

## **Opinion on a notification for Prior Checking received from the Data Protection Officer of European Investment Bank (EIB) on the processing of personal data in the frame of the management of probationary periods (e-probation)**

Brussels, 21 January 2010 (Case 2009-0718)

### **1. Proceedings**

On 29 October 2009, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer (DPO) of the European Investment Bank (EIB) a notification for prior checking relating to the processing of personal data in the frame of the management of probationary periods.

Further questions were sent to the EIB on 14 December 2009. Answers were received on 8 January 2010.

A draft opinion was sent to the EIB for comments on 12 January 2010. Comments were received on 20 January 2010.

### **2. The facts**

**Procedure.** New staff members and staff transferring to a post in a higher category with a change in function are subject to a probationary period respectively referred to as "recruitment probationary period" and "mobility probationary period". The rules governing the evaluation of these probationary periods are laid down in the "Rules and Procedures governing Probationary Periods" to be annexed to the Staff Rules.

The direct manager of a staff member ("reporting officer") shall make an overall evaluation of the staff member's performance during the probationary period in a Probation Document to be created and managed online via the EIB existing "e-performance" software. This evaluation is to be based on the staff member's ability to meet requirements of the designated job at the functional level required, taking into account certain assessment criteria such as:

- performance on the objectives set for the period, and the extent to which they have been achieved or are on target,
- performance of the assigned role, in particular the application of skills and knowledge in assuming the role and the demonstration of the key competencies to do the job,
- demonstration of the values and behaviour expected of all staff members.

The assessment criteria shall ensure that the EIB is satisfied that the staff member meets all personal and professional requirements for the type and level of the post for which he/she was recruited.

All staff on probation will have an interview with their manager at the start of the probation period to discuss the Probation Document. There will also be a mid term interview and evaluation<sup>1</sup> and an end of probation interview and evaluation. At both stages the interview and the evaluation should be summarised on the Probation Document which shall be accessible online to the staff member who shall be given the opportunity to provide comments. The staff member shall be asked to acknowledge that they have seen the evaluation. The Document shall be validated by the directorate and made available to the HR Director for formal decision.

Where staff successfully complete their probationary periods, they shall receive a written notification from the Bank confirming their employment or promotion.

Where a recruitment probationary period proves unsatisfactory, the individual shall be informed in writing at least 15 days before the end of the probationary period which is less than 6 months, and at least 30 days before the end of the probationary period which is 6 months or more, and invited to provide comments within 10 days. The EIB may subsequently decide that the employment contract may be terminated. In particular circumstances, and if provided for in the appointment letter, the EIB may decide to extend the recruitment probationary period.

Where a mobility probationary period proves unsatisfactory, the individual shall also be informed in writing at least 15 days before the end of the probationary period and invited to provide comments within 10 days. The EIB may subsequently decide that the promotion to a higher category shall not be granted.

In all cases where confirmation of the probationary period is in doubt, the manager must seek the advice of the Director of Human Resources (HR). The Director of HR shall be responsible for all decisions related to the confirmation, extension, suspension or non confirmation of probationary periods. After decision by HR regarding the confirmation, extension, or non-confirmation of the probationary period, the Probation Document is automatically locked.

**Categories of data.** The Probation Document available to the staff member shall contain section on objectives, responsibilities, mid probation review by manager, mid probation review commented by employee, overall summary by reporting officer, overall summary by final reviewing officer (normally the Director General), decision by the Bank (Director of HR) and employee final comment. All Probation Documents will be managed online and may be printed if necessary. Staff will be informed by automatic email when their probationary period has been successfully concluded. Working lists will provided by HR staff to the directorate coordinations to allow them to keep track of the status of probation documents for their staff, providing them with the name, start and end dates of the probation period, due dates for reports, and decisions.

**Retention periods.** Where probationary periods are unsuccessful and contracts are terminated, the probation document will be deleted from the database. Letters regarding the extension or non confirmation of the probationary period will be filed in the staff member's individual personal file. Probation Documents of staff members are stored online under the

---

<sup>1</sup> Except for probationary periods of less than 4 months.

heading e-performance in the Peoplesoft database during the whole career of the staff member. When a person leaves the EIB, the data will be kept only for a limited period of time so that necessary evidence is retained in the eventuality that a complaint is lodged.

**Access to data.** The concerned staff member will continue to have access to his/her Probation Document throughout their career via Peoplesoft, e-performance. Their current hierarchy will have access to the Probation Document in line with retention rules for Performance Documents<sup>2</sup>: current reporting officers have access to the Performance Document for the current year and the past three years. Where the Probation Document falls outside of this period, the reporting officer will no longer have access. The Director of HR will have access as final decision making authority. The data may also be disclosed if required to HR staff for analytical reasons (lists of HR staff who require access are to be authorised by the HR Director). The President of the EIB Group may also have access to all data. Access may also be granted to the EIB Legal services if called upon to defend the EIB Group and to HR correspondents in the directorates (according to a list proposed by the Directorates and authorised by the Director in order to ensure follow up with managers to ensure that procedures and deadlines are respected).

**Information to data subjects.** "Rules and Procedures governing probationary periods" are to be annexed to the Staff Rules. Instructions will be available on Intranet, both as a Guide to Staff, and a Guide to Reporting Officers, explaining how to complete the online documentation.

**Security.** [...]

### **3. Legal analysis**

#### **3.1. Prior checking**

Regulation (EC) 45/2001<sup>3</sup> applies to the processing of personal data by European Union institutions and bodies.

The processing of personal data by the EIB in the frame of the probationary period is carried out by a European Union body in activities which fall within the scope of the Regulation.

Regulation (EC) 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. The processing in the procedure under examination is carried out both electronically and in a structured paper filing system.

Regulation (EC) 45/2001 therefore applies.

Article 27(1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS "processing operations likely to present specific risks to the rights and freedoms of data subject 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. This list includes, under paragraph

---

<sup>2</sup> See EDPS prior check opinion on "e-performance", 19 October 2009, 2008-0379

<sup>3</sup> Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data

(b), the processing operations intended to evaluate personal aspects related to the data subject, including his or her ability, efficiency and conduct. Clearly the data processing operations in the frame of the probationary periods fall within Article 27(2) (b) and must therefore be prior checked by the EDPS. The present opinion does not cover the actual recruitment of the selected person and processing of personal data in that context.

Probationary reports for EIB staff members are already established, and the Rules and Procedures governing Probationary Periods have recently been reviewed and adopted before adoption of the EDPS opinion. Although the EDPS would have preferred to adopt his opinion prior to the adoption of these Rules, this does not alter the fact that the recommendations issued by the EDPS need to be implemented.

The Notification was received on 29 October 2009. The deadlines to provide an opinion were suspended for 33 days. The opinion must therefore be issued by 31 January 2010.

### **3.2. Lawfulness of the processing**

Article 5 of the Regulation provides criteria for a data processing operation being lawful. The personal data processing operations in the context of the probationary period serves a public interest needed for the management and functioning of the institution (Recital 27 of the Regulation). The processing operation is based on the Rules and Procedures governing Probationary Periods adopted and annexed to the EIB Staff Rules.

Evaluating probationary staff under the above legal basis confirms the lawfulness of the processing operation under Article 5(a) of the Regulation: the processing operation is considered necessary for the performance of a task carried out in the public interest on the basis of a legal act adopted on the basis of the Treaties establishing the European Union.

### **3.3. Processing of special categories of data**

Personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited (Article 10)(1) of the Regulation. Any exceptions under Article 10 of the Regulation should be narrowly tailored.

It can be possible that in some specific cases, data *on sickness or maternity leave or on accident* may appear in the processing operation, when the appointing authority extends the probationary period with the corresponding length of time to these events as foreseen in paragraph 6.3 of the rules and procedures concerning probationary periods. In these cases Article 10(2)(b) of the Regulation permits processing health related data if it is necessary for the purposes of complying with specific rights and obligations of the controller in the field of employment law insofar as authorised by the Treaties establishing the European Union or other legal instruments adopted on the basis thereof.

### **3.4. Data Quality**

According to Article 4(1)(c) of Regulation 45/2001 "*personal data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed*".

The data fields required in the Probation Document seem to be adequate and relevant and not excessive for the purposes of the processing operation, as they are largely administrative by

nature or performance indicators which are necessary to assess that the staff member meets all personal and professional requirements for the type and level of the post for which he/she was recruited. The EDPS nevertheless would like to stress that the adequacy and relevance of the data involved in the procedure, put in the Probation Document, should always be considered carefully by the reporting officer and the HR Director and any other parties who are involved in the probationary procedure.

Special care need to be taken if data on sickness, maternity or accident are involved in the processing operation. The EDPS finds it an appropriate policy that, in principle no such information would be included in the probationary report, but would be included in a separate letter explaining the reason to extend the probationary period. This procedure ensures that only adequate, relevant and not excessive data are entered in the probationary report itself. The EDPS advises that whenever personal data on sickness, accident or maternity are processed, special care is taken by the data controller.

Article 4(1)(d) of the Regulation requires that personal data must be “accurate and, where necessary, kept up to date” and “every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified”.

The assessment of probationers’ data constitutes largely subjective judgement by the reporting officer against specified criteria as to their performance. It is therefore difficult to assess the accuracy of evaluation data. In any case, the fact that the probationer has a possibility to make any comments on the Probation Document and granting the rights of access and rectification at any moment can contribute to the accuracy and to completeness of the data processed (see more about the right of access and rectification in point 3.7 below). This also makes it possible to ensure the quality of data.

Article 4(1) (a) of the Regulation provides that personal data must be processed fairly and lawfully. The lawfulness has already been examined in part 3.2 above and fairness will be addressed in relation to the information provided to data subjects (see below in part 3.8).

### **3.5. Retention periods**

Pursuant to Article 4(1)(e) of Regulation (EC) 45/2001 personal data may be kept in a form which permits identification of data subjects for no longer than necessary for the purposes for which the data are collected and/or further processed.

As mentioned in the facts above, where probationary periods are unsuccessful and contracts are terminated, the probation document will be deleted from the database. Letters regarding the extension or non confirmation of the probationary period will be filed in the staff member's individual personal file. Probation Documents of staff members are stored online under the heading e-performance in the Peoplesoft database during the whole career of the staff member. When a person leaves the EIB, the data will be kept only for a limited period of time so that necessary evidence is retained in the eventuality that a complaint is lodged.

The EDPS is satisfied that probation documents concerning persons who leave the EIB are only kept for a certain period of time. The EDPS however questions the relevance of the conservation of the Probation Documents of staff members for the whole career of the staff member. The EDPS therefore invites the EIB to consider the conservation of the Probation

Documents in the Peoplesoft data base during the whole career of the staff member in the light of Article 4(1)(e) of Regulation (EC) 45/2001.

### **3.6. Transfer of data**

Article 7 of the Regulation, permits personal data transfers 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 above, the data are transferred to the reporting officers who have access to the Performance document of the present year and of the three previous years. The Director of HR and the President of the EIB Group will also have access as the final decision making authorities. Staff in HR may have access if required for analytical reasons. Access will also be granted to the legal service in the event of a pending legal claim. Finally HR correspondents in the directorates (according to a list proposed by the Directorates and authorised by the Director of HR) may receive the data to ensure follow up and respect of procedure and deadlines.

On an abstract level, the EDPS takes note that all these transfers are considered necessary for the legitimate performance of the tasks covered by the given recipient. In principle, the data contained in the reports and to be transmitted can be seen as necessary for the human resources management, as well as for the performance of the respective tasks of the superiors. Article 7 (1) of the Regulation is therefore being complied with.

The EDPS underlines that any persons with access to the data should be routinely informed of their obligation not to use the data received for any other purposes than the one for which they are transmitted as set out in Article 7(3) of the Regulation.

### **3.7. Right of access and rectification**

Article 13 of the Regulation provides for 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.

As indicated in the facts, there are different stages of the probationary assessment process, during which the concerned staff members are given access to the information related to them and are granted the possibility to provide comments. Furthermore the concerned staff member will continue to have access to his/her Probation Document via the Peoplesoft data base. The EDPS underlines that the right of rectification of data can only apply as concerns factual data and not to any subjective appreciation of a data subject. The possibility for the person concerned to introduce comments is as far as the right to rectification can be effectively applied in this context. The EDPS notes therefore that the rights of the data subjects are respected.

### **3.8. Information to the data subject**

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. During the probationary reporting, personal data are obtained directly from the data subject and from other persons. Thus Articles 11 and 12 will apply.

According to the notification, instructions are being drafted and will be available on the Intranet both as a Guide to staff and a Guide to the reporting officers explaining how to complete the online documentation. The EDPS underlines the need for this Guide to include information on the processing of personal data as provided for in Regulation (EC) 45/2001 and invites the EIB to provide him with the final version of this Guide.

### **3.9. Security measures**

According to Articles 22 and 23 of Regulation (EC) No 45/2001, the controller and the processor must 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 unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration and prevent all other forms of unlawful processing.

On the basis of the available information, the EDPS does not see any indication to believe that the EIB has not applied the security measures required in Article 22 of the Regulation.

### **3. Conclusion:**

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the EIB respect the following recommendations:

- that special care is taken whenever personal data on sickness, accident or maternity are processed;
- that the EIB reconsider the conservation of the Probation Documents in the Peoplesoft data base during the whole career of the staff member in the light of the data protection principles;
- that information on the processing of personal data as provided for in Regulation (EC) 45/2001 is included in the Guide to staff.

Done at Brussels, 21 January 2010

(signed)

Giovanni BUTTARELLI  
Assistant European Data Protection Supervisor