



Opinion on a notification for Prior Checking received from the Data Protection Officer of Council regarding the processing of personal data in the context of a Quality Process Monitoring

Brussels, 26 July 2010 (Case 2009-0295)

1. Proceedings

On 30 April 2009, the EDPS received from the Data Protection Officer (DPO) at the General Secretariat of the Council (GSC) a notification for prior checking relating to the processing of personal data in the context of a Quality Process Monitoring.

The GSC decided to deploy its tool in two different steps. In a first phase, called pilot phase planned to run for several months, the tool was deployed only among a few language units. Then, as a second step, the full deployment of the tool within the GSC was foreseen.

The EDPS requested further information on 26 May 2009. This information was provided on 27 July 2009. Following his established approach as regards pilot projects, the EDPS analysed the procedure implemented in the context of the pilot project and provided specific recommendations relating to the pilot project on 1 September 2009, before its launch. The EDPS also provided recommendations that had to be taken into account for the full launch of the tool, in order to avoid any contradictions between the two phases (pilot phase and full launch of the system) that could have an impact on the protection of personal data. The pilot project was conducted by the GSC and results and conclusions of this exercise were provided in writing to the EDPS on 27 January 2010.

2. The facts

In view of providing the Heads of Language Units and individual members of staff with individual quality performance indicators, the Council intends to set up a Quality Process Monitoring (hereinafter "QPM"). In order to develop this QPM, the GSC has decided to conduct a pilot project. The expected duration of the pilot project was 9 months to 1 year.

The purpose of the processing is to systematically evaluate, through sampling, the linguistic and technical quality of documents produced by the Translation Department. General translation statistics, which focus on the volume of the translations per unit, are regularly used already by the Heads of Language Units. Similarly, general qualitative indicators are available since 2009.

But the Heads of Language Units had no individual quality performance indicators at their disposal. However, such indicators are considered essential management tools contributing to a fairer assessment of staff, in particular during the reporting exercise. The pilot project aimed at providing, through a sampling process, individual qualitative data on the contributions made by each person (translator, reviser, assistant) working on the sampled documents.

The **primary responsible person** for the data processing within GSC is the Translation and Document production. As underlined by the data controller, the quality monitoring system should be seen in the context of a number of performance indicators used as essential management tools in DGA-III, as recommended in the Court of Auditors Special Report N° 9/2006 concerning Translation expenditure incurred by the Commission, the Parliament and the Council, in particular §88 and §109 thereof.

For a number of years, DGA-III has been compiling production statistics, which are published at regular intervals. Similarly, “Results Monitoring”, which started as a pilot project in 2007 and has been rolled out to all language units in 2009, provided overall indicators of the quality of the translations delivered by DGA-III. These two elements cover global indicators at the level of the language unit or above, and involve no personal data.

As a third element, a pilot project on Individual Production Monitoring aimed at providing quantitative data on the individual production of members of staff in the language units. Indeed, on 1 October 2008, the EDPS issued an opinion on a notification for prior checking regarding the processing of personal data in the frame of a pilot project on Individual Productivity Monitoring (Case 2008-0436). There is a clear link between this processing operation and the QPM under analysis here. The pilot project on QPM, which is covered here constitutes the fourth and final element. Its purpose is to provide, through a sampling process, individual qualitative data on the contributions made by each person (translator, reviser, assistant) working on the sampled documents. Unlike “Results Monitoring”, “Process monitoring” will therefore involve the processing of personal data.

Regarding the **purposes**, the tool enables:

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

On the basis of the evaluation of actual output for the different activities carried out in the unit (translation, revision, formatting), an objective picture of individual performance can be established.

For this purpose, **data subjects** are Officials of the GSC, other servants, AD officials in translator or reviser function, AST officials in secretarial function. In the pilot project four language units were involved (The data subjects were all linguists and secretaries in those four language units), whereas in the final system, all language units are concerned.

The **data that are collected and processed** are: Document number; Document title (as the only indication of the nature of the document, which will help in assessing the difficulty); Source language; Target language; Date & time when attributed to the person; Date & time when finished; Net pages (for the purpose of ensuring that a significant amount of work is

assessed from each member of staff); Translator(s), reviser(s) and assistant(s) who worked on the document; and detailed evaluation of the quality of the work carried out by the person concerned, as assessed by the unit's Quality Controller or other staff, under the authority of the Head of Unit. This last type of data, the detailed evaluation, will give a description of each error encountered in the sample, following a typology (type of error and seriousness) as set out in the "Intermediate Report from the Think Tank on Quality Monitoring" (May 2007).

The data to be processed come from two **sources**. The WorkFlow system provides information on the persons (names of linguists and secretaries) who worked on the document being evaluated. The other source is the person who carries out the evaluation of the quality of the relevant document (evaluator). Typically, this is the Unit's Quality Controller or other senior linguists under the authority of the Head of Unit, who transmit their evaluations to the Quality Controller.

The individual samples are evaluated by the unit's quality controller or other members of the unit, under the authority of the Head of Unit. As underlined by the data controller, in the fully implemented system, the data produced in this way are to be used by the head of the data subject's unit and the individual members of staff as one element in the assessment of the quality of the work contributed by that person.

As to the **recipients**, results of the evaluation will be recorded on Excel sheets containing the person's name, and will be available to the Head of Unit and to the person concerned (the data subject). Anonymised data, containing no personal information, and aggregated by unit, will be available to DGA-III management.

As regards **storage**, the data are stored on a server disk.

During the pilot project, following clarifications asked by the EDPS on the storage of the Excel sheets, the data controller explained that the Excel storage procedure had not been worked out to a great level of details yet. It was explained that there could be a worksheet per individual, or they could all be included on a global worksheet, with Excel's data sorting facilities then being used to select an individual's data. An example of such workbook, comprising six different worksheets for different aspects of the evaluation, was provided by the controller, with the disclaimer that it was very much work in progress and that although the nature of the data to be included would be as shown, the format and presentation may still vary.

Furthermore, in its letter about the implementation of the EDPS' recommendations, the data controller provided more information on the procedure for the storage of data: "*Individual data will be stored in folders (one folder per language unit) which have been specifically created for the purpose on each unit's server, access to which is restricted to the Head of Unit and Quality Controller for the language concerned. At the request of DGA3's Resources Unit, DGA5 has therefore created one user group per unit, consisting of the unit's Head and Quality Controller, with full access (read and write) to the unit's Quality Monitoring folder. No other member of the unit and nobody else in DGA3 has access to these folders*".

Regarding the **retention period**, the data used for the pilot project will be deleted after one year of the end of the pilot phase. In the fully implemented system, data will normally be stored for a period not exceeding 2 years (until the end of each reporting exercise). Exceptionally in the event of appeals by individuals, it will be stored until the end of the appeals procedure. At the end of the retention period the data will be rendered anonymous.

Information will be provided to all the staff of the DGA-III Translation Department by individual note. The note will inform those persons of the monitoring schemes envisaged in the pilot project through sampling and that the processing operation has been notified to the DPO. In particular, data subjects will be informed about which categories of data will be made available in the system. Data subjects are also provided with the following additional information: a) identity of the controller, b) categories of data concerned, c) purposes of the processing operation: to ensure that DGA-III has in place Quality Monitoring procedures in line with its Framework Note on Quality Policy, d) recipients: Head of Unit concerned (personal data) and DGA-III Management (aggregated and anonymized data), e) each member of staff has a right of access to, and a right to rectify the data concerning him or her, f) further information: i) Legal basis: Article 207(2) of the EC Treaty and Article 23 of the Council's Rules of Procedure ii) time-limits for storing the data: until the end of reporting exercise iii) members of staff have the right to have recourse at any time to the European Data Protection Supervisor.

As regards the rights granted to the data subjects, those are provided in the respect of section 5 Council Decision 2004/644/EC of 13 September 2004 (OJ L n° 296, 21.9.2004, p. 20).

General **security measures** are implemented (...)

3. Legal analysis

3.1. Prior checking

Applicability of Regulation No 45/2001 ("the Regulation"): Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

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

The data processing is performed by an Institution, in this case, the General Secretariat of the Council, in the exercise of activities which fall within the scope of EU law (Article 3(1) of the Regulation).

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. In this case the processing is carried out both manually and automatically.

Regulation 45/2001 therefore applies.

Grounds for prior checking: Article 27(1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes Article 27(2)(b) "*processing operations intended to evaluate personal*

aspects relating to the data subject, including his or her ability, efficiency or conduct". The output of the pilot project as well as the main implemented system will be used by the head of the data subject's unit as one element in the assessment of the quality of the work contributed by each member of staff notably during the reporting exercise and the processing of data is therefore intended to evaluate the efficiency of staff members. The case therefore typically qualifies for prior checking.

Deadlines: The notification of the DPO was received on 30 April 2009. The EDPS requested further information on 26 May 2009. According to Article 27(4) the analysis was suspended. This information was provided on 27 July 2009. The EDPS provided his comments to the pilot project on 1 September 2009. The pilot project ran during several months and the DPO provided comments on 27 January 2010. As the EDPS considers that his recommendations have been implemented by the data controller, he did not submit the text for comments to the DPO

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the *"processing is necessary for performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body..."*. Furthermore, according to the recitals of the Regulation (§27), *"processing of personal data for the performance of tasks carried out in the public interests of the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies"*.

The legal basis for the processing of personal data of the processing on QPM is Article 207 of the EC Treaty, under which the Council decides on the organisation of the General Secretariat and adopts its Rules of Procedure. Article 23 of the Council Decision of 22 March 2004 adopting the Council's Rules of Procedure stipulates that the Council shall decide on the organisation of the General Secretariat. The Staff Regulations further provide that each institution must organise a reporting exercise. The QPM is used as a support tool for this reporting exercise. The QPM should be seen in the context of a number of performances indicators used as essential tools in DGA-III, as recommended in the Court of Auditors Report No 9/2006 concerning Translation expenditure incurred by the Commission, the Parliament and the Council, in particular §88 and §109 thereof.

It must also be examined whether and to what extent the processing can be considered as necessary for the management and functioning of the Council. It may be considered legitimate for Heads of unit to monitor the performance of staff members working for them, however this should not be the sole tool for evaluation and sufficient guarantees must be provided for staff members concerned to rectify inaccurate data or to provide justifications for certain figures. As further stated by the data controller, the tool is just one of the many aspects, which must be taken into account by the Head of Unit when evaluating the performance of a translator/reviser/secretary.

The EDPS recognises that the data processing operations performed are necessary support for the reporting exercise as provided for in the Staff Regulations and considers that the processing is therefore legitimate under Article 5(a) of Regulation 45/2001.

3.3. Data Quality

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

In the light of the elements provided in the notification, the EDPS considers that the data collected and processed in the processing operations (pilot project and full system) are adequate, relevant and not excessive in view of assessing individual and team production.

Article 4(1)(d) provides that personal data must be *"accurate and, where necessary, kept up to date"*. The pilot project must guarantee that the data are accurate and kept up to date. Granting a person the right of access and rectification will contribute to ensuring the accuracy of the data (see below 3.7 Right of access and rectification).

Article 4(1)(a) also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (see point 3.2) and fairness will be dealt with in relation to information provided to data subjects (see point 3.8).

3.4. Conservation of data/ Data retention

Article 4(e) of Regulation 45/2001 states that personal data must be *"kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed"*.

In the pilot project, it was foreseen that results of the evaluation would be recorded on Excel sheets containing the person's name, and be available to the Head of Unit and to the person concerned (the data subject).

In his analysis of the pilot project, the EDPS considered that the choice of the storage method and procedure (e.g. use of individual worksheets versus a global worksheet for all linguists) was an important aspect with regard to the technical and organisational possibilities of the access rights restrictions of the evaluators to specific worksheets (i.e. to those the evaluators are responsible for).

Therefore, the EDPS recommended that when defining the data storage procedure (in Excel or any other way) the data controller should take into account the need to restrict access rights per unit and per individual linguist (following the overall access control policy for the processing) and develop a system that from an organisational and technical point of view allowed for this.

The EDPS notes that the data controller adapted its procedure. It now foresees that the information collected would be stored on individual Excel sheets (i.e. one sheet per person concerned, namely the unit's AD officials in translator or reviser function and AST officials in secretarial function), in order to ensure that access to each sheet is restricted to the person concerned.

As underlined in the facts, the data used for the pilot project will be deleted after one year of the end of the pilot phase, and in the full implemented project, the individual personal data will normally be accessible for the automatic further processing of data for a period not exceeding two years (until the end of each reporting exercise). Exceptionally in the event of

appeals by individuals the data will be kept until the end of the appeals procedure. At the end of the retention period the data will be rendered anonymous.

The EDPS considers that this period of conservation is adequate in the light of the purposes of the processing of the data.

3.5. Compatible use / Change of purpose

According to Article 4§1(b) personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes". From the description of the facts, there is only one processing operation taking place. Therefore, no further processing of the data is foreseen

To the EDPS' knowledge, there are no current plans to link the QPM with the previously mentioned Individual Productivity Monitoring. However, if both pilot projects (individual production performance and individual quality performance) are successful and if they are later transformed into operational projects, the data from both projects will be available separately to the Head of Unit.

The EDPS is satisfied that the data will only be available separately to the Head of Unit but underlines that he should be kept informed if the GSC intends linking the two systems.

3.6. Transfer of data

Article 7 of Regulation (EC) No 45/2001 requires personal data to be transferred "*for the legitimate performance of tasks covered by the competence of the recipient*". In order to comply with this provision, in sending personal data, the data controller must ensure that (i) the recipient has the appropriate competences and (ii) the transfer is necessary.

The personal data and the detailed evaluation of the quality of the work carried out by the data subject are communicated to the data subject and to the Head of the data subject's unit. This communication must be examined in the light of Article 7. The data are transferred to the Heads of Unit as an element of support in the frame of the reporting exercise. The data are therefore transferred for the legitimate performance of the tasks covered by the competence of the recipient. Indeed, it is legitimate for the Heads of Unit to be informed of the quality of the work carried out by the staff under their supervision.

There is no transfer of data outside the institution to any other person or entity.

3.7. Right of access and rectification

According to Article 13 of Regulation (EC) No 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with the right to rectify inaccurate or incomplete data.

According to the notification, data subjects are afforded a right of access and rectification in Section 5 of the Council decision of 13 September 2004 implementing the data protection regulation. The data subject is also the permanent recipient of the data.

3.8. Information to the data subject

Pursuant to Articles 11 and 12 of Regulation (EC) No 45/2001, those who collect personal data are required to inform individuals that their data are being collected and processed.

In this case, the data are not collected directly from the data subject but the work carried out by individual members of the language units will be sampled in a systematic way.

Information must be provided according to Article 12 of the Regulation. According to the notification staff members participating in the pilot project and the full system are informed by individual note. The information (as described in the facts) includes all the items listed in the provision.

3.9. Security measures

According to Article 22 of the Regulation, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected"*. These security measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

(...)

On the basis of the available information, the EDPS does not see any indication to believe that the GSC has not applied the security measures required in Article 22 of the Regulation"

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation (EC) N° 45/2001 considering that the Council confirmed to the EDPS that it has implemented the recommendations provided for in the analysis of the pilot project. These recommendations were the following:

- *The GSC shall provide the EDPS with the conclusions and modifications it adopted on the system at the end of the pilot project and at the latest two month before full implementation of the system;*
- *The GSC should take into account the need to restrict access rights per unit and per individual linguist when defining the data storage procedure (in Excel or any other way);*
- *The GSC should provide a data processing - specific security policy where the data controller should explicitly describe: a) the different user profiles and user groups involved in the processing, b) the respective access rights granted to them, c) the organisational procedure for granting or deleting user rights;*

- The GSC should consider reviewing its logging policy for the specific processing operation.

Besides the ongoing discussion that the data controller is having with DGA5 regarding the logs and which should be followed-up, the EDPS considers that the recommendations made in the analysis of the pilot project have been implemented by the GSC.

Done at Brussels, 26 July 2010

(Signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor