



Opinion on the notifications for prior checking from the DPO of the ERA concerning Probation, CDR, Reclassification, Evaluation of the Ability to Work in a Third Language, Use of Performance Indicators in the CDR of the FIA, as well as Renewal of Contract of Employment of the ERA statutory staff

Brussels, 14 June 2012 (cases 2011-960, 2011-961, 2011-962, 2012-087 and 2012-138)

1. Proceedings

The notifications for prior checking on Probationary Period and Career Development Review (CDR), Use of Performance Indicators in the CDR of the Financial Initiating Agents (FIA)¹, as well as Evaluation of the Ability to Work in a Third Language before the First Reclassification² were submitted by the Data Protection Officer (DPO) of the European Railway Agency (ERA) on 21 October 2011, together with the following documents:

- Decision on Staff Performance Appraisal at the ERA N° 118/04.2008,
- Decision N° 130/06.2008 governing Appraisal and Reclassification Exercises at ERA,
- Decision N° 149/09.2008 on the Attestation of the Required Level of the 3rd EU Language for Implementing Article 45.2 of the Staff Regulations and Article 10 of the CEOS,
- Annual/Interim/Midterm/Probationary Report template,
- Privacy Statement for Probationary Period and CDR at ERA,
- Privacy Statement for Certification of 3rd Language Working Knowledge.

A copy of Decision N° 119/04.2008 on Staff Reclassification at ERA, as well as a copy of the *contrat de service n° ERA/2011/ADM/FWC 07* were received on 9 January 2012, together with further information requested on 16 December 2011.

The notification on Reclassification was received by the European Data Protection Supervisor (EDPS) on 25 January 2012, together with the revised notification on Use of Performance Indicators in the CDR of the FIA.

A copy of Privacy Statement for Reclassification of Temporary Agents at the ERA was provided on 9 March 2012, together with further information requested on 7 March 2012.

The notification on Renewal of Contract of Employment was received on 10 February 2012. Additional information, a copy of the Privacy Statement, a copy of the Guidelines on the prolongations of contracts as well as a copy of the renewal template were provided on 2 April 2012.

¹ Preceded by an Article 46(d) consultation on the lawfulness and adequacy of the use of statistical data related to the number of financial operations validated in the ABAC System for the purpose of the CDR of the FIA - cf. EDPS letter to the ERA DPO of 5 May 2011 (EDPS 2011-397).

² Referred to as "certification of a 3rd language working knowledge".

On 30 April 2012, the DPO submitted the following documents:

- Decision on the engagement and use of temporary agents at the ERA N° 251/11.2009,
- Decision on the engagement and use of contract agents at the ERA N° 340/11.2010,
- Decision on a policy on renewal of temporary agents' contract at the ERA N° 150/ 09.08,
- Decision on the adoption of implementing rules to staff regulations at the ERA N° 135/06.2008.

The procedure was extended for a month on 28 March 2012 due to the complexity of the matter, as well as suspended between 18 April and 5 June 2012 to allow for DPO comments on the draft Opinion.

2. Legal aspects

This Opinion deals with six already existing evaluation procedures at the ERA, namely probation, annual evaluation, reclassification, evaluation of the third language knowledge, contract renewal, as well as the use of performance indicators in the annual evaluation of FIA.

The performance indicators used in this context consist of the number of registered financial transactions (payments, commitments and recovery orders) retrieved monthly through a Business Objective ABAC³ report and cross-checked yearly with actual work time related data (number of days actually worked) available in the database on absences and leave (**LeaMa**).

All these procedures are subject to prior checking on a basis of Article 27(2)(b) of Regulation 45/2001⁴ as they consist of evaluation of data subject's ability, efficiency and conduct. An additional ground for the use of performance indicators procedure is provided in Article 27(2)(c) of the Regulation as it allows for unforeseen linkages between the ABAC and LeaMa databases.

The Opinion is based on the Staff Evaluation Guidelines⁵ which allows the EDPS to focus on practices that do not seem to be fully compliant with 45/2001.

2.1. Lawfulness. The probation, CDR, reclassification, evaluation of the third language knowledge and renewal of contract are based on Articles 34, 43 and 45 of the Staff Regulations, as well as Articles 8 - 15 and 81 - 87 of the CEOS as implemented in the Decisions of the ERA Executive Director 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 specific legal basis for the **use of the performance indicators** in the CDR of the FIA seems to be missing. The EDPS observes that none of the following legal provisions listed in the notification can be considered as a specific legal basis for the use of the ABAC related data in the CDR of the FIA:

- ERA Regulation 1335/2008⁶,
- Article 83 of the Financial Regulation, Article 103 of the respective Implementing Rules,
- Articles 43 and 110 of the Staff Regulations and Articles 15(2) and 87 of the CEOS,
- ERA Decisions N° 118/04.2008 and 130/06.2008 mentioned above.

³ Accrual Based ACcounting.

⁴ 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.

⁵ Guidelines concerning the processing of personal data in the area of staff evaluation adopted on 15 July 2011 (EDPS 2011-042).

⁶ Regulation (EC) No 1335/2008 of the European Parliament and of the Council of 16 December 2008 amending Regulation (EC) No 881/2004 establishing a European Railway Agency.

Therefore, he invites the ERA to establish such a legal basis. The latter should not only describe the respective data processing and its impact on the annual evaluation, but also provide for adequate guarantees for rectification of inaccurate data and justification of certain figures by the staff member concerned, as outlined in the Staff Evaluation Guidelines. In principle, the data subject should be able to contest the accuracy of the ABAC statistics, as well as the LeaMa related data before their (further) use for his annual evaluation.

2.2. Data retention. According to the information provided in the respective notifications, probationary reports, CDRs, reclassification decisions, language certificates, as well as the ABAC and LeaMa related data are kept in the personal files for ten years after the termination of employment or 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 notes that there is no sufficient evidence that the above mentioned storage periods extending to the whole career are necessary for the respective purposes. Therefore, he invites the ERA to reconsider these time limits and to provide for precise justifications that will be taken into account in the upcoming discussions with the relevant stakeholders.

Furthermore, the necessity of the storage of language certificates collected for the purpose of the first reclassification and the storage of the actual reclassification decision beyond the end of career at the agency also need to be reconsidered, as well as the necessity of the further storage of the ABAC and LeaMa related data.

2.3. Data transfers. Whereas all data transfers within ERA 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 them seems to be aware of the purpose limitation set out in Article 7(3) of the Regulation.

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 notes that the three existing Privacy Statements mentioned above provide for most information about data processing in the context of probation, CDR, third language evaluation and reclassification as required in terms of Articles 11 and 12 of Regulation 45/2001.

Nevertheless, no information appears to be provided about the use of the performance indicators as the "common Privacy Statement for Probation Period and CDR" does not contain any information in this respect (contrary to the indications in the respective notification).

Therefore, the EDPS recommends that the existing Privacy Statement is revised to provide all information about data processing of ABAC and LeaMa related data for the purpose of staff evaluation as outlined in Article 12 of the Regulation.

Moreover, information about the recourse to the EDPS should be added to the existing Privacy Statements, as well as information on right to rectification should reflect the impossibility to correct the (by nature subjective) evaluation data and refer to the right to lodge an appeal and/or provide comments on the actual reports.

Finally, the Privacy Statement on renewal of contract should stipulate that request for rectification of personal data shall be dealt with without delay and not within one month as it is currently indicated.

2.5. Data processing on behalf of the controller. The EDPS notes that an external contractor is involved in the evaluation of the ability to work in a third language. In fact, the Belgium based CCL⁷ is in charge of the language courses and tests leading to certificates of particular language knowledge. So, the CCL is processing personal data of staff members on behalf of the ERA and in particular, establishes the presence/absence lists for the courses, as well as the actual test results.

Pursuant to Article 23(2) of Regulation 45/2001, the contract binding the processor to the controller should at least provide for a confidentiality and security clause set out in Articles 21 and 22 of the Regulation and/or the respective national data protection provisions implementing Articles 16 and 17 of Directive 95/46⁸. Accordingly, the processor can only process the data upon instructions from the controller, and as has to adopt appropriate technical and organisational measures to ensure the security of the processing.

The confidentiality clause provided in Article II.9 of the service contract only refers to the obligation not to divulge the data transmitted and/or use them for other purposes.

Therefore, the EDPS recommends that the existing service contract is revised in order to provide for the confidentiality and security obligations set out in the applicable Belgian data protection rules.

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:

- special legal basis for the use of the performance indicators in the CDR of the FIA is adopted;
- the existing data retention periods are reconsidered in terms of the actual purpose of the respective processing;
- all data recipients are reminded of the purpose limitation of the transfers;
- the existing Privacy Statements are revised as outlined above;
- the existing service contract is revised as indicated above.

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

Done at Brussels, 14 June 2012

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

⁷ *Centre de langues de Louvain-la-Neuve.*

⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.