



Opinion on a notification for prior checking received from the Data Protection Officer of the European Central Bank on "Assessment of management skills"

Brussels, 07 March 2006 (Case 2004-273)

1. Proceedings

- 1.1. On 20 July 2004 the European Data Protection Supervisor (EDPS) sent a letter to all Data Protection Officers (DPOs) asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested communication of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.
- 1.2. On 15 September 2004, the DPO of the European Central Bank (ECB) listed the case of "Assessment of management skills" as a case for ex-post prior checking.
- 1.3. On 16 August 2005, the DPO consulted the EDPS under Article 46(d) of Regulation 45/2001 on the question of denial of access to the assessment report (case 2005-0213). The EDPS issued a reply to this consultation on 5 October 2005 and invited the DPO to submit the case for prior checking at his best convenience.
- 1.4. On 7 November 2005, the EDPS received the notification of the case for prior checking.
- 1.5. On 9 November 2005, the EDPS made a request for information. This was answered to by e-mail on 16 November 2005. Further information was requested on 23 November 2005. A reply was received on 19 January 2006.

2. Examination of the matter

2.1. The facts

Vacant posts at the ECB are published on the ECB website. Applications for such posts are only possible on-line.

Whenever at the ECB a vacant position at management level needs to be filled, candidates (ECB staff or external candidates) who apply for such a position must individually undergo a structured interview with representatives of an external consultancy company. The names of the consultants who are carrying out the interview are made known to the candidates. Based on the

interview, the company assesses the managerial capabilities of the respective candidate and produces an assessment report which is sent to the ECB's Recruitment and Staff Development Division. The assessment report is made available to all members of the Selection Panel; one hard copy is kept by the Recruitment and Staff Development Division for six months. Candidates do not receive a copy of the report. Invited candidates are offered the possibility to contact the external consultant's representative conducting the interview and to obtain verbal feedback on their managerial skills. The Report containing the external consultant's assessment is regarded as confidential and will not be provided to the candidates.

On the basis of the Selection Committee's recommendations, a candidate placed on a reserve list may be appointed to a position similar to that for which he/she was interviewed, within the same recruiting area. These reserve lists are valid for a period of six months.

In a broader context, all candidates applying on-line, whether for managerial posts or not, can access the general data protection information published on the Career pages of the ECB website ("Working for Europe"). This information covers the purpose of the processing; the persons to whom access to the data is given (Members of the Selection Committee, Directorate Human Resources); to whom the data is transmitted (subcontractors in certain cases); an undertaking to preserve confidentiality; the right of access and rectification as concerns data introduced on-line when applying for a post; the possibility to have recourse to the EDPS and the conservation period. In this respect the website informs that "The processing of your data starts from the moment it is submitted and is retained as long as the campaign is not closed and a suitable applicant recruited. Thereafter the information is kept for a 24-month period".

The website also informs candidates that for managerial positions, an assessment of the invited applicant's managerial skills is conducted in Frankfurt am Main by an external consultant. According to Article 7.7 of the Administrative Circular 5/2004 on "Rules for recruitment", the Directorate General Human Resources Budget and Organisation informs candidates invited for the selection procedure in advance of the tests and/or selection tools to be used.

ECB staff members are also provided with information on the selection procedure when they access the Administrative Circular 5/2004 on "Rules for recruitment" published on the ECB intranet.

Personal data contained in the assessment reports do not undergo any automated processing operation within the ECB. Only the hard copy of the assessment is kept for six months by the Controller.

Upon request by the candidate, the ECB can consider rectification of the facts (basic data) contained in the assessment report.

A number of physical measures are put into place in order to preserve the security of the documents.

A contract has been established between ECB and the external consultancy concerning the assessment procedure.

2.2. Legal aspects

2.2.1. Prior checking

The notification received on 7 November 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" - Article 2 sub a) by a Community body in the exercise of activities within the scope of Community law.

The assessment of management skills must be considered as a processing operation under the terms of Article 2 sub b) of Regulation 45/2001 since it involves the processing of personal data relating to candidates for managerial posts. The processing is manual, but is intended to form part of a filing system and thus falls under the scope of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct. This is clearly the purpose of the assessment of management skills by the ECB.

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case however the processing operation has already been established. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

A question on a specific point of the selection procedure was addressed as a consultation to the EDPS namely the right of access to the assessment report (case 2005-0213). The outcome of this consultation will be mentioned where appropriate in this opinion (2.2.6. Right of access).

Furthermore, it must be underlined that the present prior checking procedure concentrates on one aspect of the procedure of selection of candidates for managerial posts known as the "Assessment of management skills".

The notification of the DPO was received on 7 November 2005. The delay was suspended by two requests for information for 7 + 57 days. According to Article 27(4) the present opinion must be delivered within a period of two months that is no later than the 13 March 2006.

2.2.2. Controller and processor

As mentioned in the facts, the assessment, object of the prior check, is carried out by representatives of an external contractor who produces an assessment report which is sent to the ECB's Recruitment and Staff Development Division. The external contractor is to be qualified as a "processor" in terms of Article 2 sub e) of Regulation 45/2001, processing the personal data of candidates "on behalf of the controller" i.e. of the ECB's Recruitment and Staff Development Division. The requirements stemming from this relationship will be examined below (2.2.9. Processing on behalf of controllers).

2.2.3. Legal basis for and lawfulness of the processing

According to Article 20.2 of the Rules of Procedure of the ECB, "Members of staff shall be selected, appointed and promoted with due regard to the principles of personal qualification, publicity, transparency, equal access and non discrimination. An Administrative Circular shall further specify the rules and procedures for recruitment and for internal promotion".

Article 7.7 of Administrative Circular 5/2004 on "Rules for recruitment" thus provides that "in agreement with the Directorate Human Resources, tests and other selection tools, as appropriate, may form part of the selection procedure. The Directorate Human Resources shall inform candidates invited for the selection procedure in advance of the test(s) and/or other selection tools to be used".

Analysis of the legal basis and analysis of the lawfulness of the processing go together. Article 5, point (a), of Regulation (EC) 45/2001 stipulates that personal data may be processed only if the "*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 in the legitimate exercise of official authority vested in the Community institution*". The recitals to the Regulation further specify that "processing of data for the performance of tasks carried out in the public interest of the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies". The legal basis as provided for by the Rules of Procedure and Administrative Circular 5/2004 support the lawfulness of the processing in accordance with Article 5 of Regulation (EC) 45/2001.

2.2.4. Data Quality

According to Article 4(1) sub c, data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. In principle, according to the facts as stated in the notification, the assessment report only includes basic personal data and data related to their managerial capabilities. In order to ensure the respect of this rule, the EDPS recommends that a provision to the effect of ensuring the pertinence of the data be inserted in the contract binding the contractor to the ECB.

The data must be "accurate and where necessary kept up to date" (Article 4(1) sub d). To this effect, every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified. The system itself should therefore provide guarantees of accuracy of the data processed. This could notably be a clause of the contract between the ECB and the external consultancy company. This requirement will be examined further below (2.2.6. Right of access and rectification).

2.2.5. Conservation of data

Article 4(1) sub e) of Regulation 45/2001 provides that personal data may be kept in a form which permits identification of data of data subjects for not longer than is necessary for which the data are collected and/or further processed.

Hard copies of the assessment report are kept for six months by the Recruitment and Staff Development Division reason being that following the interview, a candidate may be selected to fill the position, rejected or put on a reserve list. On the basis of the Selection Committee's recommendations, a candidate placed on a reserve list may be appointed to a position similar to that for which he/she was interviewed, within the same recruiting area. These reserve lists are valid for a period of six months. This conservation period therefore seems fully justified in the

light of these facts as concerns candidates put on a reserve list. As concerns candidates which have been appointed or rejected, this six month period also serves to enable candidates to exercise their right of access as will be seen below.

2.2.6. Right of access and rectification

Access to the report containing the external consultant's assessment is regarded as confidential and is therefore not provided to the candidates. Candidates may only obtain oral feedback on their managerial skills. The exercise of the right of access under Article 13 of the Regulation has been the object of a previous consultation of the EDPS since a question arose as to the compatibility of the practice of access to the assessment reports and the right of access according to Regulation 45/2001 (case 2005-0213).

In his opinion in the frame of this consultation, the EDPS has taken the position that the ECB staff member has a right of access to his/her assessment report under Article 13 of Regulation (EC) No. 45/2001, but certain limitations have to be respected:

- (1) The data communicated should be limited to the final decision, for instance, without stating the debate surrounding this conclusion;
- (2) If the access reveals a comparative assessment, the names (or any other potential mean of identification) of others must be removed or masked;
- (3) If necessary to protect the rights and freedoms of others, the access to the names of the persons involved in the assessment (or any other potential mean of identification) could be limited.

The EDPS would like to see these recommendations enacted in practice when applicable. As concerns the third recommendation, the names of the two representatives of the consultancy company are known to the candidates at the time of the interview and therefore need not necessarily be hidden from him in a further stage.

As for the right of rectification of incomplete or inaccurate data granted to data subjects under Article 14, it is granted to candidates as concerns basic data (facts). The EDPS adheres to the position of the ECB according to which the right of rectification does not apply to subjective evaluation data as included in the assessment report.

2.2.7. Information to the data subject

Articles 11 and 12 provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data have not been obtained from the data subject, the information must be given when the data are first recorded or disclosed, unless the data subject already has it (Article 12).

As mentioned in the facts above, candidates may only apply on-line on the website of the ECB. The information provided covers the purpose of the processing; the persons to whom access to the data is given (Members of the Selection Committee, Directorate Human Resources); an undertaking to preserve confidentiality; the right of access and rectification as concerns data introduced on-line when applying for a post; the possibility to have recourse to the EDPS and the conservation period. This information is considered as adequate in the light of Regulation 45/2001. However, the website informs that "The processing of your data starts from the moment it is submitted and is retained as long as the campaign is not closed and a suitable

applicant recruited. Thereafter the information is kept for a 24-month period". This period does not correspond to the conservation period notified to the EDPS in the notification form which is said to be 6 months. The EDPS would like to see consistency on this point.

2.2.8. Security measures

According to Articles 22 and 23 of the Regulation 45/2001, the controller and the processor shall implement the appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

After careful analysis by the EDPS of the security measures adopted, the EDPS considers that these measures are adequate in the light of Article 22 of Regulation (EC) 45/2001.

2.2.9. Processing data on behalf of controllers

Article 23 of the Regulation provides that where a processing operation is carried out on its behalf, the controller shall choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 of the Regulation and ensure compliance with those measures.

The carrying out of a processing operation by way of a processor shall be governed by a contract or a legal act binding the processor to the controller and stipulating in particular that the processor shall only act on instructions from the controller and that the obligations as concerns confidentiality and security laid down in Articles 21 and 22 are also incumbent on the processor unless he is already subject to obligations with regard to confidentiality and security laid down in the national laws of the Member States.

As mentioned above, the external contractor processes personal data in the frame of the assessment exercise on behalf of the ECB. The contractor must be qualified as a processor according to the Regulation.

The contractor is subject to national data protection law and is therefore subject to obligations with regard to the confidentiality and security of the data as laid down by that national law.

Furthermore, a contract exists between the controller and the contractor. This contract clearly stipulates an obligation of confidentiality on the part of the consultant as concerns information relating to the services or the ECB. The consultant must also comply with relevant provisions of data protection law.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account:

- In order to ensure the respect the quality of the data, the EDPS recommends that a provision to the effect of ensuring the pertinence of the data be inserted in the contract binding the contractor to the ECB;

- the EDPS would like to see the recommendations as concerns the right of access to the assessment report by the person concerned and as formulated in the EDPS opinion in the frame of consultation 2005-0213 enacted in practice when applicable and notably:
 - 1) The data communicated should be limited to the final decision, for instance, without stating the debate surrounding this conclusion;
 - 2) If the access reveals a comparative assessment, the names (or any other potential mean of identification) of others must be removed or masked;
 - 3) If necessary to protect the rights and freedoms of others, the access to the names of the persons involved in the assessment (or any other potential mean of identification) could be limited.;
- the EDPS would like to see consistency in the information provided to data subjects as concerns the period of conservation of the data, and the actual conservation period.

Done at Brussels, 07 March 2006

Peter HUSTINX
European Data Protection Supervisor