



Opinion on the notification for prior checking relating to the appraisal of senior management staff (*Evaluation du Personnel d'Encadrement Supérieur – EPES*)

Brussels, 4 February 2005 (Case 2004-95)

Proceedings

In a note dated 16 July 2004, Mr KÖNIG – the Data Protection Officer of the European Commission – sent to the European Data Protection Supervisor a notification for prior checking relating to EPES (*Evaluation "360°" du Personnel d'Encadrement Supérieur – 360° appraisal of senior management staff*). The note was received on 22 July 2004. The file consists of the formal notification and nine annexes.

On 8 September 2004, the Assistant Supervisor sent an e-mail containing a number of queries about the file.

In an e-mail dated 10 December 2004, a member of the European Data Protection Supervisor's staff once again contacted the Data Protection Officer of the Commission to obtain answers to the questions asked.

In an e-mail dated 14 December 2004, Mr HILBERT, Assistant to the European Commission's Data Protection Officer, provided the EDPS with answers to all questions. On 7 January 2005, near the deadline for issuing the opinion, Mr BAYO DELGADO, Assistant Supervisor, sent an e-mail announcing that the deadline was extended by one month owing to the complexity of the matter, in accordance with Article 27(4)(1) of Regulation (EC) No 45/2001 of the European Parliament and of the Council.

The facts

As part of its administrative reform, the Commission has developed a new personnel management system, known as SYSPER 2, in order *inter alia*, to appraise its staff. SYSPER 2 comprises a set of modules which each deal with precise and specific aspects, including in particular the periodical appraisal and promotion reports. These modules provide for the processing of personal data.

The legal basis for these processing operations are the regulations governing the institution's relations with its staff, including the Staff Regulations of Officials of the European Communities, the Conditions of employment of other servants of the European Communities, the general provisions for giving effect to these regulations, Commission decisions and the internal management rules observed by Commission departments when performing the duties delegated to them by the Commission.

Article 43 of the new Staff Regulations (which entered into force on 1 May 2004) provides that each Commission official shall be the subject of a periodical report. Officials in grades A1 and A2 were not subject to appraisals under the previous Staff Regulations.

The Communication on the appraisal of senior management staff, preceded by the Communications of 21 December 2000 and 18 February 2004, sets out the rules governing the appraisal of officials formerly in grades A1 and A2. Since the new Staff Regulations have come into force, these rules apply to officials holding posts such as Director-General, Head of Department, Deputy Director-General, Head of Delegation, adviser *hors classe*, chief adviser, Director and *chef de cabinet* and officials formerly in grades A1 and A2 seconded outside the institution.

The appraisal aims to assist officials in the above posts with their career development, providing feedback on their performance, training needs and possible future postings.

It consists of a dialogue between the reporting officer and the appraised official. The reporting officer is also aware of the opinions of the main persons who work in close relation with the appraised official, thanks to aggregate responses received from a sample of collaborators and colleagues on the basis of a concise questionnaire, known as the "360° questionnaire".

Answers to this questionnaire are given by means of a single-use access key in order to ensure the respondents' anonymity. The aggregate responses are available only to the reporting officer and the appraised official and serve as basis for their dialogue. The questionnaire results contribute to the identification of personal development objectives.

The 360° questionnaire complements the CDR (Career Development Review), which continues to be regarded as the standard appraisal process. The CDR is managed using the SYSPER application, while the 360° appraisal is managed using EPES (*Evaluation "360°" du Personnel d'Encadrement Supérieur*), a newly developed application. The EPES system is not integrated into the SYSPER 2 system but has an interface with it; as determined by the reporting officer, established by SYSPER 2 as part of the CDR and downloaded to the EPES system.

The 360° questionnaire is sent to 10 collaborators and five internal stakeholders randomly selected from a list.

Respondents receive the following message together with the 360° questionnaire:

Dear Sir / Madam,

The new Staff Regulations enforce an evaluation procedure for senior management officials. The procedure selected requires a "360°" questionnaire to be sent to the collaborators of the appraisee. The findings of the questionnaire will help to achieve a better dialogue between the appraisee and the reporting officer.

As a collaborator of Mr XXX, you have been randomly selected from a list of collaborators to take part in his evaluation.

The questionnaire consists of 21 statements to which you are asked to give one of your ratings, ranging from "Does not correspond" to "Corresponds exactly".

Please note that your replies will be treated strictly anonymously and that the appraisee will only be told the average score on each item.

The findings drawn from the replies are summarised in a table displaying the average assessments.

The document submitted with the notification (*EPES: Evaluation "360°" du Personnel d'Encadrement Supérieur*) describes two appraisal procedures: one for the exercise undertaken in 2004 which covered the 2003 period, and another for the appraisal exercises launched as of 2005.

For the 2003 period, the procedure was as follows:

1. For each official to be appraised, the reporting officer entered into the application the list of internal stakeholders and the list of collaborators suitable for being selected at random to respond to the 360° questionnaire. Once the list of participants had been established by the reporting officer for an appraised official, it was validated by DG ADMIN A.5.
2. The software developed for the 360° appraisal (EPES) selected, at random, the responding participants (10 collaborators + 5 internal stakeholders) from the list. Neither the appraised official nor the reporting officer knew which participants had been picked. However, if the number of collaborators and internal stakeholders was lower than 10 + 5, the sample was deemed to be established. All potential participants thus became effective participants.
3. EPES automatically forwarded to the 10 + 5 participants, who had an obligation to respond within five days, a single-use key for gaining access to the 360° questionnaire of the appraised official (by e-mail).
4. Participants logged on to a dedicated server and entered their replies.
5. The replies to questions had to be anonymous; in other words, neither the appraised official nor the reporting officer were to be able to determine what reply had been given by which participant. Participation was recorded by the system but the link between participants and their replies was not.
6. Once all 360° questionnaires of an appraised official had been finalised, DG ADMIN A.5 drew up a report setting out the officials' results. This report was produced in PDF format.
7. Once the final 360° report had been established, it was annexed to the CDR of the appraised official since this official needed it for the initial dialogue with his reporting officer. This operation was carried out by the appraisal administrators of DG ADMIN A.5.
- 8.

For appraisal exercises launched from 2005 onwards, the procedure is as follows:

1. The reporting officer establishes two lists, in agreement with the appraised official:
 - The list of all collaborators (COL) of the appraised official.

- The list of the main internal stakeholders (IS) of the appraised official.

This is the procedure set out in Communication 276/6 of 10 March 2004 (page 11/29).

Lists of participants (collaborators and internal stakeholders) are proposed to the reporting officer from the staff databases. (COMREF)

2. However, the procedure given in point 13 of the document attached to the formal notification (*EPES: Evaluation "360°" du Personnel d'Encadrement Supérieur*) is slightly different:
 - The appraised official establishes the list of internal stakeholders and the list of collaborators suitable for being selected at random to respond to the 360° questionnaire about him.
 - Once the official has completed his list of potential participants, he states that the list is established; the list is then forwarded to the reporting officer for agreement.
 - The reporting officer must approve the potential participants selected by the appraised official. This approval is given by means of an electronic signature.
3. The software developed for the 360° appraisal (EPES) selects, at random, the 10 +5 participants from the lists. By mutual agreement, the reporting officer and the appraised official may designate a number of participants, regarded as particularly representative, who should also be involved in the appraisal.
4. EPES automatically forwards to the 10 + 5 participants, who have an obligation to respond within five days, a single-use key for gaining access to the 360° questionnaire of the appraised official (by e-mail). The single-use key prevents participants from replying more than once.
5. Participants log on to a dedicated server and enter their replies.
6. EPES receives the replies and processes them in the order of arrival. The replies do not contain the name of their author; it is therefore not possible to determine who gave what reply. EPES merely counts the number of replies received.
7. EPES produces a table showing the arithmetic mean of replies given regarding each of the nine dimensions covered by the questionnaire. The result is forwarded in tabular format to the reporting officer and to the appraised official only. It is not made available to other departments. Once the appraisal process is complete, the results of the 360° questionnaire are destroyed.
8. EPES also produces a mean score for the entire sample / a mean score by category. A sample of the results without identification of respondents is forwarded to the reporting officer and the appraised official.

The various types of data to be considered and which are liable to be concerned, within the framework of current or future appraisal procedures, are as follows:

1. For the appraised official
 - a. Name, forename, personnel number, grade, age and DG. The data are obtained from the COMREF database.
 - b. The aggregate data resulting from the appraisal carried out by the participants and provided by EPES itself.
2. For respondents to the 360° questionnaire
 - a. Name and forename; no other details are given. The data are also obtained from the COMREF database.
 - b. The possible restoration of the link between respondents and their replies.

Legal aspects

a) Prior checking

The notification received on 22 July 2004 relates to processing of personal data ("*any information relating to an identified or identifiable natural person*" – Article 2(a)) and therefore falls within the scope of Regulation (EC) No 45/2001.

Under Article 27(2)(b) of Regulation (EC) No 45/2001 of the European Parliament and of the Council, processing operations intended to evaluate personal aspects relating to data subjects, including their ability, efficiency and conduct, shall be subject to prior checking by the European Data Protection Supervisor.

In the case in point, the processing operation is directly related to an appraisal phase: that of the Commission's senior management staff (Directors-General, Heads of Department, Deputy Directors-General, Heads of Delegations, advisers *hors classe*, chief advisers, Directors, *chefs de cabinet* and officials in grades A1 and A2 seconded outside the institution).

The formal notification was received on 22 July 2004 through the post. The Assistant Supervisor sent an e-mail on 8 September 2004 containing a number of queries with a view to obtaining clarification on some points of the dossier. Under the terms of Article 27(4)(1), this e-mail suspended the two-month period within which the European Data Protection Supervisor had to issue an opinion. On 8 September, there were 14 days left to issue the opinion.

The Assistant to the Commission's Data Protection Officer provided answers to the queries on 14 December 2004. The 14 days from 14 December led to 28 December. As all institutions were on holiday from 24 December 2004 to 2 January 2005 inclusive and were thus unable to work, the two-month deadline therefore expired on 7 January 2005 in the evening.

On 7 January, the Assistant Supervisor sent an e-mail to the Assistant to the Commission's Data Protection Officer announcing an extension of the deadline on account of the complexity of the matter, pursuant to Article 27(4)(1) of Regulation (EC) No 45/2001.

The EPES document is the main subject of the formal notification forwarded by the Commission's Data Protection Officer. Annex 1 to this notification to the EDPS (Note dated 1 June 2004 from the Director-General of the Directorate-General for Personnel and Administration to all Commission Directors-General) presents the SYSPER 2 system. Annex 9 to the notification (Communication 276/6 of 10 March 2004), and in particular its Annex 2 on the career development review form, concerns the SYSPER system and is beyond the scope of this opinion. The SYSPER 2 system and its annexes will be dealt with in a future opinion, provided a formal notification is submitted. This opinion of the European Data Protection Supervisor focuses only on the specific aspects of the EPES system.

The EPES system submitted comprises two appraisal procedures. As one of the two procedures has been completed (appraisals for 2003, undertaken in 2004 and now finalised), it cannot be the subject of conclusions on the part of the European Data Protection

Supervisor, even if some reservations can clearly be made. Nevertheless, the European Data Protection Supervisor reserves the right to issue an opinion should any complaints be submitted against the appraisals carried out during the above period.

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this case, as the European Data Protection Supervisor was appointed after the system was set up, the check necessarily has to be performed *ex post*. However, this does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be introduced.

b) Legal basis and lawfulness of the processing operation

The question of legal basis concerns two categories of individual: appraised officials and respondents to 360° questionnaires.

With respect to appraised officials, the legal basis lies in Article 43 of the Staff Regulations of Officials of the European Communities. In accordance with Article 110 of the Staff Regulations, the institutions adopt the provisions implementing the periodical report to be drawn up every two years on ability, efficiency and conduct in the service. The Staff Regulations contain no derogations for officials at the grades being reviewed here. As the implementation of Article 43 is a matter for the institutions, the legal basis relating to the appraised official is valid.

As regards respondents to 360° questionnaires, the legal basis is to be found in the three Communications, dated 22 December 2000, 18 February 2004 and 10 March 2004 respectively, annexed to the formal notification. The latter two Communications complement Article 43 of the Staff Regulations and contain no provisions contradicting the new Staff Regulations which came into force on 1 May 2004. The legal basis is therefore valid.

Alongside the legal basis in relation to Regulation (EC) No 45/2001 the lawfulness of the processing operation must also be considered. Article 5(a) of Regulation (EC) No 45/2001 stipulates that the processing shall be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities ... or in the legitimate exercise of official authority vested in the Community institution ...*".

As appraisal procedures which involve collecting and processing personal data relating to officials or other servants come under the legitimate exercise of official authority vested in the institution, the processing operation is lawful. The legal basis found in the Staff Regulations of Officials of the European Communities (Articles 43 and 110) supports the lawfulness of the processing operation.

c) Collection and transfer of data

Footnote 6 on page 11 of the Communication specifies that the lists of participants in the appraisal of officials are proposed to the reporting officer on the basis of the staff databases.

The processing operation being reviewed involves no general change of the specified purpose of staff databases and is not incompatible with that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 is not applicable to the case in point and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data within or to other Community institutions or bodies "*if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient*".

Responsibility for processing in connection with the EPES database lies with DG ADMIN, Directorate A, Unit 5. Responsibility for processing in connection with appraisal procedures (SYSPER 2 system) lies with each Directorate-General. Such is the conclusion which can be drawn from the note of the Director-General of DG ADMIN dated 1 June 2004, which points out that:

"It should be pointed out that overall responsibility for the (SYSPER 2) system lies with DG ADMIN, while the Directors-General and Heads of Department are responsible for the use of SYSPER 2 locally within their Directorate-General or department. In particular, this implies that they are legally responsible as regards data protection in the event of a complaint of inappropriate processing within their department ..."

As the two controllers are in two separate Directorates-General, it is necessary to ensure that the conditions of Article 7(1) are fulfilled; they are since each Directorate-General has competence for organising the appraisals of its officials and the data provided by other officials are needed to complete the processing operations.

d) Data storage

The computer data and aggregate results managed by DG ADMIN (A.5) are destroyed on completion of the appraisal procedure.

To the question "Is identification of collaborators and internal stakeholders possible once all completed questionnaires have been collected and are these people included in the 'computer data' mentioned in Article 22 of the notification", the answer was as follows:

"The option to allow the DPO to inspect the results in the event of a dispute was maintained as a safeguard; however, this data can also be read by the computer engineers.

NB: the links between participants and their replies have been kept in the system's computer data at the request of the Data Protection and Computer Security Adviser of DG ADMIN D (Patrice), in order to enable the DPO to use these data in case of an investigation."

This seems to indicate that collaborators and internal stakeholders can still be identified after the end of the appraisal procedure.

It can be necessary to preserve data links for the purposes of handling complaints or conducting investigations. Network administrators and the Data Protection Officer have this possibility.

Article 4(1)(e) of Regulation (EC) No 45/2001 lays down the principle that 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*".

The official's appraisal can be regarded as "the purposes for which the data were collected" and the event of investigations or complaints as "the purposes ... for which they are further processed".

In all cases, data may be kept only "*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 Regulation (EC) No 45/2001). This implies that, in the present case, data may be kept only for as long as complaints may be submitted.

As regards investigations, however, no details are given as to the type of investigation or context in which it may be carried out. Such investigations must nevertheless fulfil the conditions set out in Article 4(1)(e) of Regulation (EC) No 45/2001, in particular: "*The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes*". The data must therefore be kept in anonymous form.

Further processing is an admissible purpose but it must be accompanied by adequate safeguards, such as restricted access, exclusion of other purposes and data encryption. The European Data Protection Supervisor recommends that appropriate safeguards be established regarding the use of these data after the end of the appraisal process.

e) Information for data subjects

Article 12 of Regulation (EC) No 45/2001 sets out the information to be supplied where the data have not been obtained from the data subject. The various categories of information to be provided are far from being complete.

No explicit provision appears to have been made for mention of the identity of the controller or of the existence of a right of access to, and a right to rectify, the data concerning him or her. Of course, what is at issue here is the right of access to and the right to rectify personal data during the period set to collect the replies, not the right of access to and right to rectify the replies themselves.

Furthermore, while the items of information set out in Article 12(1)(f) ("*the legal basis of the processing operation for which the data are intended, the time-limits for storing the data* – this information must be supplied if no mention is made of the fact that the answers will be erased after the appraisal –, and *the right to have recourse at any time to the European Data Protection Supervisor*) are not compulsory, they could be mentioned.

In the light of these observations, the European Data Protection Supervisor requests that the compulsory information (identity of the controller and existence of a right of access and a right to rectify) be mentioned, along with the fact that the data will be erased after the appraisal. Furthermore, the European Data Protection Supervisor requests that the information mentioned in Article 12(1)(f) of the Regulation be mentioned as well. Information about anonymity is dealt with below.

f) Quality of the data

The data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation to the processing operation.

Furthermore, the data must be processed fairly and lawfully (Article 4(1)(a) of Regulation (EC) No 45/2001). The matter of lawfulness has been reviewed above.

The question of fairness is related to the information given on the anonymity of questionnaire respondents and the anonymity of replies.

No information is given about the anonymity of questionnaire respondents. Point 5.1(4) on page 25 of the Annex to the notification entitled *EPES: Evaluation 360° du Personnel d'Encadrement Supérieur, User requirements* states that the reporting officer and the appraised official must not be able to determine the identity of the collaborators and internal stakeholders selected at random. Respondents to the 360° questionnaire must be informed of this fact.

However, while questionnaire respondents cannot, in principle, be identified, there are many reasons to doubt whether this is in fact the case.

Under the exercise undertaken in 2004 and covering the 2003 period, where it was not feasible to establish samples of 10 collaborators and 5 internal stakeholders, the samples were deemed complete. "All potential participants become active participants" (according to the document *Evaluation "360°" du Personnel d'Encadrement Supérieur* of 29 January 2004). In such cases, at least the reporting officer knew who the respondents to the 360° questionnaire were.

The same problem will arise for appraisal exercises covering the years from 2004. Even if the list of participants is compiled by the reporting officer in agreement with the appraised official, the selection algorithm will still pick the participants at random. If the sample is under 10 + 5, it will still be deemed to be established (point 5.1(2) on page 25 of the Annex to the notification entitled *EPES: Evaluation 360° du Personnel d'Encadrement Supérieur, User requirements*).

In addition, a number of other statements in the same Communication appear to run counter to the principle that the participants (10 collaborators and 5 internal stakeholders) should remain anonymous.

- On page 9/29: *"the reporting officer shall determine, in agreement with the jobholder: ... the number of representatives of each 'category' that the samples comprise"* (see point 6.2).
- On page 10/29: *"5 internal stakeholders and 10 collaborators shall be selected at random in accordance with the number of representatives by category set at the beginning of the period"* (footnote: *"If the required number (5 or 10 participants) cannot be achieved within the DG, the number of participants shall be reduced accordingly"*) (see point 6.2.).
- On page 11/29: *"In common agreement the reporting officer and the appraised official shall be able to designate a number of participants, regarded as particularly representative, who should also be involved in the appraisal"* (see point 6.3.2)

As a consequence, the procedure for establishing the sample of collaborators and internal stakeholders picked at random to respond to the 360° questionnaire would not be fair in terms of the information provided if specific information is not provided in cases where the anonymity of participants is not safeguarded. The controller must include this in the information required and provide it.

Furthermore, in order to ensure that the data processing is fair as regards the data subject, it is also necessary to inform respondents to the 360° questionnaire that their responses, even though they will be destroyed once the official's appraisal has been completed, are not strictly anonymous because both the IT department of DG ADMIN and the Data Protection Officer can have access to the data in the event of investigations or complaints. The European Data Protection Supervisor recommends that this information be given to respondents to 360° questionnaires.

g) Security

With respect to Article 22 of Regulation (EC) No 45/2001 ("Security of processing"), the Commission has implemented a number of provisions, both technical and

organisational, to make access to the data secure (points 32 to 34 of the formal notification). These measures appear to meet the security and confidentiality requirements.

However, the Commission must strengthen security of processing in the event of a subsequent investigation or complaint. Data encryption on completion of the appraisal – "*which was rejected on grounds of development time or cost*" – should be implemented.

Conclusion

The proposed processing operation does not seem in breach of any provision for Regulation (EC) No 45/2001, provided that the aforementioned considerations are taken fully into account. This implies in particular that DG ADMIN:

- mention the compulsory information (identity of the controller and existence of a right of access and right to rectify) and the information relating to the legal basis for the processing and the right to have recourse to the European Data Protection Supervisor;
- provide information regarding the anonymity of respondents to the questionnaire and, where the anonymity of respondents is not ensured, mention that fact;
- inform respondents to 360° questionnaires that the replies they give, while destroyed on completion of the official's appraisal, may be restored in the event of subsequent investigations or complaints;
- strengthen security measures in the event of subsequent investigations or complaints, in particular by means of data encryption.

Done at Brussels on 4 February 2005

European Data Protection Supervisor

Peter HUSTINX

Follow-up Note

20 May 2005

DG ADMIN has followed the comments provided in the conclusion of this opinion.

The European Data Protection Supervisor