



Opinion on the notification for prior checking from the Data Protection Officer of the Fuel Cells Hydrogen Joint Undertaking concerning annual appraisal and probation

Brussels, 16 January 2012 (case 2011-835)

1. Proceedings

On 13 September 2011, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the Fuel Cells Hydrogen Joint Undertaking (**FCH**) a notification for prior checking concerning annual appraisal and probation of contract and temporary agents, as well as Executive Director and middle management.

The DPO reply of 8 November 2011 to an EDPS information request of 18 October 2011 was accompanied by the following documents:

- General Implementing Provisions of 17 November 2009 on the procedures governing the engagement and the use of contract staff at the FCH;
- General Implementing Provisions of 17 November 2009 governing the middle management staff;
- General Implementing Provisions of 17 November 2009 on the procedures governing the engagement and the use of temporary agents at the FCH;
- Decision of the FCH Governing Board of 17 November 2009 on the adoption of implementing rules to the staff regulations;
- Decision of the FCH Governing Board of 5 March 2010 concerning the appraisal for the Director;
- Decision of the FCH Governing Board of 5 March 2010 amending the Decision on the adoption of implementing rules to the staff regulations;
- Probationary Report form;
- Annual Report form;
- Draft Decision of the FCH Executive Director adopting implementing rules concerning the Data Protection Officer at the FCH.

The procedure was also suspended between 1 December 2011 and 10 January 2012 for DPO comments on the draft Opinion.

2. Facts

This prior checking Opinion deals with the already existing annual appraisal and probation procedures at the FCH and is based on the EDPS Staff Evaluation Guidelines of 15 July

2011¹ which allows the EDPS to focus on the practices that do not seem to be fully compliant with Regulation 45/2001².

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 Article 22.

However, the EDPS observes that a specific legal basis for annual appraisal of contract and temporary agents is 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 annual appraisal of the Director, the probation of temporary and contract agents, as well as the management trial period are based on the General Implementing Provisions of 17 November 2009 listed above, as well as on the Decision of the FCH Governing Board of 5 March 2010. These procedures can thus be considered lawful in terms of Article 5(a) of Regulation 45/2001 (read together with its recital 27).

At the same time, a specific legal basis for annual appraisal of temporary and contract agents based on Article 43 of the Staff Regulation and Articles 14 or 84 CEOS is still missing. The EDPS has, however, been informed that the respective implementing rules have been drafted. The FCH is therefore invited to provide a copy of these rules as soon as they are adopted. Furthermore, any recommendations made in the present Opinion should be reflected therein.

2.2. Data retention. Data processed in the context of annual appraisal and probation are kept for ten years after termination of employment or until the last pension payment, in accordance with the practice established by the European Commission in the Common Conservation List.

Article 4(1)(e) of 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 FCH 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 was considered in conformity with Regulation 45/2001³.

Consequently, the FCH is invited to reconsider the existing retention periods and establish shorter ones in relation to the actual purposes of the processing.

2.3. Data transfers. The data transfers within the FCH can all be considered necessary for the accomplishment of the respective task in the annual appraisal and/or probation procedures and thus in compliance with Article 7(1) of Regulation 45/2001.

¹ Guidelines concerning the processing of personal data in the area of staff evaluation (EDPS 2011-042)

² 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.

³ 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).

In order to ensure full compliance with the Regulation, the EDPS recommends that all data recipients are made aware of the purpose limitation set out in its Article 7(3).

2.4. Information to data subjects. The EDPS observes that although information pertaining to the nature of data and the processing in terms of Articles 11 and 12 of Regulation 45/2001 is meant to be provided to data subjects, only some general information on rights of access, rectification and recourse to the EDPS is actually contained in the Section 4 of the Draft Decision adopting implementing rules concerning the DPO listed above.

Therefore, he recommends that specific privacy notices are being established for the respective procedure outlining information on the identity of the controller, the purpose of the processing, data categories, data recipients, legal basis of the processing, data storage and the data origin. The information on right of rectification should reflect the impossibility to correct the (by nature subjective) evaluation data and refer to the right to lodge an appeal and/or to provide comments on the respective report.

These notices should be made available at the launch of the respective appraisal exercise.

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 annual appraisal of temporary and contract agents (as announced);
- the existing data retention periods are being reconsidered in terms of the actual purposes of the processing;
- all data recipients are reminded of the purpose limitation principle;
- specific privacy notices are being established and made available as outlined above.

Done at Brussels, 16 January 2012

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor