



**Opinion on the notification for prior checking received from the Data Protection Officer of the Council of the European Union concerning the procedure for the "Selection of officials and temporary servants awarded early retirement in accordance with the provisions of Article 9(2) of Annex VIII to the Staff Regulations"**

Brussels, 18 May 2005 (Case 2004-248)

## **1. Procedure**

- 1.1.** On 20 July 2004 the European Data Protection Supervisor (EDPS) wrote to Data Protection Officers asking them to contribute to drawing up an inventory of data processing operations likely to be the subject of prior checking by the EDPS as provided for by Article 7 of Regulation (EC) No 45/2001. The EDPS asked for notification of all processing operations subject to prior checking, including those which began before the Supervisor's appointment and in the case of which checking could never be considered as being prior, but which would be subject to "ex post" checking. The EDPS also considered that procedures establishing recurrent data processing should be treated as new processing operations subject to prior checking. These procedures should not be subject to fresh checking each year provided that there were no fundamental changes to them, in which case such changes should be notified to the EDPS.
- 1.2.** On 16 April 2005 the Council's Data Protection Officer questioned the EDPS about the advisability of carrying out prior checking of the procedure for the selection of officials and temporary servants awarded early retirement in accordance with the provisions of Article 9(2) of Annex VIII to the Staff Regulations. This request was accompanied by notification of the procedure made by the controller to the Data Protection Officer, the implementing measures adopted by the Council on 29 April 2004 (Staff Note 80/04) and the Staff Notes concerning the 2004 and 2005 procedures (Staff Note 105/04 and Staff Note 61/05).
- 1.3.** On 29 April 2005 the Council's Data Protection Officer gave notification of the procedure for prior checking and supplied additional information in the form of a Staff Note (74/05) dated 28 April 2005 concerning personal data protection in the context of the procedure for early retirement without reduction of pension.

## 2. Examination of the issue

### 2.1. The facts

Article 9(2) of Annex VIII to the Staff Regulations gives the Appointing Authority (hereafter: AA) the option of deciding, in the interests of the service and on the basis of objective criteria, not to apply to the pension rights actually acquired the reduction of 3,5% per year provided for under Article 9(1) for officials interested in immediate retirement, i.e. before the age at which they are entitled to a retirement pension within the meaning of Article 77 of the Staff Regulations and of Article 22 of Annex XIII. Under the same Article 9, the number of officials concerned must not be higher than 10% of the total number of officials in all institutions who retired the previous year, although the annual percentage may vary from 8% to 12%, subject to a total of 20% over two years and the principle of budget neutrality.

Implementation of this measure by the institutions, and, in particular, the General Secretariat of the Council, requires a transparent internal procedure to be drawn up, which is based on objective criteria.

The general implementing provisions of 29 April 2004 stipulate that the AA shall adopt and publish annually the number of officials eligible for the measure in the course of the following year. That number must be determined annually for each institution on the basis of interinstitutional consultation. Moreover, in order to benefit from this measure, an applicant must have reached the minimum age of 55 and been employed by the European Communities for at least 15 years. An applicant who is eligible must submit an application using a form provided for that purpose.

Under the general implementing provisions, the "interests of the service" must be assessed in the light of the circumstances and of different factors including: the need for structural deployment of certain departments and the need for renewal or refocusing of skills. The AA, at the appropriate time, requests the Joint Committee to deliver an opinion on the objective and specific criteria for implementing this measure during the year in question (see the criteria for 2005 below).

The AA consults the departments concerned and forwards to the directors-general/directors of each of these departments the list of applicants who are interested, obtaining their opinion as to the compatibility of the envisaged departures with the interests of the service. The AA, after consulting an ad hoc internal committee, compiles the final list of officials to benefit from the measure. The AA may also compile a reserve list of applicants which may not exceed in number a quarter of that on the main list. The AA must also take account of the balance between the different grades and function groups from the viewpoint of the needs of the institution. The definitive list - which is to include a reserve list - is published on the DGA 1 website.

Following consultation of the Joint Committee on 24 February 2005, the AA specified the criteria on which the measure was to be based in 2005 (Staff Note 61/05). They include the following:

- (a) the interests of the service (50 points), in accordance with Article 5 of the general implementing provisions, which shall be assessed in the light, in particular, of:
  - the need for structural redeployment or reorganisation of certain departments, and/or
  - the new tasks assigned to the General Secretariat of the Council and the

constraints imposed by enlargement: the need for renewal or refocusing of skills, the need for renewal and lowering of the average age of staff;

- (b) the actual length of service with the European Communities (25 points);
- (c) the official's merits in terms of his performance at the institution and throughout his career (25 points).

Applicants on the reserve list of the previous exercise will be given priority if they choose to renew their application.

The applications relating to applicants who have not been selected are retained for 2 years. Data relating to the applications concerning those selected are placed in the personal files and retained for as long as the official or those entitled under him are alive. The reasons relating to the application are not retained in the personal file but are filed separately according to the nature of the information supplied.

The security procedures and measures in force in the Personnel Management department apply to data processing in the context of the procedure for the immediate retirement pension without reduction.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The selection procedure examined constitutes a personal data processing operation within the meaning of Article 3(2) of Regulation (EC) No 45/2001 in that it consists of the collection, consultation and storage of personal data which, although carried out manually, are contained in a filing system.

Article 27(1) of Regulation (EC) No 45/2001 makes 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" subject to prior checking by the EDPS.

Article 27(2) of the Regulation contains a list of processing operations likely to present such risks, such as processing operations "intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)).

The procedure is intended to select officials who may be eligible for an immediate pension without reduction. The criteria adopted by the AA for 2004 and 2005 include "the interests of the service" and "the official's merits in terms of his performance at the institution and throughout his career". In the case of the interests of the service, the criterion in Article 3(a) of the Decision of 15/04/2005 (Staff Note 61/05) of "the need for structural redeployment or reorganisation of certain departments" seems to imply an appraisal of the applicants in terms of their ability. The AA consults the departments concerned and forwards to the directors-general/directors of each of these departments the list of applicants who are interested, obtaining their opinion as to the compatibility of the envisaged departures with the interests of the service. There is therefore an appraisal of the ability of the applicants in terms of the requirements of the service.

As for "the official's merits in terms of his performance at the institution and throughout his career", even though this would involve a synthesis of previous evaluations (which is not stipulated in the Staff Notes), the official's merits and ability will have to be assessed globally

and in terms of the specific application. The reasons given in the application form will, moreover, have to be appraised.

We are therefore clearly dealing here with a processing operation aimed at evaluating the applicant and his or her eligibility for the measure concerned. The processing operation must, therefore, be subject to prior checking by the EDPS.

In principle, checking carried out by the European Data Protection Supervisor takes place prior to inception of the processing operation. In this case, since the procedure has already been established for 2005, checking cannot be carried out in advance. However, as the procedure is a recurrent one, this does not alter the fact that it would be desirable for the recommendations made by the European Data Protection Supervisor to be introduced. In addition, some of the recommendations can still be adopted with regard to the 2005 procedure.

The notification from the Data Protection Officer was received on 29 April 2005. In accordance with Article 27(4), this opinion must be delivered within two months following the first working day after receipt of the notification. The Supervisor will therefore deliver his opinion on 29 June 2005 at the latest.

### **2.2.2. Legal basis and lawfulness of processing**

The processing operation is based on Article 9(2) of Annex VIII to the Staff Regulations giving the AA the option of deciding, in the interests of the service and on the basis of objective criteria, not to apply, to the pension rights actually acquired, the reduction of 3,5% per year provided for in Article 9(1) for officials interested in immediate retirement.

Moreover, the general implementing provisions of 29 April 2004 lay down the specific procedure in this context.

Alongside the legal basis, the lawfulness of processing as defined in Article 5 of Regulation (EC) No 45/2001 must also be considered. Article 5(a) stipulates that personal data may be processed only if 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". The legal basis of Article 9(2) of Annex VIII to the Staff Regulations and the abovementioned Council Decision support the lawfulness of processing.

### **2.2.3. Data quality**

"Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed" (Article 4(1)(c)). They must be "accurate and, where necessary, kept up to date" (Article 4(1)(d)).

The data needed for evaluating the application are collected by means of a form attached to Staff Note 61/05. The Supervisor considers that these data are adequate in the light of the purpose of the processing. Furthermore, the form must be completed each year for any new application, which helps to ensure that the data are kept up to date.

In the course of the procedure the AA consults the directors-general/directors of the departments to obtain their opinion. In addition, the data relating to the career of the person concerned are taken from the personal file. It should be ensured that only adequate and relevant data are kept in the file.

#### **2.2.4. Data retention**

Under Article 4(1)(e) of the Regulation, 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 applications relating to applicants not selected are kept for 2 years. This is justified by the fact that in the event of repeated applications, applicants can refer to the reasons given in the initial application. The EDPS considers this justification to be sound and the retention period to be adequate in relation to the Regulation.

As for the applications concerning the persons selected, the data are placed in the personal file and retained for as long as the official or any persons entitled under him are still alive. The reasons relating to the application are not retained in the personal file but are filed separately in view of the nature of the information supplied. However, no time limit is set regarding the reasons. The EDPS considers that, although it is useful for the decision itself to be kept in the personal file for as long as the official or those entitled under him are alive, the documents concerning the procedure should remain in the file only as long as it is possible to contest the decision. A time limit must therefore be set for keeping the documents concerning the procedure, including the forms containing reasons of the applicants selected.

#### **2.2.5. Compatible processing**

Article 4(1)(b) of the Regulation stipulates that the data must be collected for specified purposes and not further processed in a way incompatible with those purposes.

The selection procedure for immediate retirement without reduction consists in examining the official's merits throughout his or her career, and these data are obtained from the personal file of the person concerned. In the European Supervisor's opinion, there is no use of data for purposes that are incompatible with the purposes of personal files.

#### **2.2.6. Data transfer**

The data are collected by the AA and forwarded to an ad hoc internal committee comprising the Director-General of Administration, the Director for Human Resources and a member of the Legal Service (see Article 7 of the general implementing provisions). This is therefore a transfer of personal data within the institution as referred to by Article 7 of Regulation (EC) No 45/2001.

In view of the role assigned by the procedure to this internal committee, the transfer is necessary for the performance of a task covered by the competence of the recipients and is thus compatible with Article 7.

#### **2.2.7. Processing including the personal number or other identifier**

Article 10(6) of the Regulation stipulates that the European Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution. The personal number of the applicant official is collected and processed under this procedure and Article 10(6) should therefore be applied. However, it should be pointed out that there is no need to examine the conditions for use of personal numbers in general, but only in this specific case.

Since we are dealing with a manual data processing operation and the personal number is used

only for the purposes of administrative identification, the European Supervisor considers that specific conditions need not be laid down for processing such data.

#### **2.2.8. Information to be given to the data subjects**

Under Article 11 of the Regulation, any personal data processing implies that the data subjects are adequately informed of such processing. Such information must normally be provided at the latest when the data are collected from the data subject unless the latter has already been informed.

Neither Staff Note 61/05 describing the procedure for obtaining an immediate pension without reduction nor the application form attached to that note contain sections concerning personal data processing. However, a subsequent Staff Note (74/05) dated 28 April 2005 specifies the mandatory information. Despite the fact that it would have been desirable for the information to have been provided at the latest when the data was collected from the data subjects, the EDPS considers that Article 11 has been complied with. However, in the future, he would like that information to be provided in good time.

The Staff Note should, moreover, mention the time limit for retention of the documents relating to the procedure, including the reasons of the applicants selected.

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

Under Articles 13 and 14 of Regulation (EC) No 45/2001, data subjects have the right to access and to rectify the personal data concerning them. Article 20 of the Regulation provides for exemptions from that right, particularly in order to "safeguard the protection of the data subject or of the rights and freedoms of others".

Under this selection procedure, applicants have the right to access and to rectify the information they have provided at any time, with the exception of the period when the ad hoc committee is in operation. Any rectification of data following the period of operation of that committee cannot alter the outcome for that particular year.

The Supervisor considers that this restriction on the right of rectification is compatible with the Regulation.

#### **2.2.10. Security**

Under Article 22 of Regulation (EC) No 45/2001, the controller must implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.

Following an analysis of the means put in place in the context of managing applications for immediate retirement without reduction, the EDPS considers that the measures are adequate in the light of Article 22 of the Regulation.

### **Conclusion**

The proposed processing operation does not appear to involve any breaches of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that:

- it should be ensured that only adequate and relevant data are included and kept on the file;
- the documents relating to the procedure, including the reasons of the applicants selected, should appear on the personal file only as long as it is possible to contest the decision; a time limit for retention must therefore be set;
- the information concerning personal data processing under the procedure for immediate retirement without reduction should be provided at the latest when the data are collected;
- that information should also mention the time limit for the retention of documents relating to the procedure.

Done at Brussels, 18 May 2005.

Peter HUSTINX  
European Data Protection Supervisor

Follow-up Note

23 August 2006

All acting measures have been taken by the Council on 2 February 2006.

*The European Data Protection Supervisor*