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Guidelines concerning the processing of personal data in the area of staff evaluation

INTRODUCTION

These guidelines are issued by the European Data Protection Supervisor (**EDPS**) in the exercise of the powers conferred on him in Articles 41(2) and 46(d) of the Regulation 45/2001. They are based on the existing 'EDPS jurisprudence' in the area of staff evaluation consisting of 76 opinions on the respective data processing operations by several EU institutions, bodies and agencies¹. They address the following procedures:

- **staff evaluation *stricto sensu***, also referred to as staff performance assessment, staff appraisal or career development review/report (**CDR**), based on Article 43 of the Staff Regulations (and/or Article 15(2) of the Conditions of Employment of Other Servants - **CEOS**), including the possible use of performance indicators for the purpose of such evaluation,
- **probationary reports**, also referred to as establishment of officials or initial staff evaluation, based on Article 34 of the Staff Regulations (and/or Articles 14 and 84 CEOS), as well as management probationary reports in terms of Articles 44 - 46 of the Staff Regulations,
- **promotion of officials** based on Article 45 of the Staff Regulations (including the evaluation of ability to work in a third EU language within the first promotion and/or renewal of a contract for an indefinite period in terms of Article 85(3) CEOS),
- **regrading of temporary agents** based on Articles 10(3) and 15 CEOS,
- **certification procedure** based on Article 45a of the Staff Regulations enabling appointment of an AST official to a job in the AD function group by means of a compulsory vocational training by European Administrative School (**EAS**),
- **attestation procedure** based on Article 10(3) of the Annex XIII to the Staff Regulations allowing former C and D officials in service before 1st May 2004 to become full members of the AST function group ('administrative assistants')².

These processing operations are subject to prior checking on a basis of Article 27(2)(b) of Regulation 45/2001 since they are intended to evaluate personal

¹ As listed in Annex I, as well as available on the EDPS website (www.edps.europa.eu).

² As well as the corresponding procedures at the European Central Bank (ECB) and European Investment Bank (EIB) in accordance with the respective provisions of the ECB Conditions of Employment or the EIB Staff Regulations.

aspects relating to the data subject; namely, the ability, efficiency and conduct of the respective staff members³.

The objective of the Guidelines is to offer practical guidance and assistance to all Data Protection Officers and controllers in their task of notifying the existing and/or future evaluation related data processing to the EDPS. The DPO network has been consulted on the draft Guidelines in May 2011.

Their aim is to present in a clear and concise way the EDPS positions and recommendations regarding the data protection principles enshrined in Regulation 45/2001, as well as to provide information about existing best practices.

In each section below, issues common to several procedures are outlined first, before possible procedure specific aspects are addressed.

1. LAWFULNESS OF PROCESSING

Article 5(a) of Regulation 45/2001 provides 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 or other legal instruments adopted on the basis thereof. Recital 27 further specifies that processing of personal data for the performance of tasks carried out in public interest by the EU institutions and bodies includes the processing necessary for their management and functioning.

As it has been already outlined above, the legal bases for the respective data processing operations can be found in the Staff Regulations (Articles 34, 43, 45 - 46, as well as Article 10(3) of Annex XIII), the Conditions of Employment of Other Servants (Articles 14, 81, 84 and 87)⁴, as well as in the respective **implementing rules** adopted on a basis of Article 110 of the Staff Regulations.

Given the fact that the processing of personal data is considered as necessary for the execution of the (initial) evaluation, promotion, regrading, attestation and certification procedures provided for in the Staff Regulations, the processing of personal data carried out in this context can be considered as lawful.

The use of performance indicators related data for annual evaluation could be considered legitimate provided it is used only as a support tool, as well as based on an appropriate legal instrument outlining adequate guarantees for

³ Permanent officials, contract agents, temporary agents, as well as external staff members such as freelance translators.

⁴ The actual legal provisions are listed in Annex II.

rectification of inaccurate data and justification of certain figures by the staff member concerned.

2. PROCESSING OF SPECIAL CATEGORIES OF DATA

According to Article 10 of Regulation 45/2001, processing of certain sensitive data is prohibited unless in certain predefined circumstances.

In the framework of the probation procedure, data concerning **health** may be processed, namely in case of its extension due to a maternity and/or sick leave as provided for in Article 34(1) of the Staff Regulations.

The processing of such data may be justified in terms of Article 10(2)(b) of Regulation 45/2001 as it is necessary to comply with the controller's obligations in the area of employment law as foreseen by the Staff Regulations.

Furthermore, within the staff evaluation as such, data revealing **trade union membership** may be collected. These data may consist of information spontaneously provided in the self-assessment part of CDRs ('additional duties'), such as information about membership in the joint committees.

The processing of such data may be justified on the basis of Article 10(2)(a), (b) and/or (d) of Regulation 45/2001 since it would be considered either necessary for the employer's compliance with specific rights and legal obligations and/or concern data already manifestly made public by the data subject him or herself or eventually be based on a freely given, specific and informed indication of his or her wishes (consent of the data subject).

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.

Proportionality: The administrative and evaluation data processed in this context must be necessary for accomplishment of the respective procedure.

In this respect, the collection of the following administrative data may be considered excessive for the purpose of staff appraisal: nationality, date of birth, details concerning previous education and career, as well as contact details of previous reporting officer(s).

Also, the collection of medical data within the respective probation reports is deemed unnecessary for the purpose of completion of the particular

procedure. It is recommended that the reason for the extension of the probationary period (sickness, maternity or accident) is provided in a separate note and that no information about the actual diagnosis is processed within the probation procedure.

Accuracy: The data processed must be accurate, and where necessary, kept up to date, whereas every reasonable step must be taken to ensure that inaccurate or incomplete data are erased or rectified.

The accuracy of the **administrative data** processed in this context can be ensured by the nature of the procedure itself. In fact, part of the data is provided by the data subjects themselves (in the self-assessment part of the CDR, as well as the applications for certification and attestation). Also, the yearly repetition of appraisal and promotion procedures enables to ensure that the data processed are up to date.

The accuracy of the **evaluation data** processed is difficult to establish due to their subjective nature. In fact, the evaluation of the staff performance constitutes largely subjective judgements by the hierarchical superiors against specified predefined criteria. In any case, data subjects must be provided with a possibility to add their comments directly on the respective reports.

In addition, data subject rights of access, rectification and/or appeal contribute to the accuracy of the data processed (as outlined below).

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.

The following evaluation related documents containing personal data are being kept in **personal files** in line with Article 26 of the Staff Regulations⁵ for up to **ten years after the termination of employment**⁶:

- career development reports,
- probation reports,
- promotion/regrading decisions, as well as letters confirming the final award of the respective points,
- certification files of successful applicants (application⁷, training attendance and exam results),

⁵ Read together with Articles 11(1) and 81 of the Conditions of Employment of Other Servants.

⁶ Or the last pension payment.

⁷ Without the supporting documents that should be destroyed in one month after the publication of the list of successful applicants.

- attestation decisions.

The necessity for such a lengthy conservation period may be questionable as it does not correspond to the specific purposes for which the data were collected and/or further processed, i.e. the accomplishment of the respective evaluation exercise. In this respect, in certain cases, the storage of evaluation reports for up to five years after the end of a particular evaluation procedure would be considered appropriate.

This is especially true as concerns evaluation reports which need not necessarily still be relevant during the whole career of the person concerned. Evaluators should be able to consult previous reports to assess the progress made by the member of staff but appropriate time limits should be established as to how far back the reports can go.

Promotion, certification, attestation decisions would in principle need to be kept during the career of the member of staff, but not all related documents should be kept after a certain period.

Also, further storage of lists published on the Intranet within promotion and certification procedures for five years is considered as appropriate for audit purposes.

Finally, the files of unsuccessful applicants for certification and attestation can be kept until all appeal channels have been exhausted, including the time limits for appeals before the Civil Service Tribunal.

5. COMPATIBLE USE / CHANGE OF PURPOSE

Pursuant to Article 4(1)(b) of Regulation 45/2001, personal data should be collected for specified, explicit and legitimate purpose and not further processed in a way incompatible with those purposes. Possible change of purpose is only permissible if explicitly allowed by the internal rules of the EU institution or body, as provided for in Article 6(1) of Regulation 45/2001.

In this respect, the following processing operations have been considered fully compatible with the original purpose in terms of Article 4(1)(b) of the Regulation:

- processing of data collected within the probationary report for the preparation of the first evaluation report (CDR) and the follow-up of the individual training,
- processing of data collected within evaluation report (CDR) for subsequent career development, promotion or regrading, renewal of contracts, as well as follow up of individual training.

6. DATA TRANSFERS

Internal transfers: Data processed within evaluation procedures are mainly transferred to recipients within the same or to other institution, body or agency. As outlined in Article 7 of Regulation 45/2001, such transfers have to be necessary for the legitimate performance of tasks covered by the competence of the recipient who cannot process the data for any other purpose than for which they were transmitted.

Transfers to the respective hierarchical superiors (reporting officers, countersigning officers, appeal assessors and appointing authority), responsible Human Resources staff members, as well as members of the respective joint committees may be considered necessary for the accomplishment of the particular (initial) evaluation, promotion or regrading procedure.

In addition, within the certification procedure, transfers of applicants' files to the European Administration School (EAS) and the European Personnel Selection Office (EPSO), as well as data transfers from EPSO to the body managing the internal network and the computer system storage and hosting environment (DG DIGIT) can be considered as necessary for the accomplishment of this particular procedure⁸.

Furthermore, the transfers to internal auditors, Legal Service, Civil Service Tribunal, EDPS and European Ombudsman can be considered necessary in certain cases for the performance of the respective supervisory, advisory or judicial task.

Finally, transfers of administrative and evaluation data contained in the personal files to responsible services in other EU institutions, bodies or agencies can be considered necessary in case of the transfer of a specific staff member.

In order to ensure full compliance with Regulation 45/2001, the EDPS recommends that all internal recipients are reminded of the purpose limitation obligation in terms of Article 7(3) of the Regulation.

External transfers: According to Article 8(a) of Regulation 45/2001, transfers to external recipients established in the EU⁹ have to be necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority.

⁸ In detail cf. EDPS Opinion in case 2006-396 on the EAS and EPSO involvement in the certification.

⁹ Subjected to the national law implementing the Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

So, in the present context, external subjects would need to act on behalf of a particular EU institution, body or agency, i.e. as processors within the meaning of Article 2(e) of the Regulation¹⁰.

Accordingly, the data transfers to the **external instructors** involved in compulsory training on behalf of the EAS, as well as to the **external assessors** sitting on the Examination Boards on behalf of the EPSO can be considered necessary for the provision of the respective training, as well as the assessment of the concerned officials within the certification procedure.

7. RIGHTS OF DATA SUBJECTS

The data subjects' rights of **access and rectification** are enshrined in Articles 13 and 14 of Regulation 45/2001.

In principle, within the evaluation procedures, data subjects are provided with a copy of their reports and are invited to make comments on them, as foreseen in Articles 34 and 43 of the Staff Regulations, as well as Articles 14 and 84 CEOS. They can also obtain access to all the documents in their personal file even after leaving the service as provided for in Article 26 of the Staff Regulations, as well as Articles 11(1) and 81 of the CEOS.

The rectification of the factual data processed is possible upon request to the controller, whereas the (by nature subjective) evaluation data can be rectified within the respective **appeal** procedures. In any case, it should be ensured that the revised reports are being added to the personal file.

8. INFORMATION TO DATA SUBJECTS

In order to ensure transparency and fairness of the processing, the following information listed in Articles 11 and/or 12 of Regulation 45/2001 should be provided to data subjects:

- identity of the controller,
- purpose of the processing,
- data categories,
- whether replies to the questions are obligatory or voluntary, as well as possible consequences of failure to reply,
- possible data recipients,
- existence of rights of access, rectification and recourse to the EDPS,
- legal basis of the processing,
- applicable data retention periods.

Due to the fact that this information should be provided either at the collection of data or before their first disclosure to a third party, the following

¹⁰ Cf. in detail below (point 9).

communication means were considered as appropriate for the particular procedure:

- data protection clause in the respective report form, application form or messages sent to data subjects, and
- specific privacy statement made available on the Intranet.

9. PROCESSOR

As already mentioned above, the external instructors and assessors taking part in certification on behalf of EAS/EPSO, as well as DG DIGIT managing the internal network and the computer system storage and hosting environment for EPSO have to be considered as data processors in terms of Article 2(e) of Regulation 45/2001 since they are processing personal data of staff members taking part in the EAS compulsory training and exams on behalf of the Office.

Pursuant to Article 23 of Regulation 45/2001, a contract or legal act binding the processor to the controller should be established which stipulates, in particular, that the processor can act only on instructions from the controller and that he has to comply with obligations of confidentiality and security as set out in Articles 21 and 22 of the Regulation, unless he is already subject to these obligations outlined in the respective national law transposing Articles 16 and 17(3) of Directive 95/46/EC.

Accordingly, the training instructors and members of the Examination Boards are obliged to sign a '**confidentiality note**' at their first certification related meeting, whereas a **service contract** between the EPSO and the DG DIGIT concerning the storage and hosting of personal data processed within the certification procedure has been established¹¹. All these legal documents should provide for an explicit reference to the applicable national data protection legislation.

¹¹ In detail cf. EDPS Opinion in case 2006-396 on the EAS and EPSO involvement in certification as already referred to in footnote 6.