



Opinion on the notification for prior checking from the Data Protection Officer of the European Monitoring Centre for Drugs and Drug Addiction concerning Probationary Period, Management Probationary Period and Annual Performance Appraisal of the Director

Brussels, 26 January 2011 (case 2010-895)

1. Proceedings

On 10 November 2010, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Monitoring Centre for Drugs and Drug Addiction (**EMCDDA**) a notification for true prior checking concerning probationary period, management trial period and annual performance appraisal of the EMCDDA Director. The notification was accompanied by the following documents:

- Draft Privacy Statement for probationary and management probationary periods of the EMCDDA Director,
- Draft Privacy Statement for annual appraisal of the EMCDDA Director,
- Draft Decision of the EMCDDA Management Board on annual appraisal and probationary period of the Director (including templates of probationary period report, management probationary period report and annual performance appraisal report).

The draft opinion was sent to the DPO for comments on 18 January 2011. On 25 January 2011, the DPO informed the EDPS that they have no comments on the draft.

2. Facts

This prior checking opinion deals with the new evaluation of the EMCDDA Director within the following three procedures established by the respective Decision of the EMCDDA Management Board:

- six months probation in terms of Article 14 of the Conditions of Employment of Other Servants (**CEOS**),
- nine months managerial probation (pursuant to Articles 44 - 46 of the Staff Regulations applicable by analogy),
- annual appraisal in terms of Article 43 of the Staff Regulations and/or Article 15(2) CEOS.

The purpose of the data processing is the assessment of the Director's achievements with regard to his ability, efficiency and conduct in the service.

The data controller is the EMCDDA represented by the Head of Unit Administration.

The data subject is a temporary agent or an official nominated as the EMCDDA Director¹.

The following data categories are being processed in this context:

- administrative data (name, personnel number, function group and grade),
- evaluation data (assessment of the general and/or managerial capacities).

The probationary period, management probationary period and annual performance appraisal reports are stored in personal files of the person concerned for ten years after the termination of service or the last pension payment. Further storage of anonymous data for statistical purposes is also envisaged.

Personal data processed in this context may be transferred to the following recipients:

- reporting officers (two designated members of the EMCDDA Management Board and/or a representative of the European Commission),
- responsible Human Resources staff members,
- appeal assessor (Chairperson of the EMCDDA Management Board or its designated member),
- parent Directorate General of the European Commission (in case of an annual appraisal of an official seconded in the interest of service),
- other EU institutions (in case of the actual transfer of the official concerned),
- internal auditors, OLAF, ECA (in case of an audit),
- Civil Service Tribunal, European Ombudsman, EDPS (in case of a dispute).

The data transferred may be processed exclusively for the purpose for which they were submitted as outlined in the respective privacy statements².

Information to data subjects is provided in the respective privacy statements, as well as the EMCDDA Management Board Decision posted on the EMCDDA Intranet. The privacy statements provide for information about identity of the controller, purpose of the processing, certain data recipients, existence of rights of access and rectification, legal bases of the processing, time limits for storage of the data, as well as the right to have recourse to the EDPS. Information about all data categories processed is provided in the Annexes to the EMCDDA Management Board Decision.

Rights of access and rectification are granted upon an e-mail request to the controller. The functional mailbox EMCDDA-HR@emcdda.europa.eu should be used in this respect.

(...)

3. Legal aspects

3.1. Prior checking. The processing of personal data for the purpose of the Director's evaluation by the European Monitoring Centre falls within the scope of Regulation 45/2001.

It is subject to prior checking by the EDPS pursuant to its Article 27(2)(b) since it is clearly intended to evaluate ability, efficiency and conduct of the data subject.

¹ with exception of an official seconded in the interest of the service, as well as a Director already performing senior management functions at the time of the engagement or having served at least two years in such managerial functions in any other European institution who are not subjected to the respective probation or managerial probation.

² See under headings "Who has access to your information and to whom it is disclosed?".

The notification of the DPO was received on 10 November 2010. According to Article 27(4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 18 days (7 + 11) to allow for comments on the draft opinion, as well as for the Christmas break suspension. Therefore, the present opinion must be delivered no later than on 31 January 2011 (29 January being a Saturday).

3.2. Lawfulness of the processing. As it has been already mentioned, the legal basis for the respective evaluations of the EMCDDA Director can be found in Articles 43-46 of the Staff Regulations, as well as Articles 14 and 15(2) of the CEOS, as implemented in the Decision of the EMCDDA Management Board on annual appraisal and probationary period of the Director.

The processing can also be considered necessary for the management and organisation of the performance of the Centre and therefore lawful in terms of Article 5(a) of Regulation 45/2001 (read together with its recital 27).

3.3. Data quality. Pursuant to Article 4(1)(a), (c) and (d) of Regulation 45/2001, personal data must be processed fairly and lawfully, be adequate, relevant and not excessive in relation to the purpose for which they are collected and further processed, as well as accurate.

As to the proportionality of the data processed, the EDPS notes that the administrative data collected are considered necessary for the accomplishment of the respective probation or appraisal procedure. As long as it is ensured that only relevant evaluation data are being processed in this context, full compliance with Article 4(1) (c) of the Regulation is also being guaranteed.

The accuracy of the evaluation data processed is difficult to assess due to their subjective nature. In any case, it is partly ensured by the nature of the respective appraisal procedure itself. In addition, the invitation to make use of the rights of access, rectification and/or appeal helps to ensure that the processed data are accurate and kept up to date (cf. point 3.6 in detail).

The fairness of the data processing has to be assessed in the context of information provided to data subject (cf. point 3.7), whereas its lawfulness has been already discussed (cf. point 3.2).

3.4. Data retention. According to Article 4(1)(e) of Regulation 45/2001, personal data may be kept in a form enabling the identification of data subjects for no longer than necessary for the purposes for which they were collected or further processed. Further storage of data for historical, statistical or scientific purpose is possible in anonymous form only.

As it has been already indicated above, personal data processed within the (initial) appraisal of the EMCDDA Director are stored in the respective personal files for ten years after the termination of service or the last pension payment. The EDPS notes that this time limit corresponds to the data retention period for personal files established in the Common Conservation List of the European Commission³. Therefore, he is of the opinion that compliance with the Regulation is fully ensured in this respect.

3.5. Transfer of data. The internal and inter-institutional data transfers mentioned above are subject to Article 7 of Regulation 45/2001. They should be necessary for legitimate

³ This issue is addressed in the EDPS Comments on the CCL of 7 May 2007 - cf. Common Commission-Level Retention List for European Commission Files of 4 July 2007 - SEC(2007)970; cf. also EDPS Opinion 2007-334 of 11 January 2008 concerning Staff Evaluation at the EMCDDA.

performance of the task covered by the competence of the particular recipient who could process the data only for the purposes for which they were transmitted.

The EDPS notes that transfers to the designated EMCDDA Management Board Members, representatives of the European Commission, as well as responsible Human Resources staff members are considered necessary for accomplishment of the respective (initial) appraisal procedure, whereas the transfers to the respective audit bodies, CFI, EO and EDPS are necessary for the execution of the particular supervisory task.

He also notes that transfers of appraisal related data to other EU institutions, as well as transfers of the annual period appraisal reports to the parent DG of the European Commission are deemed necessary for the establishment of the subsequent career development reports in case of the actual transfer of the official and/or his secondment in the interest of the service⁴.

The EDPS notes that the obligation to process personal data only for the purposes for which they were transmitted is mentioned in the respective privacy statements. Consequently, he is of the opinion that Article 7(1) and (3) of the Regulation is duly complied with.

3.6. Right of access and rectification. Articles 13 and 14 of Regulation 45/2001 provide for data subject's rights of access and rectification with respect to their personal data processed. As indicated above, access and rectification of the data processed can be obtained upon an e-mail request to the controller.

The EDPS acknowledges that the right of rectification has to be limited to the factual data processed and welcomes the possibility to add comments about the evaluation data on the respective reports. The compliance with the Regulation is therefore ensured in this respect.

3.7. Information to the person concerned. As indicated above, most of the information required in terms of Article 11 and 12 of Regulation 45/2001 is already provided in the privacy statements and the Annexes to the EMCDDA Management Board Decision as referred above. In order to ensure full compliance with the Regulation, the EDPS requests that information about the possible recipients is being completed by adding references to the respective audit and supervisory bodies to the existing privacy statements.

(...)

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided that the existing privacy statements are being revised in light of the recommendation provided above (point 3.7).

Done at Brussels, 26 January 2011

(signed)

Giovanni BUTTARELLI
Assistant European Data Protection Supervisor

⁴ the latter in accordance with the double career principle in terms of Article 18 of the Decision of the EMCDDA Management Board on annual appraisal and probationary period of the Director