



Opinion on the notification for prior checking from the Data Protection Officer of the European Union Agency for Fundamental Rights on Performance Appraisal, Probation, Career Advancement, Reclassification, as well as Appraisal and Probation of the Director

Brussels, 21 March 2012 (cases 2011-938, 2011-954, 2011-1076 and 2011-1077)

1. Proceedings

The notification for prior checking on Performance Appraisal of Temporary and Contract Agents was submitted by the Data Protection Officer (DPO) of the European Union Agency for Fundamental Rights (**FRA**) on 17 October 2011, together with the following documents:

- Career Development Report template;
- Guidelines for the Performance Appraisal Exercise;
- Note of the Head of HR and Planning Department on Career Development Reports for Exercise 2010;
- Career Development Plan template for 2010;
- Explanatory Note on Career Development Plan.

The notification on Assessment of Probationary Staff was submitted on 21 October 2011 accompanied by the Probationary Period Plan, as well as Probationary Report forms for Contract and Temporary Agents.

The notifications on Appraisal and Probation of the Director, as well as Career Advancement of Temporary Agents and Reclassification of Contract Agents were submitted on 22 November 2011, together with the following documents:

- Decision of the FRA Executive Board No 2011/01 concerning the appraisal for the Director;
- Career Development Report - Annual Appraisal template;
- Probationary Report template;
- Management Probationary Period Report template;
- Decision of the FRA Director No 2010/44 regarding the Reclassification of Contract Staff;
- Decision of the FRA Director No 2011/04 on composition of Career Advancement Board for the Reclassification of Contract Agents in 2010 as amended by Decision No 2011/07;
- List of Contract Agents Eligible for Reclassification in 2010 template;
- Note of the FRA Director on Reclassification Procedure for 2010;
- Decision of the FRA Director No 2005/16 on Career Advancement Scheme for Staff of the EUMC;
- Decision of the FRA Director No 2011/03 on Composition of 2011 Career Advancement Board;
- Note of the FRA Director on Career Advancement Procedure 2011;
- List of Temporary Agents Eligible for Career Advancement in 2011.

The procedure was extended by one month on 23 January 2012, as well as suspended between 13 February and 14 March 2012 for DPO comments on the draft Opinion.

2. Legal aspects

This Opinion deals with the already existing annual appraisal, regular and managerial probation, career advancement, as well as reclassification procedures at the FRA. It is based on the Staff Evaluation Guidelines¹ which allows the EDPS to focus on the Agency practices that do not seem to be fully compliant with the Data Protection Regulation 45/2001².

2.1. Lawfulness. The appraisal and probation procedure for the FRA Director, as well as the career advancement and reclassification procedures are based on the FRA Decisions No 2011/01, 2010/44 and 2005/16 implementing the respective provisions of the Staff Regulations and Conditions of Employment of Other Servants (CEOS). These procedures can thus be considered lawful in terms of Article 5(a) of the Regulation 45/2001 (read together with its recital 27).

At the same time, no specific instrument based on Articles 34 and 43 of the Staff Regulations, as well as Articles 14, 15, 84 and 87 of the CEOS has been adopted by the FRA for the **appraisal and probation procedures for temporary and contract agents**. Therefore, the EDPS recommends that a specific legal basis is adopted in this respect.

2.2. Data retention. According to the information provided in the respective notifications, career development reports and probationary reports are kept in personal files for 20 years after the end of active employment or the last pension payment, whereas data processed in the context of the career advancement and reclassification procedures are kept for five years after the end of the particular exercise to allow for possible legal remedies.

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 existing time limits for career advancement and reclassification procedures can be considered in line with the Regulation. At the same time, the storage periods for appraisal and probation procedures extending the whole career of the data subject at the FRA do not seem to be necessary for the accomplishment of the respective evaluation exercise. In similar cases, the EDPS considered that a maximum storage period of five years after the end of a particular evaluation exercise was in line with the requirements of Article 4(1)(e) of the Regulation³.

Consequently, the FRA is invited to reconsider the existing retention periods for appraisal and probation procedures and establish shorter ones in relation to the actual purposes of the processing.

2.3. Data transfers. Whereas all data transfers taking place in this context can be considered necessary for the legitimate performance of tasks of the particular recipient in terms of Article 7(1) of Regulation 45/2001, none of the recipients seem to be aware of the purpose limitation set out in Article 7(3) of the Regulation.

¹ Guidelines concerning the processing of personal data in the area of staff evaluation adopted on 15 July 2011 (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 (now, EU) 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).

Therefore, the EDPS recommends that all recipients are reminded of their obligation not to process data for any other purposes than the ones for which they were transmitted.

2.4. Information to data subjects. The EDPS observes that no information pertaining to the nature of data and the processing in terms of Articles 11 and 12 of Regulation 45/2001 is provided in the context of probation, career advancement and reclassification procedures, as well as that the information provided within the appraisal procedure is incomplete.

Therefore, he recommends that specific privacy notices are 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. These notices should be made available at the launch of the respective evaluation exercise.

Furthermore, information on the controller's identity, data subject's rights of access, rectification and recourse to the EDPS, as well as data storage should be added to the existing Guidelines for the Performance 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 adopted for the appraisal and probation procedures for temporary and contract agents;
- maximum time limits for storage of personal data processed within appraisal and probation procedures are established in relation to the actual purposes of the processing;
- all data recipients are reminded of the purpose limitation principle;
- information to data subjects is provided as outlined above.

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

Done at Brussels, 21 March 2012

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor