



Opinion on notifications for prior checking from the Data Protection Officer of the Executive Agency for Competitiveness and Innovation on Annual Appraisal, Reclassification, Probation and Evaluation of the Ability to Work in a Third Language

Brussels, 29 May 2012 (cases 2011-998, 2011-999 and 2011-1000)

1. Proceedings

On 31 October 2011, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the Executive Agency for Competitiveness and Innovation (EACI) three notifications for prior checking concerning (1) annual appraisal or career development review (CDR), reclassification of contract agents and promotion of temporary agents, (2) probation and (3) evaluation of the ability to work in a third language before renewal of a contract for an indefinite period and/or first promotion of temporary agents. They were accompanied by the following documents:

- *Décision du Comité de Direction relative à l'évaluation des agents temporaires;*
 - *Décision relative à la carrière des agents temporaires et à leur affectation à un emploi à un grade supérieur à celui auquel ils ont été engagés (sur la base de l'article 10 du RAA);*
 - *Décision relative aux dispositions générales d'exécution de l'article 87, paragraphe 3, du RAA;*
 - *Décision relative aux procédures régissant l'engagement et l'emploi des agents temporaires (C(2007)4357);*
 - EACI General Implementing Provisions on the procedures governing the engagement and the use of contract staff (C(2008)1168);
 - Note to all staff on the annual career development review 2011;
 - Note to all staff on promotion/reclassification 2011;
 - 2011 Career Development Review Guide;
 - Decision on reclassification and promotion into the next higher grade (samples);
 - Note on Introduction of Mid-Term Probationary Period Dialogue and Feedback from Newcomers;
 - Mid-Term Probationary Period Dialogue form;
 - Note to all staff on the Requirement to demonstrate the ability to work in a third language;
 - Confirmation on the first, second and third language templates;
- as well as the respective Privacy policy statements.

On 24 January 2012, a copy of the *Décision du Comité de Direction relative à l'évaluation des agents contractuels* was submitted together with further information requested on 10 January 2012.

The procedure was extended for a month on 19 December 2011 due to the complexity of the matter, as well as suspended between 30 January and 22 May 2012 to allow for DPO comments on the draft Opinion.

2. Legal aspects

This Opinion deals with the already existing annual appraisal, probation, reclassification and third language knowledge evaluation procedures at the EACI. It is based on the Staff Evaluation Guidelines¹ which allows the EDPS to focus on the practices that do not seem to be fully compliant with the Data Protection Regulation 45/2001².

2.1. Lawfulness. The annual appraisal, reclassification, promotion and probation procedures are based on Articles 34, 43 and 45 of the Staff Regulations, as well as Articles 10, 14, 15, 84 and 87 CEOS as implemented in the six General Implementing Provisions listed above. These procedures can thus be considered lawful in terms of Article 5(a) of Regulation 45/2001 (read together with recital 27).

At the same time, the **evaluation of the third language knowledge of contract agents** is based on an interpretative note of the EACI Director established in this respect in terms of Article 85(3) CEOS, whereas the evaluation of the third language knowledge of **temporary agents** is carried out "in direct application of Article 45(2) of the Staff Regulations".

In order to ensure full compliance with Article 5(a) of Regulation 45/2001, the EDPS recommends that specific legal bases are adopted for the evaluation of the third language knowledge before the first promotion of temporary agents, as well as the renewal of contracts for indefinite period. These documents should provide for a description of the respective evaluation procedure, also in terms of the involvement of the EPSO (cf. also point 2.6 below).

2.2. Data quality. The EDPS welcomes the EACI announcement that the health related data processed in connection with the extension of probationary period due to maternity or sickness leave will be dealt in a separate document from the Probationary Period Report, as recommended in the Guidelines in terms of the application of Article 4(1)(c) of Regulation 45/2001.

2.3. Data retention. According to the information provided in the notifications, the data processed in the context of annual appraisal, probation, promotion, reclassification and third language evaluation procedures are kept for ten years after the termination of employment.

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 notes that there is no sufficient evidence that the existing storage periods which extend the whole career of the data subject at the agency are necessary for the accomplishment of the particular procedure. In similar cases, he 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.

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 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).

Consequently, the EACI is invited to reconsider the existing time limits. In principle, shorter retention periods should be established in relation to the actual purposes of the respective processing operations, unless precise justifications for the existing ones can be provided.

2.4. Data transfers. Whereas all data transfers taking place in this context can be considered as in full compliance with Article 7(1) of Regulation 45/2001, only certain recipients seem to be aware of the purpose limitation of the transfers in terms of Article 7(3) of the Regulation. In fact, only recipients in other EU institutions and bodies, as well as EPSO are being reminded of their obligation not to process the data received for any other purposes than the ones for which they were transmitted.

Therefore, the EDPS recommends that all recipients are made aware of the purpose limitation principle.

2.5. Information to data subjects. The EDPS notes that all information listed in Articles 11 and 12 of Regulation 45/2001 is provided in the existing Privacy policy statements published on the EACI Intranet.

Nevertheless, he suggests that the information on the respective legal basis is revised in order to refer to the EACI Decisions implementing the relevant provisions of the Staff Regulations and CEOS already mentioned therein.

2.6. Data processing on behalf of controller. According to the information provided in the notification, EPSO may be involved in the evaluation of the third language knowledge at the EACI. In fact, EPSO may be processing personal data of contract and temporary agents on behalf of the EACI in the course of the organisation of language tests, as well as the assessment of the test results. However, at present time, no contract between EACI and EPSO has been established to this respect.

Article 2(e) of Regulation 45/2001 defines the processor as an entity which processes personal data on behalf of the controller, whereas the conditions of the involvement of a processor are set out in Article 23 of the Regulation. Accordingly, the processing of personal data by a processor should be governed by a contract or legal act binding the processor to the controller outlining in particular the obligations to act only upon instructions of the controller, as well as to ensure security of the processing.

Consequently, the EDPS recommends that such a legal act providing for the confidentiality and security obligations of the processor is being established between the EACI and the EPSO.

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:

- specific legal basis are provided for the evaluation of the third language knowledge of contract and temporary agents;
- the reason for the extension of the probationary period is provided in a separate note from the Probationary Period Report as announced;
- the existing data retention periods are reconsidered;
- all data recipients are reminded of the purpose limitation principle;

- information on legal bases of the respective procedures is revised as indicated above;
- legal act between EACI and EPSO is established as outlined above.

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

(signed)

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