

## **Opinion on the notification for prior checking from the Data Protection Officer of EMCDDA regarding the "Internal Promotion of Official and Reclassification of Temporary Agents"**

Brussels, 22 April 2010 (Case 2009-0839)

### **1. Proceedings**

On 19 February 2008, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the European Monitoring Centre for Drugs and Drug Addition (**EMCDDA**) a notification for prior checking relating to the processing of personal data for the purpose of internal promotions of officials and reclassification of temporary agents to posts carrying higher grades than that at which they were engaged (**the notification**).

The notification was accompanied by the following documents: (i) EMCDDA Management Board Decision DEC/MB/08/10 on the career and reclassification of temporary agents; (ii) EMCDDA Management Board Decision DEC/MB/08/09 on the career and promotion of officials<sup>1</sup> and, (iii) privacy policy.

Questions were raised on 10 March 2009. EMCDDA answered on 22 March 2010. On 24 March 2010 the EDPS asked an additional question and the confirmation of certain facts. On the same date, he extended for two weeks the deadline within which it has to issue an opinion under Article 27 of Regulation 45/2001<sup>2</sup>. The question and confirmation of facts were answered on 19 April 2010. The draft opinion was sent to the DPO for comments on 20 April 2010. The EDPS received a reply on 21 April 2010.

### **2. Facts**

The purpose of the processing is to conduct the yearly internal promotion/reclassification exercise for officials and temporary agents in compliance with Article 45 of the Staff Regulations and Article 10 of the Conditions of Employment of Other Servants (CEOS), as well as the two EMCDDA Management Board Decisions DEC/MB/09/09 and DEC/MB/09/10 on the career of officials including the reclassification of temporary agents. The current promotion/reclassification scheme is based on the attribution and accumulation of points according to merits.

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

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<sup>1</sup> Amended versions of the MB Decisions were adopted and provided later on to the EDPS.

<sup>2</sup> Regulation (EC) 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (Regulation 45/2001).

The **processing operations** can be summarized as follows:

- At the beginning of each yearly exercise, the Administration Unit (HR) consults the personal files of staff members to draw a table containing information for each staff member. The table contains among others, name, staff number, unit, eligibility<sup>3</sup>, and time in grade. The table is exclusively used by the Administration Unit (HR) to establish who is eligible for promotion and as a reference table to register the points awarded to all officials and temporary agents. The table is referred to as the '*main table*'.
- The Administration Unit (HR) provides a sub-set of the above table (referred to as '*Director/Unit table*') to the Director and the heads of Unit regarding only the staff hierarchically reporting to them. The Director and the heads of Unit are the members of the Promotions/Reclassification Management Committee. The table contains the information regarding the points from previous years (appraisal based points, transition points, etc.). The Director and the heads of Unit may insert in advance the points they propose to award to their staff. The purpose of the table is to ease the task of distributing the points. Since calculations are complicated<sup>4</sup> the members are able to better distribute points being guided and being sure not to make any mistake.
- A meeting of the Promotions/Reclassification Management Committee is held with the view to discuss the global awarding of promotion/reclassification points, deliberate and adopt by consensus a list of officials/temporary agents to be proposed for promotion/reclassification to the AIPN/authority authorized to conclude contracts (AHCC). The only document that reflects what it is said in the meeting are the minutes, which are kept by the Administration Unit (HR).
- An individual notification of the proposed points is sent to the staff members concerned who may lodge an appeal against the points awarded within ten working days to the Promotion/Reclassification Joint Committee (PRJC)<sup>5</sup> in accordance with the EMCDDA Decisions of the Management Board DEC/MB/09/09 and DEC/MB/09/10.
- The Promotion/Reclassification Joint Committee delivers an opinion on the fairness and objectivity of the promotion/reclassification process only upon request/appeal from a staff member. Wherever relevant, it shall formulate recommendations to the AIPN/AHCC.
- The final promotion/reclassification points are awarded by the AIPN/AHCC.
- An individual notification of the final points awarded is sent to each staff member concerned by the promotion/reclassification exercise. The final decision on promotion/reclassification of staff is published in the Agency intranet. The

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<sup>3</sup> To be eligible for promotion/reclassification, staff members need to have completed a minimum seniority of two years in their grade by 31 December of the year of the promotion exercise.

<sup>4</sup> For instance, the total number of points awarded to one person may not exceed 4 points, priority promotion points equal to the number of officials minus the ABP, etc.

<sup>5</sup> The PRJC is composed of a chairperson and an alternate chairperson with the rank of head of unit appointed by the AIPN/AHCC and two members and two alternates of the administrator's function group: one member and one alternate designated by the Head of Administration one member and one alternate designated by the Staff Committee. The PRJC shall be established on the basis of the above mentioned MB decisions and has been set up for the first time with the launching of the first promotion/reclassification exercise according to the new rules.

AIPN/AHCC takes individual promotion/reclassification decisions assigning the concerned staff member to a post corresponding to a higher grade. Promoted/reclassified staff members are communicated the formal AIPN/AHCC decision by the Administration Unit (HR).

**Data subjects** concerned are officials and temporary agents who may be awarded promotion/reclassification points.

**Categories of data processed** include: full name, gender, staff number, category and grade, seniority in grade, overall assessment comment in the last appraisal exercise, the accumulated capital of points since the last promotion/reclassification if any, the promotion/reclassification threshold, the number of promotion/reclassification points proposed/awarded in the current exercise, total number of promotion/reclassification points in past promotions/reclassification exercise, information about the third language (to check compliance with Article 45(2) of the Staff Regulations in case of promotion/reclassification).

**Information to data subjects** is given through a privacy statement for the career and promotion/reclassification of EMCDDA officials and temporary agents exercise published in the EMCDDA intranet. It contains information about the purpose and legal basis of the processing, the controller of the data, data recipients, the protection and safeguard of the information, the existence of rights of access and rectification, verification and deletion, the time limits for storing of the data, as well as the right to have recourse to the EDPS.

Data subjects have to submit a written request to the Administration Unit (Human Resources Management Sector) **to exercise the rights of access and rectification.**

The data may be **disclosed** to the following recipients: (i) The staff member concerned, (ii) Heads of unit, or the Director for the Heads of unit and for the staff working directly with him, (iii) the members of the Promotions/Reclassification Management Committee, (iv) the members of the Promotions/Reclassification Joint Committee (only in case of appeal), (v) the Director in his capacity of appointing/contracting authority, (vi) the human resources officer dealing with the promotions/reclassification exercise. In case of transfer of officials, to the hosting institution or agency.

Regarding **data retention**, the tables used during the promotion/reclassification exercise are kept electronically in the protected drive of exclusive access/use of the Administration Unit (HR) and a paper version is kept in a lock cabinet within the offices of the Administration Unit (HR). The decisions on promotion/reclassification are kept in each individual's personal file.

All data is kept for ten years, starting from the time when the staff member concerned leaves the EMCDDA services or from the last pension payment. After this period data for statistical purposes will be kept anonymously.

The following **security measures** are applicable to the processing in question ....

### 3. Legal aspects

#### 3.1. Prior checking

**Applicability of Regulation No 45/2001 ("the Regulation"):** The processing of data at stake constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a former Community body, now an EU body, the EMCDDA, in the exercise of activities which fall within the scope of EU law<sup>6</sup>. The processing of the data is done through automatic means (or part of filing system if manual). Therefore, Regulation No 45/2001 is applicable.

**Grounds for prior checking.** Article 27(1) of Regulation 45/2001 subjects to prior checking by the EDPS all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*". Article 27(2) of Regulation 45/2001 contains a list of processing operations that are likely to present such risks. This list includes "*processing operations intended to evaluate personal aspects relating to the data subjects*" (Article 27 (2)(b) of Regulation 45/2001).

The processing in question consists of evaluation of the ability, efficiency and conduct of officials and temporary agents with the view of their promotion or reclassification. Consequently, it has to be subjected to prior checking on a basis of Article 27(2)(b) of Regulation 45/2001.

**Ex-post prior checking.** Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case, however, the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

**Notification and due date for the EDPS Opinion.** The notification of the DPO was received on 11 January 2010. According to Article 27(4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. For special reasons the delay was extended for two weeks on 24 March 2010. The procedure was suspended for a total of 37 days for further information from the controller and 1 day for comments. Consequently, the present opinion must be delivered no later than on 4 May 2010.

### **3.2. Lawfulness of the processing**

The lawfulness of the processing operations has to be examined in light of Article 5 of Regulation 45/2001. Pursuant to Article 5(a) of Regulation 45/2001, the processing is lawful if it is "*necessary for 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 institutions or body*". The processing of personal data for performance of tasks carried out in the public interest includes "*the processing necessary for the management and functioning of those institutions and bodies*" (recital 27).

The promotion and reclassification procedures involving collection and processing of personal data are part of the legitimate exercise of the official authority vested in EMCDDA. The legal basis confirming the lawfulness of the processing can be found in the following provisions: (i) Article 45 of the Staff Regulations and Article 10 of the CEOS; (ii) two

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<sup>6</sup> The concepts of "Community institutions and bodies" and "Community law" can not be any longer used after the entry into force of the Lisbon Treaty on 1st December 2009. Article 3 of Regulation 45/2001 must therefore be read in the light of the Lisbon Treaty.

EMCDDA Management Board Decisions DEC/MB/09/09 and DEC/MB/09/10 on the career of officials including the reclassification of temporary agents.

The EDPS therefore considers that the processing of personal data in the frame of the procedure of promotions of officials and reclassification of temporary staff is a processing operation necessary in order to comply with a legal obligation of the controller in accordance with Article 5(a) of Regulation (EC) 45/2001.

### **3.3. Data Quality**

Article 4(1)(a) of Regulation 45/2001 provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 3.2.) and fairness will be dealt with in relation to information provided to data subjects (see point 3.7.).

According to Article 4(1)(c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The processing of administrative and evaluation data is necessary for the examination of merits and the subsequent attribution of promotion/reclassification points. It is therefore in full compliance with Article 4 (1)(c) of Regulation 45/2001.

Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified.*" The EDPS considers that the EMCDDA promotion/reclassification procedure helps to ensure the accuracy of the personal data processed and, by using recent appraisal reports, is up to date and complete. Furthermore, the invitation to make use of the rights of access and rectification helps to ensure the quality of data (see point 3.6).

### **3.4. Conservation of data**

Article 4 (1)(e) of Regulation 45/2001 states that personal 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 conservation in individual's files of the decisions on promotion/reclassification for a period of 10 years may be considered reasonable. However, the EDPS questions the proportionality of keeping in electronic form the tables (main table, director table and minutes) used during the promotion/reclassification exercise electronically for such long period. He calls upon EMCDDA to re-evaluate the conservation period for such type of information and propose shorter conservation periods.

### **3.5. Transfer of data**

Article 7(1) of Regulation 45/2001 states that "*Personal data shall only be transferred 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*".

In this case, personal data are communicated to (i) The staff member concerned, (ii) Heads of unit, or the Director for the Heads of unit and for the staff working directly with him, (iii) the members of the Promotions/Reclassification Management Committee, (iv) the members of the Promotions/Reclassification Joint Committee (only in case of appeal), (v) the Director in

his capacity of appointing/contracting authority, (vi) the human resources officer dealing with the promotions/reclassification exercise. In case of transfer of officials, to the hosting institution or agency. In each of these cases the transfer is necessary for the tasks each of these recipients is required to perform and only the necessary task for the performance of the task is communicated.

As such, the EDPS notes that, in each case, the transfer of personal data within EMCDDA is in accordance with Article 7(1) of Regulation 45/2001. However, the EDPS recommends that, in accordance with Article 7(3), each of the recipients is made aware that they shall process the personal data they receive in the course of the promotions procedure only for that purpose.

### **3.6. Right of access and rectification**

Article 13 of Regulation 45/2001 grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

According to the notification received, individuals have a right to request access to the personal data by sending a written request to the Administration Unit. The EDPS notes that access to individuals' data may include access to the tables and to the minutes of the meeting of the Promotions/Reclassification Management Committee to discuss the global awarding of promotion/reclassification points. Access applies unless one of the exceptions of Article 20 of Regulation 45/2001 applies. If, for example, exception of Article 20.1(c) "*the protection of the data subject or the rights and freedoms of others*" applied, EMCDDA could consider giving partial, limited access.

### **3.7. Information to the data subject**

Articles 11 and 12 of the Regulation provide a list of information that should be supplied to the person concerned and specify the moment of providing that information.

The EDPS considers that it is Article 12 on information to be supplied to the data subject where the data have not been obtained from the data subject directly that applies mainly in this case, because the information is obtained from the various parties involved in the process.

A data protection statement as well as the EMCDDA Management Board Decisions DEC/MB/09/09 and DEC/MB/09/10 on the career of officials including the reclassification of temporary agents are available in EMCDDA intranet.

Individuals do not seem to be given or be reminded of the privacy statement when the annual procedures start. The EDPS considers that the mere availability of the policy on the Intranet, without specific warning, is not sufficient. The EDPS suggests that when the annual exercise starts, staff members should be notified about the procedures and where to find the privacy policy (in the Intranet).

The privacy statement contains most of the information required by Article 11 and 12 of the Regulation. However, in the section "*How do we protect and safeguard your personal information*", it only refers to information stored in the personal file. There is no mention to the information (the tables and minutes) stored electronically. This gives the wrong impression that the only information used is stored in personal files. This should be amended.

### **3.8. Security Measures**

After careful analysis of the security measures adopted, the EDPS notes that these measures could be considered adequate in the light of Article 22 of the Regulation.

### **4. Conclusion**

There is no reason to believe that there is a breach of the provisions of Regulation (EC) 45/2001 provided that the following considerations are taken into account. In particular EMCDDA should ensure that:

- The recipients should be made aware that they shall process the personal data they receive in the course of the promotions procedure only for that purpose;
- EMCDDA ensures that the right of access also includes access to the tables and to the minutes (unless an exception applies);
- The conservation period for the tables used during the procedure should be re-evaluated and shorter periods should be suggested;
- Individuals should be notified when the procedure starts about where to find such procedures and the privacy policy. In addition, the privacy policy should be amended as suggested in this Opinion.

Done at Brussels, 22 April 2010

**(Signed)**

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Assistant European Data Protection Supervisor