

Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the Court of Justice of the European Union regarding the ‘ability to work in a third language’

Brussels, 10 December 2013 (Case 2013/0771)

1. Proceedings

On 28 June 2013, the European Data Protection Supervisor (the ‘**EDPS**’) received from the Data Protection Officer (Officer) of the Court of Justice of the European Union (‘**the Court**’) an ex post notification relating to the processing of personal data with regard to the verification of the ability to work in a third language.

The notification was sent for prior checking under Article 27(2)(b) of Regulation No 45/2001 (the ‘**Regulation**’).

As an ex post notification is involved, the two-month period within which the EDPS must in principle give his opinion does not apply. This case was handled within a reasonable period.

2. Relevant facts

In accordance with Article 45(2) of the Staff Regulations, newly recruited officials may receive their first promotion only after having demonstrated their ability to work in a third language of the European Union. The same rule applies to contract staff in function group IV who wish to have their contract renewed for an indefinite period¹.

The institutions of the Union have entrusted the European Personnel Selection Office (‘**EPSO**’) with general responsibility for the definition and organisation of the assessment of linguistic ability².

The interinstitutional rules laying down the procedure for implementing Article 45(2) of the Staff Regulations were adopted by decision of the Administrative Committee of the Court of 26 October 2006 (the ‘**Implementing Decision**’). The Implementing Decision provides that the assessment of linguistic ability shall be based on certificates/diplomas or tests³.

The three methods of assessment of the ability to work in a third language are:

- assessment based on certificates/diplomas by EPSO⁴;

¹ Article 85(3) of the Conditions of Employment of Other Servants.

² Article 7 of Annex III to the Staff Regulations.

³ Article 7(1) of the Implementing Decision.

⁴ Article 7(1) and (2) of the Implementing Decision.

- assessment based on tests by EPSO⁵;
- assessment based on certificates/diplomas by the Court⁶.

The assessment based on certificates/diplomas shall take account of:

- the successful completion of the basic training cycle of the institutions (level 6);
- success in a test of an appropriate level recognised as such by EPSO in a competition organised by the institutions;
- the certificates/diplomas on an indicative list drawn up and updated by EPSO, whose holders are deemed able to work in a third language⁷.

When the assessment based on certificates/diplomas is carried out by the Court, it is done so under the same conditions as EPSO⁸.

3. Legal analysis

The present opinion is based on the Guidelines of the EDPS concerning the processing of personal data in the area of staff evaluation adopted on 15 July 2011 (**‘the Guidelines’**)⁹, which enables the EDPS to concentrate on practices which depart from the Guidelines and do not appear to comply with the Regulation. It is understood that the recommendations of the Guidelines which are relevant for the processing in question apply.

3.1. *Field of application of the opinion*

Assessment by the Court of Justice

The data processing carried out by EPSO in order to assess the ability of officials and staff to work in a third language has been the subject of a notification for prior checking and an opinion from the EDPS¹⁰. In that opinion, the institutions are mentioned as recipients of the assessment by EPSO. The present opinion refers thereto with regard to the situations in which the Court would entrust the EPSO with the assessment of the ability to work in a third language. The data processing carried out beforehand by the Court (sending EPSO the data required for the assessment) is not subject to notification in accordance with Article 27 of the Regulation. Likewise, following the processing by EPSO, in so far as the Court is limited to noting the ability or otherwise to work in a third language, on the basis of the EPSO conclusions, but does not itself carry out an assessment of this ability, it is not necessary to notify the EDPS.

Therefore, the present opinion only concerns the situation in which the Court itself assesses the ability of an official or member of staff to work in a third language, as permitted by the Implementing Decision.

Promotion of officials - Renewal of the contracts of contract staff for an indefinite period

⁵ Article 7(3) of the Implementing Decision.

⁶ Article 7(2) in fine of the Implementing Decision.

⁷ Article 7(2) paragraph 1 of the Implementing Decision.

⁸ Article 7(2) of the Implementing Decision.

⁹ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Guidelines/11-07-15_Evaluation_Guidelines_EN.pdf.

¹⁰ Case 2007-088 - Opinion of 4 September 2007.

The notification combines verification of the ability to work in a third language and promotion. However, the granting of promotions falls under processing which is linked to but distinct from the assessment of the knowledge of a third language, the demonstration thereof being a condition which is necessary but not sufficient for allowing an official to receive a first promotion¹¹. Incidentally, the notification refers exclusively to the ability to work in a third language and not to the other assessment criteria which may give rise to a promotion. The processing of personal data in the context of promotions is, moreover, covered by a separate notification from the Court ('Promotion points; notations and promotions') and an opinion from the EDPS¹².

Furthermore, promotion does not concern contract staff in function group IV, even though they are also affected by the assessment of their ability to work in a third language. For these members of staff, the demonstration of their knowledge of a third language opens the way to a renewal of their contract for an indefinite period. This is, however, a condition which is necessary but not sufficient for obtaining this renewal. This therefore involves a separate assessment procedure which should either be the subject of a specific notification, or be integrated into existing notifications, by means of a possible update of the latter (notification regarding recruitment¹³ or notification regarding staff assessment¹⁴).

Therefore, the present opinion does not concern the processing of data concerning the assessment of officials with a view to promotion or of contract staff with a view to renewing their contract for an indefinite period. It covers only the assessment by the Court of the ability of its officials and staff to work in a third language.

3.2. Personal data

The notification indicates that the data processed are the surname and first name (of the official or member of staff). However, the following data are at the very least likely to be processed for the purpose of assessing the ability to work in a third language: first and second languages; third language chosen; certificate of successful completion of the training cycle of the institutions or certificate of success in a language test organised by EPSO or any certificate/diploma whose holders are deemed able to work in a third language.

The notification should be supplemented and the information notice adapted (see No 4.3. below).

3.3. Data retention

The data may 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 (Article 4(1)(e) of the Regulation).

The notification does not include a specific retention period for the results of the assessment of the ability to work in a third language. According to the notification: *'The promotion decision is stored in the personal file, the rules for retaining the personal file apply. The files are retained for one year after the promotion decision or promotion refusal decision. This period is justified by the need to be able to effectively respond to possible complaints'*.

¹¹ See Article 45 of the Staff Regulations.

¹² Case 2004-282. The EDPS gave his opinion on 7 April 2006.

¹³ Case 2011-0388 ('Staff recruitment'). The EDPS gave his opinion on 21 October 2011.

¹⁴ Case 2004-0281 ('Personal files: reports at end of probationary periods and staff reports'). The EDPS gave his opinion on 4 July 2005.

For the reasons set out above, a distinction has to be made between data for assessment of the ability to work in a third language and data for assessment in the scope of a possible promotion¹⁵. The same goes with regard to their retention period, particularly because the knowledge assessment data may be negative, in which case the officials concerned will not be able to be considered for a promotion (just as contract staff will not be able to obtain a renewal of their contract for an indefinite period).

Consequently, the Court should lay down specific retention periods for assessments of the ability to work in a third language, whether they be positive or negative, which are not directly linked to promotion. These periods should be established in accordance with the Guidelines.

3.4. Information of data subjects

The content of the information notice drawn up by the Court is in accordance with the Regulation and the Guidelines. However, the information concerning the personal data processed and the retention periods should be adapted in accordance with the abovementioned recommendations (see No 3.1. and 3.2. above).

Furthermore, in addition to the publication of the information notice on the Intranet, the data subjects should receive a copy of the notice from the start of the process of verification by the Court, for example by e-mail.

3.5. Security

On the basis of the information available, the EDPS has no reason to believe that the Court has not complied with the security measures required by Article 22 of the Regulation.

Conclusion

The processing proposed does not appear to involve any infringement of the provisions of the Regulation provided that account is taken of the recommendations made above, namely in particular:

- supplement the list of personal data processed in the scope of the assessment by the Court of the knowledge of a third language;
- lay down specific retention periods for data for assessment of the ability to work in a third language, in accordance with the Guidelines;
- adapt the information notice concerning personal data and retention periods.

The EDPS asks the Court to inform him of the implementation of these recommendations within three months of the present opinion.

Done at Brussels, on 10 December 2013

(signed)

Giovanni Buttarelli
Assistant Supervisor

¹⁵ Data regarding the ability to work in a third language and promotion decisions are also stored in different places (see point 10/ Data storage medium).