



**EDPS**  
Procedure for identifying, dealing with and remedying  
cases of professional incompetence  
**Ex-post Prior Checking Opinion**  
(File 2017-0489)

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The procedure for identifying, dealing with and remedying cases of professional incompetence seeks to prevent the risk of professional incompetence being recorded in an official's staff report, and focuses on support measures in order to avoid steps such as downgrading (after three negative reports) or dismissal (following five negative reports).

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Brussels, 14 December 2017

## 1) The facts

By email of 16 May 2017, the European Data Protection Supervisor received a notification for prior checking under Article 27 of Regulation (EC) 45/2001 ('the Regulation') entitled 'Procedure for identifying, dealing with and remedying cases of professional incompetence'.

### Description of the processing operation

The processing operation in question seeks to define the procedure for identifying, dealing with and remedying the professional incompetence of officials in order to help them to regain a satisfactory level of performance.

Where the assessor considers there to be a risk that the official's upcoming staff report may record professional incompetence, he may adopt any useful preventive measure, in accordance with his superiors and, where necessary, with the support of the Human Resources Unit (HRBA).

The purpose of the processing operation is to establish a preventive policy, based on the implementation of any useful measure that would avoid a finding of professional incompetence in the staff reports.

Where that preventive policy is not successful, the formal incompetence procedure is initiated on the basis of Article 51 of the Staff Regulations of Officials of the European Union<sup>1</sup> and the decision of the EDPS Director.<sup>2</sup>

That processing operation concerns EDPS officials only, not contractual or temporary servants.

#### 1.1 Prevention

The first stage in the procedure is therefore that of prevention, which involves establishing a dialogue between the assessor and the official in order to resolve the problems. The aim is to avoid, as far as possible, the need to initiate a procedure for dealing with professional incompetence.

The prevention stage consists of professional support measures which are defined as part of a dialogue between the official and the assessor. Those measures may include the following: change of duties, professional guidance, coaching, training, transfers, etc.

The assessor establishes the prevention measures, and also sets out the objective(s) to be met, the action(s) to be taken, the criteria for success and a monitoring schedule. That information is sent to the official under appraisal. The measures are maintained for as long as necessary.

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<sup>1</sup> Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community: [https://myintracomm.ec.testa.eu/hr\\_admin/fr/staff-regulations/Pages/index.aspx](https://myintracomm.ec.testa.eu/hr_admin/fr/staff-regulations/Pages/index.aspx)

<sup>2</sup> Decision of the European Data Protection Supervisor of 10 November 2015 on the procedure for identifying, dealing with and remedying cases of professional incompetence.

## 1.2 Finding of professional incompetence - First staff report

Where, despite the preventive measures taken, the official's annual staff report (including the appeals procedure) contains a reference to *professional incompetence*, the assessor will at that point set in motion the procedure for dealing with professional incompetence. The assessor establishes a support programme following consultation with the appeal assessor, setting out the objectives to be met by the official under appraisal, in order to improve his level of performance.

## 1.3 The support programme

The support programme, which is aimed at dealing with professional incompetence, sets out:

- a) specific professional objectives;
- b) clear success criteria specifying, in particular, the level of performance required; and
- c) the timetable for achieving the above.

The programme sets out the measures which must be taken to remedy the situation. Those measures may include a change of duties, training initiatives or proposals for appropriate professional development opportunities.

The official receives the support programme in writing and is given the opportunity to be heard by the assessor within seven working days; he may also submit any comments in writing within seven working days of receiving the support programme.

The support programme begins as soon as it is notified to the official under appraisal and ends when the official receives notification of the next staff report.

After the support programme has been established, there is a mid-term review at which the official may be accompanied by a person of trust or a staff representative. The assessor writes up the mid-term review and sends it to the official under appraisal.

If, subsequently, the annual staff report no longer contains any reference to unsatisfactory performance, the procedure is closed.

## 1.4 Second unsatisfactory annual report

However, if the second consecutive annual staff report again contains a reference to professional incompetence, the assessor continues the procedure for dealing with professional incompetence by drawing up a new support programme, setting out the objectives to be achieved. The first support programme may be extended.

The support programme begins and ends as set out in the preceding point and there will also be a mid-term review.

## 1.5 Third unsatisfactory annual report

If the third staff report again contains a reference to unsatisfactory performance, the assessor sends, via the HRBA Unit, a reasoned proposal to

downgrade the official under appraisal by one grade, under Article 51(1)(a) of the Staff Regulations.<sup>3</sup>

That proposal to downgrade by one grade is sent by the Appointing Authority to the Joint Advisory Committee for professional incompetence for an opinion. The Appointing Authority takes a view after receiving the Committee's opinion.<sup>4</sup>

At that stage, the assessor continues the procedure for dealing with professional incompetence by drawing up a new support programme setting out the objectives to be achieved in order for the official to improve his level of performance.<sup>5</sup>

#### 1.6 Fourth unsatisfactory annual report

If, despite all efforts, the fourth annual staff report again contains a reference to professional incompetence, the assessor continues the procedure for dealing with professional incompetence by drawing up a new support programme setting out the objectives to be achieved. The first support programme may be extended.

#### 1.7 Fifth unsatisfactory annual report

If the fifth unsatisfactory annual staff report again contains a reference to professional incompetence, the assessor sends the file to the Appointing Authority, via the HRBA Unit.

The Appointing Authority seeks an opinion from the Joint Advisory Committee for professional incompetence on a proposal to dismiss the official under appraisal, on the basis of Article 51(1)(a) of the Staff Regulations. That proposal is sent to the official concerned, who is informed of his rights under Article 51(2) et seq. of the Staff Regulations.

#### 1.8 The evaluation report and the supervisor

Throughout the procedure, at the end of each support programme, the assessor drafts a staff report alongside an evaluation report that contains an analysis and an assessment of the efforts made by the official concerned to implement the measures set out in the support programme. Where the level of performance is found to be unsatisfactory, that finding shall be supported by facts.

In addition, a supervisor may be allocated by the assessor, with the official's consent, in order to help him to complete the support programmes.<sup>6</sup>

The people or categories of people who may be sent the data are the assessor, the appeal assessor, the person of trust or staff representative chosen by the official under appraisal, the Human Resources Unit, the Appointing Authority, and the Joint Advisory Committee for

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<sup>3</sup> See the Staff Regulations, footnote 1.

<sup>4</sup> In accordance with Article 11 of the Director's Decision the Joint Advisory Committee is composed of two members in addition to its chairman. The chairman and members are appointed in accordance with Article 12 of Annex II to the Staff Regulations. They must be officials of grade AD 14 and in the event that the EDPS does not have enough officials at that grade, the Advisory Committee is to be composed of officials of the highest grade.

<sup>5</sup> In the same way as in the preceding paragraph, the support programme may be extended.

<sup>6</sup> The supervisor advises the official concerned throughout the support programme and informs the official and the assessor where he finds that the official's level of performance has not improved. He is present at the discussions between the official in question and the assessor carried out as part of the programme's interim evaluation, and is consulted at the time of drafting of the evaluation report.

professional incompetence; in the event of a transfer to another institution, the official responsible for the personal files of that institution, the DPO of the EDPS, the IAS, the Court of Auditors, where appropriate.

Documents drafted during the prevention stage are not included in the personal file and are destroyed once the issue has been resolved, or from the start of the first support programme.

## 2) Legal Analysis

The present prior checking opinion<sup>7</sup> under Article 27 of the Regulation will concern aspects that raise issues of compliance with the Regulation or that require more in-depth analysis. As regards aspects which are not covered in the present opinion, the EPDS will issue no comment on the basis of the documents provided.

The data processing in question is subject to prior checking because it presents specific risks in relation to the rights and freedoms of the data subjects owing to its nature, scope and purposes. That data processing falls within the scope of Article 27(2)(b) of the Regulation since it is intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct. In the alternative, the data processing falls within the scope of Article 27(2)(d), since it seeks to exclude individuals from a right, benefit or contract.

### 2.1 Legal basis and lawfulness of the processing

The data processing is lawful on the basis of Article 5(a) of the Regulation.<sup>8</sup>

The Staff Regulations, and in particular Article 51(1)(a) thereof, which states that *‘an official who, on the basis of three consecutive unsatisfactory annual reports as referred to in Article 43, still shows no progress in his professional competence shall be downgraded by one grade. If the following two annual reports still show unsatisfactory performance, the official shall be dismissed.’*

Lawfulness is also based on a decision of the EDPS of 10 November 2015 on the procedure for identifying, dealing with and remedying cases of professional incompetence (‘the decision’).

### 2.2 Data quality

The following data are processed: name, date of birth, personal identification number, data concerning recruitment, grade, starting date in the job and assigned

department, description of duties, data relating to language skills and training undertaken, appraisal data for the period of reference, and data contained in the staff reports and evaluation reports.

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<sup>7</sup> Given that this is an ex-post notification, the time-limit of two months for adoption of an opinion by the EDPS does not apply. The notification was received on 15 May 2017. This file has been processed at the earliest opportunity.

<sup>8</sup> According to that article, ‘processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed’.

The data quality is guaranteed by the fact that, in accordance with Article 4 of the aforementioned EPDS decision, the official under appraisal receives the support programme in writing and is given the opportunity to be heard by the assessor. He may submit written comments on the measures set out in the support programme, which will contribute to the data quality.

That data quality is also guaranteed since Article 12 of the decision provides that the documents drafted during the prevention stage (Article 2 of the decision) will not be placed in the personal file and will be destroyed as soon as the problem has been resolved, or from the start of the first support programme. That means that the preparatory documents drafted before the staff report will be destroyed immediately either because the problem has been resolved (the staff report makes a finding of professional competence) or because a support programme has been established with the official under appraisal.

The data processed, as described above, are collected for specific and legitimate purposes and appeared to be adequate, relevant and not excessive in relation to the purposes for which they are collected. Therefore, Article 4(1) of the Regulation is complied with as regards the data quality.

However, it should be clearly stated that where there is professional incompetence for medical reasons, this is the subject of a separate procedure.

In order to guarantee that the processing has a specific purpose, it should be clarified that any professional incompetence for medical reasons is subject to a separate processing of data (for medical purposes) and that there will be no interference between the two data processing operations.<sup>9</sup>

## 2.3 Policy of retention of personal data or categories of data.

### 2.3.1 Documents drafted at the prevention stage

As stated above, documents drawn up during the prevention stage are not placed in the personal file and are destroyed following the resolution of the issue, or from the start of the first support programme, in compliance with Article 4(1)(e) of the Regulation. The EDPS welcomes that immediate destruction of the data.

However, the EDPS wishes to emphasise that the notification does not contain any information on the security of the document storage during the prevention stage.

### 2.3.2 Staff reports

In the second place, the retention period for unsatisfactory staff reports is set at 10 years from the date of the official's departure (or from the last pension payment).<sup>10</sup>

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<sup>9</sup> In that regard, it should be borne in mind that the notification of the ECB on the procedure for dealing with professional incompetence provides expressly that the procedure does not apply in cases where the ECB's medical advisor has established that the individual's medical condition is the main cause of the professional incompetence, see the opinion of the EDPS of 30 August 2013 (file 2013-0892).

<sup>10</sup> Article 26 of the Staff Regulations provides that the personal file of an official must contain all reports relating to his ability or efficiency.

That retention period must be consistent with the maximum period laid down for the retention of staff reports in the EDPS staff evaluation procedure and paragraph 4 of the EDPS Guidelines concerning the processing of data in the area of staff evaluation.<sup>11</sup>

The Guidelines establish, however, that *‘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.’* The issue of whether a period of five years is sufficient could therefore be examined in the light of the Guidelines.

The EDPS recommends examining, in the light of the EDPS Guidelines, whether a retention period of five years is sufficient.

### 2.3.3 Decision of the Appointing Authority to downgrade

The notification does not specify the retention period for the final decision of the Appointing Authority to downgrade following three negative reports. As regards the retention period for the decision to downgrade, reference should be made to Article 51(7) of the Staff Regulations, which establishes: *‘Officials who are downgraded on grounds of incompetence may after a period of six years ask for all references to that measure to be deleted from their personal files.’*

According to the Staff Regulations, that deletion is carried out at the request of the official concerned. The EDPS recommends, as good practice, the automatic deletion of any reference to that measure after a period of six years. That amounts to establishing a retention period of six years from the date of downgrading.

The EDPS recommends establishing a maximum retention period of six years for decisions to downgrade, from the date of adoption of the decision. Thus, any support measures connected to the decision should also be deleted after six years.

### 2.3.4 Dismissal decision of the Appointing Authority

The notification does not specify the maximum retention period for a dismissal decision by the Appointing Authority. In any event, the period should be sufficient to allow the person under appraisal to appeal to the Court of Justice, or to complain to the European Ombudsman. Furthermore, the period should enable a possible audit by the Court of Auditors.

The EDPS recommends establishing a retention period for dismissal decisions.

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<sup>11</sup> [https://edps.europa.eu/sites/edp/files/publication/11-07-15\\_evaluation\\_guidelines\\_en.pdf](https://edps.europa.eu/sites/edp/files/publication/11-07-15_evaluation_guidelines_en.pdf)

### 2.3.5 Other documents

Following the notification, the other documents relating to the procedure such as the *evaluation* reports and the support programme(s) are placed in the personal file of the official under appraisal in the section entitled ‘professional incompetence’. The notification also states that ‘electronic documents produced during the procedure for dealing with incompetence must be deleted immediately after the reports have been placed in the personal file.’ Those two statements appear to be contradictory. Either these are documents to be placed in the personal file, under the professional incompetence tab, or only the report is kept in the personal file.

In both scenarios, there is no information relating to the retention period for those documents.

However, in the light of Article 51(7) of the Staff Regulations, the time-limit should not exceed six years, as it would not be logical to retain the supporting documents of a decision for longer than the decision itself.

The EDPS recommends providing clarification as to which documents will be placed in the personal file of the official concerned and establishing a retention period for those documents which does not exceed six years.

### 2.4 Rights of the data subjects.

The data subject is entitled to access data relating to him. However, it is not specified how that individual will be able to exercise his right. It is presumed that the individual will have access to all the documents relating to him, namely the staff report, the evaluation report, support measures, notes and reports, but this should be specified.

The EDPS recommends specifying clearly the documents to which the data subject will have access (complete file).

The data subject is also entitled to rectify the data by contacting the Head of the Human Resources Unit. There is a difference between objective personal data (name, address, etc.) and subjective or soft data (such as evaluations, reports etc.). It is clear that the individual will be entitled to rectify only objective data and to submit comments relating to subjective data, such as those in his staff reports or evaluation reports. Article 4(3) of the Director’s decision provides that ‘*the official under appraisal receives the support programme in writing and has the opportunity to be heard by the assessor. He may submit comments on the measures set out in the support programme...*’.

Although the right to rectification appears to be properly guaranteed, the EDPS recommends specifying clearly that data subjects will be entitled to rectify only objective data and to submit comments on subjective data.



Other rights, such as blocking or erasure, appear to be guaranteed, but a reasonable time-limit for exercising those rights should be set, such as, for example, fifteen working days.<sup>12</sup>

The EDPS recommends providing for a reasonable time-limit for exercising rights such as blocking or erasure.

## 2.5 Information intended for data subjects

The notification states that an information notice has been posted on the intranet site, but that notice could not be found. The recommendation is therefore to post a clear and complete information notice on the EDPS intranet, with a hyperlink to the Director's decision, in the section on the legal basis, and the possibility for the data subject to request, where appropriate, the blocking and erasure of the objective data.

Given the sensitive nature of the data processing involved in the procedure for handling professional incompetence, mere publication on the intranet is not sufficient. The notice must also be sent to the persons affected by the processing from the first recording of the data.

The EDPS recommends posting the information notice on the intranet alongside the information on the procedure for dealing with professional incompetence. It also recommends sending the notice to the persons affected from the first recording of the data forming part of the notified processing operation, and referring to the notice at the time of the decision adversely affecting an official (to downgrade or dismiss).

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## 3) Recommendations

In the present opinion, the EDPS has issued several recommendations seeking to guarantee that the processing complies with the Regulation, and several suggestions for improvement. Provided that those recommendations are implemented, the EDPS considers that there is no reason to conclude that the provisions of the Regulation have been infringed.

The EDPS expects the following **recommendations** to be **implemented, with supporting documentary evidence**, within **three months** from the date of the present opinion:

1. to examine, in the light of the EDPS Guidelines, whether a retention period of five years is sufficient for staff reports;

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<sup>12</sup> See Guidelines on the Rights of Individuals with regard to the Processing of Personal Data, p. 23.

2. to clarify that professional incompetence for medical reasons is subject to a different data processing operation (for medical purposes) and that there will be no interference between the two data processing operations;
3. to establish a maximum retention period for decisions to downgrade of not more than six years from the date on which the decision was taken;
4. to establish a maximum retention period for dismissal decisions;
5. to clarify which documents are to be placed in the personal file of the official concerned and to establish a retention period for those documents, which does not exceed six years;
6. to specify clearly the documents to which the data subject will have access (complete file);
7. to clarify that the data subjects will be entitled to rectify only objective data and to comment on the subjective data;
8. to provide a reasonable period of time to exercise rights, such as blocking or erasure;
9. to post the information notice on the intranet alongside the information on the procedure for dealing with professional incompetence and to send the notice to the persons affected from the first recording of the data forming part of the notified processing operation, and to refer to that notice at the time of the decision adversely affecting an official (to downgrade or dismiss).

Done at Brussels, 14 December 2017  
**(signed)**

**Wojciech Rafal WIEWIÓROWSKI**