



Opinion on the notification for prior checking from the Data Protection Officer of the Agency for the cooperation of Energy Regulators (ACER) concerning Probationary Reports and Staff appraisals including appraisal of Director

Brussels, 15 December 2011 (Case 2011-0953)

1. Proceedings

On 20 October 2011, the European Data Protection Supervisor (**EDPS**) received from the Head of Administration of the Agency for the cooperation of Energy Regulators (ACER) a notification for prior checking concerning the Probationary Reports and a notification concerning Staff appraisals including appraisal of Director, accompanied by the following documents:

- Decision AB 25/2011 establishing the policy and procedure for the performance appraisal of staff (including the performance appraisal report template),
- Decision AB 26/2011 concerning the appraisal of the ACER Director,
- Data protection information note for annual performance appraisal,
- Probationary Period Report template,
- Probationary Period for Management Posts template,
- Data protection information note for probationary period report.

2. Legal aspects

This Opinion deals with the probationary period report (staff and management), the annual appraisal of staff members (temporary and contract agents) and annual appraisal of the Director at the ACER¹ and is based on the Staff Evaluation Guidelines² which allows the EDPS to focus on the practices that do not seem to be fully compliant with the Data Protection Regulation (EC) 45/2001 (hereinafter "Regulation 45/2001").

The EDPS notes that the administrative and evaluation data are processed in compliance with data quality principles set out in Article 4(1)(a), (c) and (d). The right of access and rectification can be granted to the data subject in accordance with its Articles 13 and 14 (for the probationary period report), and the applicable security measures can be considered as adequate in terms of its Article 22.

However, the EDPS observes that a specific legal base for the probation procedure seems to be missing and that the data retention, data transfers and right of rectification (annual appraisal of staff members), as well as information policy, appear not to be in full compliance with the Regulation. Therefore, he addresses these issues in more detail below.

¹ Notifications for prior checking of the **promotion** and **regrading** procedures will be submitted at a later stage, the procedures are not set up yet (rules are expected to be adopted in the first half of 2012). Procedures concerning **attestation** and **certification** are not applicable for ACER which is not employing officials.

² Guidelines concerning the processing of personal data in the area of staff evaluation adopted on 15 July 2011 (EDPS 2011-042).

2.1. Lawfulness. The staff appraisal procedure and the appraisal of the Director procedure are based on Articles 43 of the Staff Regulations, as well as Article 15 (2) and 87 (1) of the CEOS as implemented in the two ACER Decisions listed above. These procedures can thus be considered lawful in terms of Article 5(a) of the Regulation 45/2001³ (read together with its recital 27).

However, no specific instrument based on Article 34 of the Staff Regulations and Articles 14 and 84 of the CEOS has been adopted by the agency for the probation procedure. Therefore, the EDPS recommends that a specific legal basis is being adopted in this respect.

2.2. Data retention. Staff appraisal and probation reports are kept in personal files for ten years after termination of employment or until the last pension payment.

Article 4(1)(e) of the Regulation 45/2001 states that personal data can be kept in a form permitting identification of data subjects for no longer than necessary for the purpose for which they were collected or further processed.

The EDPS is of the opinion that the necessity of the above mentioned storage period extending to the whole career is questionable and therefore invites the ACER to establish shorter deadlines in relation to the actual purposes of the processing. In similar cases, storage of appraisal and probation reports for maximum five years period after the end of a particular exercise was considered in conformity with the Regulation 45/2001⁴.

2.3. Data transfers. Whereas all data transfers within ACER, as well as to other EU institutions can be considered as in full compliance with Article 7(1) of Regulation 45/2001, all the recipients should be informed of their obligation to process the data received only for purposes for which they were transmitted.

Therefore, the EDPS recommends that all recipients are made aware of the purpose limitation set out in Article 7(3) of Regulation 45/2001.

2.4. Information to data subjects. The EDPS notes that information to data subjects is provided through a privacy statement posted on ACER intranet and attached to the probationary period report on one hand and to the annual appraisal report on the other hand. The EDPS carefully analysed the content of the information provided to data subjects.

Information concerning the legal basis should be completed. ACER Decisions implementing Articles 15 (2) and 87 (1) of CEOS should be added in the relevant privacy statement. Once the text of normative value is adopted concerning the probationary report, reference should be added in the relevant privacy statement.

Moreover, the EDPS notes that the Privacy statements for the probation and appraisal procedures do not inform data subjects about the impossibility to correct the (by nature subjective) evaluation data when exercising their right to rectification or the categories of data collected.

³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

⁴ cf. EDPS opinions on annual appraisal and probationary period of CPVO President and Vice-President of 28 July 2009 (EDPS 2009-355 and 2009-356).

The EDPS suggests that for all Privacy statements, the information on the right to rectification is revised in order to reflect the data categories and the impossibility to correct the (by nature subjective) evaluation data (which can be rectified within the respective appeal procedures).

In addition, the Privacy statements should be revised in the light of the recommendations made in this Opinion, in particular concerning the time limits for storage.

Finally, the EDPS recommends deleting the paragraph "general issues" in both privacy statements as this may be confusing for the data subject.

3. Conclusion

In view of the above, the EDPS recommends that the following measures are taken in order to ensure full compliance with Regulation 45/2001:

- a specific legal basis is provided for the probation procedure;
- shorter storage periods are established in relation to the actual purposes of the data processing unless precise justification for the conservation of the data for the period established is provided;
- all data recipients are reminded of the purpose limitation principle;
- the existing Privacy statements are revised as outlined above.

He would like to invite the ACER to inform him about the implementation of these recommendations within three months after receipt of this Opinion.

Done at Brussels, 15 December 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

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