



## **Opinion on the notification for prior checking from the Data Protection Officer of the Eurofound concerning Probationary Reports, Staff Appraisals and Promotions**

Brussels 19 December 2011 (case 2011-0628)

### **1. Proceedings**

On 28 June 2011, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Foundation for Improvement of Living and Working Conditions (**Eurofound**) a notification for prior checking concerning the Probationary Reports, Staff Appraisals and Promotions, accompanied by the following documents:

- Final Draft Decision on the promotion of officials and reclassification of temporary agents (Article 45);
- Final Draft Decision laying down by analogy the general provisions for implementing of Article 43 of the Staff Regulations and Articles 15 and 87 of the Conditions of Employment of Other Servants (Staff Appraisal);
- Procedure note for the proposed staff probation, appraisal and promotion/reclassification in Eurofound;
- Standard Information Sheet;
- Staff Appraisal Form;
- Feedback to Management Form;
- Regrading (NAP) Form;
- Office Notice on the Promotion Exercise 2011.

In reply to the EDPS request for additional information of 29 July 2011, a **revised notification** for prior checking was submitted to the EDPS on 15 September 2011, together with the following documents:

- Probation Report Form;
- revised Procedure note on staff probation, staff appraisal and promotion/reclassification in Eurofound;
- Tender Specifications published in July 2011;
- Standard Contract template;
- Summary Form sample<sup>1</sup>.

Accordingly, the procedure was extended by one month due to the complexity of the case on 12 October 2011. A reply to the further information request of 31 October 2011 was provided on 22 November 2011. On 12 December 2011, the DPO informed the EDPS that he has no comments on the draft Opinion submitted on 23 November 2011.

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<sup>1</sup> Entitled 'Indicative Analytical Table based on proposed promotion model' to be used instead of Standard Information Sheet.

## **2. Legal aspects**

This Opinion deals with the new staff appraisal, probation, promotion and reclassification procedures at the Eurofound<sup>2</sup> and is based on the Staff Evaluation Guidelines<sup>3</sup> 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 Article 13 and 14; as well as that the applicable security measure 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, as well as information policy appear not to be in full compliance with the Regulation. Therefore, he addresses these issues in more detail below.

**2.1. Lawfulness.** The staff appraisal, promotion and reclassification procedures are based on Articles 43 and 45 of the Staff Regulations, as well as Article 15 of the CEOS as implemented in the two Eurofound Decisions listed above. These procedures can thus be considered lawful in terms of Article 5(a) of the Regulation 45/2001<sup>4</sup> (read together with its recital 27).

At the same time, no specific instrument based on Article 34 of the Staff Regulations, as well as 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, as well as promotion and reclassification decisions 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 the whole career is questionable and therefore invites the Eurofound to establish shorter ones 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, as well as storage of promotion and reclassification decisions until the termination of employment was considered in conformity with the Regulation 45/2001<sup>5</sup>.

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<sup>2</sup> Notifications for prior checking of the certification and attestation procedures will be submitted at a later stage.

<sup>3</sup> Guidelines concerning the processing of personal data in the area of staff evaluation adopted on 15 July 2011 (EDPS 2011-042).

<sup>4</sup> 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.

<sup>5</sup> 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).

**2.3. Data transfers.** Whereas all data transfers within Eurofound, as well as to other EU institutions can be considered as in full compliance with Article 7(1) of Regulation 45/2001, only certain recipients seem to be aware of their obligation to process the data received only for purposes for which they were transmitted. In fact, only the members of the Joint Promotions Reclassifications Committee (JPRC) and the Joint Appeals Committee (JAC) are supposed to sign a notice of confidentiality and data privacy established in this respect.

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 should be provided in the **Human Resources Development Plan (HRDP) Guidelines** to be established after the adoption of this Opinion. These Guidelines should complement information already available in the **Office Notice on the Promotion Exercise 2011** that states the following: "*We would like to draw attention to the fact that in accordance with the Data Protection Directive you have the right to access, rectify, erase or block personal data, collected for the purpose of the Promotions exercise if such data is deemed inaccurate or incomplete.*".

In accordance with Articles 11 and 12 of Regulation 45/2001, information about controller's identity, purpose of the processing, data categories concerned, possible data recipients, rights of access, rectification and recourse to the EDPS, legal basis of the processing, time limits for data storage and the data origin should be provided to the data subject at the time of the data recording.

Consequently, the EDPS recommends that the HRDP Guidelines containing all these information are made available to all concerned staff members in an appropriate way and in due time. In particular, they may be posted on the Intranet, attached to the respective forms and/or mentioned in the Office Notices launching the particular procedure.

In addition, the existing Office Notice should be revised so that it refers to the Regulation 45/2001 rather than the Data Protection Directive, the actual way how to exercise rights of access and rectification (upon request to the controller), as well as the inherent limitation of the rectification right to appeal or comments by 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;
- information to data subjects is made available as announced;
- the existing Office Notice on The Promotion is revised as outlined above.

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

Done at Brussels, 19 December 2011

**(signed)**

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor  
(signed)