

Opinion on a notification for prior checking received from the Data Protection Officer of the Community Plant Variety Office concerning "Evaluation of the President and the Vice-President of the CPVO"

Brussels, 28 July 2009 (Cases 2009-355 and 2009-356)

1. Proceedings

On 14 May 2009, the European Data Protection Supervisor (hereinafter EDPS) received from the Data Protection Officer (DPO) of the Community Plant Variety Office (hereinafter CPVO) two notifications for prior checking concerning annual appraisal, probationary period and management trial period of the President of the CPVO and of the Vice-President of the CPVO.

The notification was accompanied by:

- Decision of the Administrative Council of the Community Plant Variety Office concerning the appraisal of the President of the CVPO,
- Decision of the Administrative Council of the Community Plant Variety Office concerning the appraisal of the Vice-President of the CVPO,
- Template of the "Carrier Development Report" form,
- Template of the "Probationary report" form,
- Template of the "Management probationary period report" form,
- Internal memo to the attention of reporting officers.

The EDPS requested the DPO to validate the facts and provide supplementary information on 1 July 2009. The DPO answered on 9 July 2009. The draft opinion was sent to the DPO for comments on 17 July 2009 and these were received on 28 July 2009.

2. Facts

The present opinion is based on facts as provided by the DPO in the notification and in the supporting documents.

The present notification concerns the evaluation of the President of the CPVO and of the Vice-President of the CPVO as foreseen in Articles 34, 43, 44 and 46 of the Staff Regulations of Officials of the European Communities (hereinafter Staff Regulations) and Articles 14 and 15(2) of the Conditions of Employment of Other Servants of the European Communities (hereinafter CEOS).

The conditions for the establishment of annual appraisal, probationary period and management trial period of the President of the CPVO and of the Vice-President of the CPVO

are laid down in the "Decision of the Administrative Council of the Community Plant Variety Office concerning the appraisal of the President of the CVPO" and the "Decision of the Administrative Council of the Community Plant Variety Office concerning the appraisal of the Vice-President of the CVPO" which are not yet adopted (hereinafter Decisions).

The controller for the present processing of personal data is the head of the CPVO Human resources service.

The data subjects concerned are the President of the CPVO and the Vice-President of the CPVO who are temporary agents within the meaning of the Article 2a) of the CEOS as well as the reporting officers who are members of the Administrative Council and the Chairman of the Administrative Council of the CPVO.

2.1. Description of the data processing operations

The appraisal of the President of the CPVO and of the Vice-President of the CPVO (hereinafter *jobholders*) is conducted by the *reporting officers* who are two members of the Administrative Council (hereinafter AC) appointed by the AC in accordance with Article 3 of the Decisions.

The *appeal assessor* (the Chairman of the Administrative Council) makes the final decision on report of the jobholder after consultation of the Administrative Council.

The *CPVO Human resources service* provides administrative support in the process. Within the service the following persons have access to the data: HR officer, his/her replacement and HR secretary.

Probationary period appraisal

The probationary period starts on the first day of the entry into service of the probationer and finishes at the end of a six month period.

During the month which follows the first day of entry into service, the reporting officers meet the probationer in order to comment on his job description and to agree, in writing, on how the objectives and the performance level expected from the probationer will be assessed during his probationary period.

At the latest month before the expiry of the probationary period, a final report shall be drawn up on the efficiency of the probationer, on his competencies to perform the duties pertaining to his post and on his conduct in the service. The report is divided into six chapters. The reporting officers fill in chapters 1 to 4 before a formal dialogue is held with the probationer. After the dialogue has been held, the reporting officers, in case of Vice-President after consulting the President of the CPVO, finalise the report and fill in chapter 5. In case of need, the probationary period may be extended for a maximum period of six months.

After having being notified of the report in writing, the probationer has eight working days to accept the report without making any observations, accept it after adding comments in the appropriate section of the report, or refuse the report justifying his/her decision. The appeal procedure is the same as for the annual appraisal procedure (see below). If the probationer accepts the report, the procedure is closed.

Management probationary period appraisal

The probationer performing for the first time senior management functions shall serve a management probationary period of nine months. The management probationary period begins the first day of entry into service of the probationer and finishes at the end of a nine month period.

After the end of the management probationary period, the reporting officers draw up a draft report. The report is divided into three chapters. The jobholder and the reporting officers hold a formal dialogue and at the latest 10 working days after this dialogue, the reporting officers can, in case of Vice-President after consulting the President of the CPVO, either propose a positive appraisal of the management probationary period or propose its extension. After having being notified of the report in writing, the probationer has eight working days to comment on the report. A report is deemed to be accepted in case of absence of reaction of the probationer within the time foreseen. The appeal procedure is not foreseen.

Annual appraisal

The jobholder is subject to an annual appraisal exercise, organised at the beginning of each calendar year. The reference period for the annual appraisal is from 1 January to 31 December of the preceding year.

To this end, an annual report covering the reference period is drawn up for the jobholder. The report is divided into eight chapters. The reporting officers fill in chapters 1, 2 and 3 and send the report to the jobholder and ask him/her to do a self assessment and to fill in chapter 5. Once completed the report is sent back to the reporting officers and a date for a formal dialogue is set. Both jobholder and reporting officers meet for a formal dialogue which covers the fulfilment of objectives, implementing of the Office's work programme, and a training plan (chapter 4). After the formal dialogue has been held, the reporting officers, in case of Vice-President after consulting the President of the CPVO, draw up a draft career development report which includes appraisals of efficiency, abilities and conduct in the service which is consistent with the indications given during the formal dialogue (chapters 6 and 7).

The draft report is then transmitted to the jobholder, who is allowed up to 5 working days to accept the appraisal without adding any comment, accept it after adding some comments in the appropriate section or refuse to accept it, stating in the appropriate section the reasons for requesting that it is reconsidered. If the jobholder accepts the annual appraisal report, the latter is considered as being final. If the jobholder fails to react within the time limit, he /she shall be deemed to have accepted the report.

If the jobholder refuses to accept the career development report, the reasoned refusal is transmitted to the appeal assessor, who has 5 working days to deliver his/her opinion. After consultation with the Administrative Council, the appeal assessor confirms or amends the report. When the appeal assessor departs from the opinion of the Administrative Council, he/she must justify his/her decision. The report is then closed and communicated to the jobholder and to the Administrative Council.

2.2. Purpose of the processing

The purpose of the data processing in question is to assess the efficiency, the competencies and the aspect of conduct in the service of the jobholder.

2.3. Categories of data processed

The "Probationary Report" contains the following information:

- period of appraisal (from - to);
- reporting officers' details: surname, first name(s), position;
- jobholder's details: surname, first name(s), staff number, status and grade, contact details;
- reporting officers' appraisal containing assessment of capacities and aptitudes of the jobholder including general comments and final recommendations as well as reporting officers' signatures;
- if applicable jobholder's breaks in service (length and reasons);
- jobholder's eventual comments and signature;
- if applicable, Chairman of the Administrative Council opinion, decision and signature;

The "Management Probationary Period Report" contains the following information:

- period of appraisal (from - to);
- reporting officers' details: surname, first name(s), staff number, institution, function;
- jobholder's details: surname, first name(s), status and grade, function;
- reporting officers' final decision as well as reporting officers' signatures;

The "Career Development Report" contains the following information:

- period of appraisal (from - to);
- reporting officers' details: surname, first name(s), institution, function;
- jobholder's details: surname, first name(s), staff number, status and grade;
- description of overall purpose, functions and duties of the jobholder;
- list of planned objectives for the period of appraisal, and assessment criteria, personal development goals and assessment criteria;
- jobholder's self-assessment report containing achievement of objectives and description of personal development;
- reporting officers' appraisal containing assessment of efficiency, abilities, competencies, conduct in service and overall summary as well as reporting officers' signatures;
- jobholder's eventual comments and signature;
- if applicable, Chairman of the Administrative Council opinion, decision and signature;

2.4. Data retention

The data are collected in paper form. The templates of the reports are sent electronically by email to the different contributors. Once completed, they are printed, signed and transmitted on paper to the HR department.

The paper copy of the final report is kept in the personal file of the jobholder in the HR Department for 10 years starting at the date of the end of contract.

The report is also scanned directly by HR department (PDF format) to be included in Docman (electronic storage of documents system). The report remains in the system for 10 years starting at the date of the end of contract.

This electronic copy in Docman is accessible only to the HR officer, his/her replacement and the HR secretary via a password.

Storage for historical, statistical or scientific purposes is not being envisaged.

2.5. Information provided to the data subjects

The whole process of appraisal is detailed in the two decisions concerning the appraisal of the President and Vice-President of the CVPO.

The jobholders are informed, when signing the engagement contract (articles making reference to the Staff Regulations), of the two probationary reports to be drawn up during the first 6/9 months. He/she is also informed orally about the appraisal to be drawn up annually. The Decisions of the Administrative Council of the CPVO concerning the appraisal, once adopted, will also be added to the 'Vademecum of the CPVO procedures'. This Vademecum is available to all staff, including the jobholders, on the CPVO intranet.

The Decisions clarify:

- purpose of the processing;
- legal basis for the processing;
- contradictory character of the appraisal procedures, enabling the jobholder to exercise his right to access and to rectify his personal data;
- recipients of personal data related to the processing.

The reporting officers will receive, before the appraisal procedure starts, an "Internal memo to the attention of reporting officers" in which they are informed that:

- the personal data contained in the different reports is to be used only for the purposes they were transmitted to them for, i.e. to evaluate the suitability for the post, the management skills and the ability, efficiency and conduct in the service of the Vice President and President of the CPVO.
- the personal data is not to be used for any other purpose and shall not be transmitted to any other person or body than those identified in the probationary, management probationary and annual appraisal procedures.

No specific data protection statement is available for this processing.

2.6. Rights of the data subjects

The contradictory character of the appraisal procedure enables the jobholder to exercise his right to access and rectify his personal data during the procedure. As already indicated above, each jobholder receives a final copy of his evaluation forms and write his or her comments directly on the form.

In addition, in line with Article 26 of the Staff Regulations, the staff members have right of access to all the documents contained in their personal files even after leaving the service. They can take a copy of different appraisal reports.

2.7. Data transfers

The data processed within the carrier development exercise can be known or disclosed to the following recipients:

- as long as the appraisal process is ongoing:
 - the jobholder,
 - the reporting officers,
 - all the members of the Administrative Council
 - the HR staff (HR officer, his/her replacement and HR secretary),

- once the appraisal process is completed, the following controlling bodies can, in specific circumstances, have access to the file:
 - competent judicial authorities,
 - Court of Auditors,
 - internal audit service,
 - OLAF,
 - European Ombudsman,
 - EDPS.

2.8. Security measures

[...]

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The evaluation of the staff members constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a Community body in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation). The processing of the data related to the evaluation of the President and the Vice-President of the CPVO is manual, but the data form part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subject, including his ability, efficiency and conduct*" (point (b)). The annual appraisal, probationary period evaluation and management trial period evaluation of the President of the CPVO and of the Vice-President of the CPVO clearly represent such processing operations and they are therefore subject to prior checking by the EDPS.

Deadlines: The notification of the DPO was received on 14 May 2009. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 8+ 11 days. Consequently, the present opinion must be delivered no later than 3 August 2008.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. One of the criteria provided in Article 5 (a) is that the "*processing is necessary for 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 or in the legitimate exercise of official authority vested in the Community institutions or body".

In addition, in line with recital 27 of the Regulation "*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 the management and functioning of those institutions and bodies*".

The legal base for the processing in question can be found in Articles 43, 44 and 46 of the Staff Regulations and Articles 14 and 15(2) of the CEOS. The evaluation procedures in question fall within the scope of the legitimate exercise of public authority vested in the CPVO. The legal bases confirm the lawfulness of the processing in question.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*".

The data processed are listed in section 2.3 of the present opinion. Those data can be considered as complying with the data quality related requirements outlined above and necessary for the evaluation of the jobholders.

Accuracy and completeness: Article 4 (1) (d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*".

The contradictory character of the appraisal procedure enables the jobholder to exercise his right to access and rectify his personal data during the procedure.

The evaluation carried out by the reporting officers and the appeal assessor is subjective by nature. It is therefore difficult to assess the accuracy of such data. Each jobholder receives a final copy of his evaluation forms and can write his or her comments directly on the form.

In any case, the invitation to make use of the rights of access, rectification and appeal allows ensuring that the data are accurate and up to date (cf. section 3.7).

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (cf. section 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. section 3.8)

3.4. Data retention

Article 4 (1)(e) of the Regulation states that personal data must be "*kept 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*".

As indicated in section 2.4, the different evaluation reports are kept in the personal file of the respective jobholder for a period of ten years starting at the date of the end of the jobholder's contract. The same retention policy applies to the electronic files.

Storage for historical, statistical or scientific purposes is not being envisaged.

The EDPS notes that the storage period which extends to all the carrier of the jobholder in the CPVO plus ten years is not necessary in light of the purpose for which the data are processed which is to assess the efficiency, the competencies and the aspect of conduct in the service of the jobholder. In the similar cases, the EDPS considered that storage period of a maximum five years starting at the date of the end of the specific evaluation exercise is in line with the requirements of Article 4 (1)(e) of the Regulation. A pending legal action may be the only exception from this rule. After the end of the retention period the data shall be destroyed or made anonymous.

Thus, the controller is requested to reconsider the retention period and establish a shorter retention period for all paper and electronic files.

3.5. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1). The recipient can process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

As mentioned in section 2.7, the data are communicated to the members of the Administrative Council of the CPVO and to certain members of the Human Resources service.

On a general level, the EDPS considers that these communications are necessary for the legitimate performance of the tasks covered by the given recipient. In principle, the data contained in the reports can be seen as necessary for the human resources management, as well as for the performance of the supervisory tasks of the Administrative Council.

In addition, in case of dispute, the file containing the evaluation reports may be transferred to the Community Courts. The data contained in the evaluation report can also be subjected to an audit by the Court of Auditors or an internal auditor. Finally, the data can be transferred to the OLAF, to the European Ombudsman or to the EDPS. These transfers have a legitimate purpose because they are necessary for judicial proceedings, audit or exercise of supervisory tasks.

In case of an inter-institutional transfer of the jobholder concerned, his evaluation reports stored in the personal files are transmitted to the respective institution. This transfer is necessary for the legitimate performance of tasks covered by the competence of the receiving institution.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. Therefore, Article 7 (1) of the Regulation is being complied with.

In order to ensure the full compliance with Article 7 (3) of the Regulation, the EDPS recommends that all recipients of data are reminded of their obligation not to use the data

received for any further purposes than the one for which they were transmitted. For example the communication of data to the members of Administrative Council should be accompanied by a notice informing the recipient of the requirements of Article 7 (3) of the Regulation.

3.6. Processing including the personnel or identifying number

Article 10 (6) of the Regulation provides that "*the European Data Protection Supervisor determines the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body*".

The different forms used in the present processing contain the personal number of the jobholder concerned. The EDPS considers that the personal number can be used in this context since it allows for the identification of the jobholder and facilitates the follow-up. There is no reason to determine any further conditions in this case.

3.7. Right of access and rectification

Article 13 of Regulation 45/2001 provides a right of access to personal data being processed and Article 14 of the Regulation provides for a right to rectification without delay of inaccurate or incomplete data.

In addition, Articles 34(3) and 43(3) of the Staff Regulations and Article 14 of the CEOS state that the relevant evaluation reports shall be communicated to the person concerned who shall have right to submit his comments in writing.

Finally, in terms of Article 26 of the Staff Regulations, officials have a right of access to all documents contained in their personal files even after leaving the service. Article 11 of the CEOS makes this provision applicable by analogy to temporary staff.

As indicated in the section 2.1, there are formal dialogues during the evaluation exercises, during which the concerned jobholders are given access to the information related to them. Final versions of the reports are also communicated to the jobholders and, upon a request; they can obtain access to their personal files even after leaving the service.

Regarding the right to rectification, jobholders are asked to add their comments directly on the final reports so that these comments are clearly visible to all recipients of the reports. Moreover, in order to rectify the data, the jobholder in question can refuse the evaluation report and have the matter automatically referred to the appeal assessor.

The EDPS considers that the procedure as such allows the concerned jobholder to correct his factual data, as well as to add comments related to his (by nature subjective) evaluation data provided by the evaluators. In view of the above, the EDPS considers that Articles 13 and 14 of the Regulation are complied with.

3.8. Information to the person concerned

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for

certain information to be supplied where the data have not been obtained from the data subject. Both articles apply in this case.

According to the information provided, the relevant jobholders will receive, once adopted, the internal CPVO Decisions describing the evaluation procedures. Those Decisions will also be added to the 'Vademecum of the CPVO procedures'. This Vademecum is available to all staff, including the jobholders, on the CPVO intranet (cf. section 2.5).

The EDPS notes that, even if some information required by Articles 11 and 12 of the Regulation is provided by the Decisions, several required elements are missing. Thus, the controller is requested to provide the persons concerned with information on the identity of the controller, the time-limits for storing the data and the right to have recourse at any time to the EDPS. The EDPS recommends adding a specific data protection notice providing the data subjects in a complete way with all information required by Articles 11 and 12 of the Regulation. Such a notice could be attached as a footnote or an annex to all relevant evaluation forms.

3.9. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected"*. These security measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

On the basis of the available information (cf. section 2.8), the EDPS does not see any indication to believe that CPVO has not applied the security measures required in Article 22 of the Regulation.

Conclusion:

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

- reconsider the retention period and establish a shorter retention period for all paper and electronic files;

- remind all recipients of data of their obligation not to use the data received for any further purpose beyond the purposes stated in the relevant CPVO Decisions;
- provide appropriate information to the data subjects in line with section 3.8 of the present opinion.

Done at Brussels, on 28 July 2009

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor