 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*".

The recipients of the processing operation under analysis are both internal and external.

On one hand, staff members of each team within the External Translation Unit may have access to data in FLUID which relate to the management of the translations and to the evaluation procedure on the basis of their respective tasks and responsibilities. Other internal staff members of other units, namely DG TRAD ex-ante team, the financial team of DG TRAD may have access to the financial related data. The Court of Auditors is also a potential recipient in the framework of the budgetary discharge procedure. In cases of technical problems, internal IT staff members may provide assistance and have access to FLUID if necessary. In each of these cases the transfer is considered necessary for the tasks each of these recipients is required to perform and only the necessary data for the performance of the task is communicated. Consequently, the EDPS notes that, in each case, the transfer of personal data within the EP seems to be in accordance with Article 7 (1) of Regulation 45/2001. However, the EDPS recommends that in accordance with Article 7 (3), each of the recipients is explicitly informed that they shall process the personal data they receive only for the purpose for which they were transmitted.

On the other hand, documents to be translated, as well as the evaluation of each translation carried out by the external translators, are transferred to external contractors. Article 8 of Regulation 45/2001 provides that personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC. In the present case, Article 8 (b) applies since the external contractor is a private entity which is contracted with the EP. The transfer of data by the EP is necessary for carrying out the translation work and the data subjects' legitimate interests cannot be prejudiced, since the transfer of data by the EP is necessary for the monitoring and evaluation of translations in the context of the contract's execution (see further on security requirements under Article 23 of the Regulation, point 2.8)

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

Article 13 of the Regulation provides for a right of access and sets out the modalities of its application following the request of the staff member concerned. Article 14 of the Regulation



provides that *"the data subject shall have a right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data"*.

There are two categories of data subjects who provide data which may form part of an evaluation. On one hand, the evaluators who will declare the evaluation acceptable or unacceptable. The result of their evaluation without their name is sent to the contractor concerned. On the other hand the contractor and the translators may wish to contest the evaluation result, they can contact the unit and the translation can be subject to a new evaluation and second opinion.

The rights of access and rectification are therefore respected in light of Articles 13 and 14 of the Regulation.

### **3.7. Information to the data subject**

Articles 11 and 12 of the Regulation 45/2001 provide that data subjects must be informed of the processing of data relating to them and list a range of general and additional items. The latter apply insofar as they are necessary in order to guarantee fair processing in respect of the data subject having regard to the specific circumstances of the processing operation.

In the present case, Article 11 of the Regulation applies since the External Translation Unit collects and processes data which are provided directly by the contractor and translator or reviser (through their contractor), namely contact details, translation, and in case of contest, their disagreement arguments etc.

There is no specific information on this aspect. The controller informed the EDPS that the External Translation Unit is in the course of preparing a relevant privacy notice.

The EDPS recommends that the External translation Unit prepares a clear privacy statement indicating all the elements listed in Article 11 of the Regulation. This statement should be provided to all data subjects concerned, namely the contractors and the evaluators of the EP before the processing of monitoring and evaluation procedure concerning their data begins.

### **3.8. Processing data on behalf of controllers**

Article 2 (e) of the Regulation 45/2001 states that *"processor' shall mean any natural or legal person, public authority, agency or any other body which process personal data on behalf of the controller"*. Article 23 of the Regulation stipulates on one hand, the role of the processor and on the other hand, the obligations of the controller in ensuring sufficient guarantees in respect of the technical and organisational security measures and ensuring compliance with those measures.

The contract between the EP and the potential external translation contractors makes reference to Regulation 45/2001 and mentions that each assignment shall be carried out by the contractor with the specific instructions given by the EP. Thus Article 23 (2) (a) is respected. Furthermore, the contract indicates a confidentiality clause which is in compliance with Article 21 of the Regulation on *"confidentiality of the processing"*, a provision clearly stated in Article 23 (2) (b). Nevertheless, Article 23 (2) (b) does not refer only to the obligations set out in Article 21, but also to Article 22 of the Regulation regarding the *"security of the processing"*. Taking into account that the contractor is subject to the law of Luxembourg and Belgium, the EDPS recommends that the controller (EP) should ensure that the obligations with regard to security measures laid down in the national law by virtue of Article 17 (3),

second indent, of Directive 95/46/EC are incumbent on the processor (external translation contractor). This clause should be added to the contracts.

### **3.9. Security Measures**

According to Article 22 of Regulation (EC) No 45/2001, concerning the 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 security measures adopted by the EP seem to comply with Article 22 of the Regulation.

### **4. Conclusion**

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

- inform each of the recipients that they shall process the personal data they receive only for the purpose for which they were transmitted;
- prepare a clear and detailed privacy statement indicating all the elements listed in Article 11 of the Regulation. This statement should be provided to all data subjects concerned, namely the contractors and the evaluators of the EP before the processing of monitoring and evaluation procedure concerning their data begins;
- ensure that the obligations with regard to security measures laid down in the national law by virtue of Article 17(3), second indent, of Directive 95/46/EC are incumbent on the processor (external contractor) by adding a clause in the contract;

Done at Brussels, 4 June 2010

(signed)

Giovanni BUTTARELLI  
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