



Opinion on the notification for prior checking received from the Data Protection Officer of the European Court of Auditors concerning the ‘probationary period of Heads of Unit/newly appointed Directors’ procedures case

Brussels, 13 February 2012 (Case 2011-0988)

1. Procedure

By letter received on 26 October 2011, a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 (‘the Regulation’) was made by the Data Protection Officer (DPO) of the European Court of Auditors concerning the case: ‘probationary period of Heads of Unit/newly appointed Directors’.

The notification was accompanied by the following documents:

- Decision No 45/2010 of the Court of Auditors concerning the selection procedures for Heads of Unit and Directors;
- Decision No 23/2011 of the Court of Auditors defining the criteria for drafting appraisals for Heads of Unit and newly appointed Directors at the end of the probationary period;
- Decision No 64/2010 concerning the composition of the Reports Committee for 2011;
- note concerning the appraisal for the Head of Unit/Director;
- note for the attention of the President and Members of the Court concerning advancement to a higher step at the end of the nine months as Head of Unit;
- example of the form for halfway through the probationary period;
- example of the form for the end of the probationary period;
- note for the attention of the President and Members of the Court concerning the appointment of the mentor;
- Decision No 77/2006 of the Appointing Authority implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data as part of human resources policy.

The procedure was suspended on 17 November 2011 to request further information. The information was received on 20 January 2012. The draft opinion was sent to the controller for comments on 3 February 2012.

The comments were received on 7 February 2012. The opinion must be adopted no later than 5 March 2012 (2 months + 68 days of suspension).

2. Legal aspects

Probation procedures are addressed in the Guidelines issued by the European Data Protection Supervisor (EDPS) on the processing of personal data in the area of staff evaluation within the institutions and agencies of the European Union¹.

Therefore, the EDPS will first underline the practices which do not seem to be in conformity in terms of data protection under the Guidelines and will then restrict his legal analysis to those practices. It is understood that the recommendations made in the Guidelines and which are relevant to the processing in question apply.

The EDPS notes that data quality, the rights of data subjects and the security measures are in conformity with the Regulation.

The EDPS notes, however, that the lawfulness of the processing, data storage, the transfer of data and the information to be given to data subjects do not seem to be in full conformity with the Regulation. Moreover, it is essential to bring to mind the concept of the Supervisor.

2.1. Lawfulness of the processing. The European Court of Auditors bases the lawfulness of its processing on Article 5(b) of the Regulation.

Article 34 of the Staff Regulations and the corresponding articles of the CEOS include the obligation to serve a probationary period. The procedure put in place is specifically for organising performance appraisals during that probationary period and may therefore be regarded as necessary for the performance of a task carried out in the public interest on the basis of the above-mentioned legal provisions.

With this in mind, the EDPS recommends that the lawfulness of the processing should be based on Article 5(a) of the Regulation, according to which personal data may be processed only if processing is ‘necessary for the 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’, supplemented by Recital 27 which states, moreover, that the processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for their management and functioning.

2.2. Data storage. Electronic files are stored for three years. Probationary period reports are stored in the data subject’s individual file. That file is stored for eight years after the extinction of all rights of the person and of their dependants and at least 120 years after the data subject’s date of birth.

Article 4(1)(e) of the Regulation provides that data are stored 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.

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

<http://www.edps.europa.eu/EDPSWEB/edps/lang/en/Supervision/Guidelines>.

Although the EDPS is satisfied with the storage period of three years for electronic files, he reiterates nevertheless that he considers the storage of probationary period reports in paper form for a period of five years to be appropriate, as that type of document does not necessarily remain relevant throughout the whole career of the data subject. He therefore requests that the European Court of Auditors reassess the storage period for the data subject's probationary period reports.

However, the same does not apply to decisions appointing or confirming the official which may be stored for up to ten years after the last pension payment.

2.3. Data transfer. Data processed in the context of the probation procedure for Heads of Unit and newly appointed Directors are transferred only within the same institution or between Community institutions and bodies. Such transfers must therefore be examined in the light of Article 7 of the Regulation, paragraph 1 of which provides that 'personal data shall only be transferred 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 EDPS has taken due note of the various potential recipients to whom the data may be transferred. He believes that all such transfers are considered to be necessary for the legitimate performance of tasks covered by the competence of the recipient. He also reiterates that the personal data processed in this context may be transferred to OLAF, the Civil Service Tribunal, the EDPS and the European Ombudsman if they are considered to be necessary for the performance of a specific monitoring task, be it advisory or judicial. Transfers to the HR services of other institutions and bodies may also be necessary in the case of a transfer of a member of staff.

In order to ensure full conformity with Article 7(3) of the Regulation, the EDPS recommends reminding all recipients of their obligation not to use the data received for purposes other than those for which they were transmitted.

2.4. Information to be given to data subjects. The EDPS reiterates that to ensure transparency and fairness of processing, the information set out in Articles 11 and 12 of the Regulation must be provided to data subjects.

This information may be provided either when the data are collected or when they are first disclosed to a third party. The following means of communication have been regarded as appropriate for appraisal procedures:

- data protection clause in the report form or messages sent to data subjects; and
- specific privacy statement made available on the intranet.

The EDPS therefore requests that the European Court of Auditors provide it with one of those documents in order to comply with Articles 11 and 12 of the Regulation.

2.5. Controller. The European Court of Auditors, from a legal point of view, has general responsibility for all processing operations carried out within its institution (see in particular Article 1(1) of the Regulation). In practice, however, the internal management of processing operations to be notified falls under the responsibility of a Directorate-General, a sector, a unit or a specific department of the institution and is assigned to a contact person.

Points 1 and 2 of the notification must be revised accordingly.

3. Conclusion

The proposed processing does not appear to entail any infringements of the provisions of the Regulation, provided that account is taken of the above-mentioned observations. In particular, this requires:

- the lawfulness of the processing in question to be based on Article 5(a) of the Regulation;
- the storage time for probationary period reports in paper format to be reassessed;
- all recipients to be reminded of their obligation not to use the data received for purposes other than those for which they were transmitted;
- a document specific to the processing in question to be drawn up listing the information to be provided to data subjects, in accordance with Articles 11 and 12 of the Regulation;
- points 1 and 2 of the notification to be revised.

The EDPS requests that the European Court of Auditors adopt the necessary measures in order to comply with the Regulation. We would be grateful if you could provide the EDPS with all the relevant documents within three months of the date of this notice to prove that the recommendations have been implemented.

Done at Brussels, 13 February 2012

(signed)

Giovanni Buttarelli
(Assistant Supervisor)

Cc: Johan Van Damme, Data Protection Officer, European Court of Auditors