

Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Justice on "Promotion points; notations and promotions"

Brussels, 7 April 2006 (Case 2004-282)

1. Proceedings

On 20 July 2004 the EDPS sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested communication of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27-check could never be prior, but which had to be dealt with on an "ex-post" basis.

After receipt and analysis of the inventories, the EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking to be addressed first. Staff evaluation is one of these priority themes.

On 11 May 2005, the EDPS received a notification for prior checking by the Data Protection Officer of the Court of Justice concerning "promotion points; notations and promotions". On Thursday 16 June 2005, additional information was requested and partially received the next day. A further request for information was made on 17 June. Due to a technical communication problem, the answer was not received until 24 January 2006. A further request for information was made on 26 January 2006. A final answer was received on 21 March 2006. On 4 April, complementary information was given by the Court of Justice.

2. Examination of the matter

2.1. The facts

The purpose of the processing operation is to calculate the number of promotion points accumulated by staff members in order to determine priority for promotion.

2.1.1. The system of promotion points in the Court of Justice

Article 45 of the Staff Regulations of officials of the European Communities (Staff Regulations) states: "Promotion shall be by decision of the Appointing Authority in the light of Article 6(2). It shall be effected by appointment of the official to the next higher grade in the function group to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum of two years in their grade after consideration of the comparative merits of the officials eligible for promotion. When considering comparative merits, the Appointing Authority shall in particular take account of

the reports on the officials, the use of languages in the execution of their duties other than the language for which they have produced evidence of thorough knowledge in accordance with Article 28(f) and, where appropriate, the level of responsibilities exercised by them."

The Court of Justice has implemented this provision in its "*Décision de la Cour de Justice du 19 octobre 2005 relative aux promotions*". An annex to the Decision on promotions gives instructions on how to proceed. All texts explain the procedure of promotions to be given to all grades falling under the scope of article 8 of the "Décision" (all grades except: A*15/ AD 15, A*16/AD 16 and the promotions to become head of unit or director).

The progress of an official's career is linked to merits and time. Each year, officials can collect promotion points, varying from 0 to 3. 2 is the average. Once they have collected a certain number of promotion points, they can be promoted to the next higher grade. In the annex attached to the Decision on promotions, a table indicates the number of years an official usually stays in a certain grade. In order to be taken into consideration for promotion, an official needs to collect a number of points equal to twice the number of years it usually takes to promote, as mentioned in the table. For example, when it -in accordance with the table- normally takes 4 years to be promoted from LA7 to LA6, the number of promotion points to collect is 8 (4 times 2). An official receiving three promotion points each year can thus be promoted faster than an official collecting only one promotion point a year.

The Director of each Division distributes the number of promotion points he has at his disposal (double the number of officials he has in his directorate) to his staff, on a yearly basis. In principle, this is done on the basis of the comparative merits and mainly on the staff report of the data subject.

A general e-mail is sent to everyone from the Personnel Division informing data subjects of the promotion procedure shortly before it commences.

When the promotion points have been attributed and entered into the Oracle Database entitled "Notations Promotions" by the Personnel Division, the officials are informed via a further e-mail about their access to the number of points they have received. The e-mail contains a step-by-step description on how to access the database (login) and a secret code which the user can change once logged on.

Officials have the possibility to disagree with this decision via the *comité paritaire de promotion* (Promotion Committee). They have to oppose in writing to the Head of the Personnel Division and provide a motivation within 5 days. This information is provided in the same e-mail. The final decision is made by the Registrar of the Court (or if the official falls under the Tribunal, by the President of the Tribunal).

Every year, each Director establishes for his directorate the list of officials who have reached the required number of promotion points for each grade. The lists are published and transferred to the Promotion Committee. There are two different Committees depending on the grade to be promoted (A and LA officials - AD from 1 May 2006 - for one and B, C, D - AST from 1 May 2006- for the other). Both Committees meet at least once a year. Their deliberations are secret. Committees make a comparative analysis of the merits of all officials who can be considered for promotion. The committee takes the promotion points into consideration and verifies whether they correspond with the staff appraisal reports. Finally, the Committee establishes a list of officials to promote for each grade. It also indicates the order of priority. This list is sent to the Appointing Authority for promotions for a final decision.

In addition to this list, the Promotions Committee prepares one general report per grade. In this general report the following information is included:

- general observations regarding the promotions procedure for the year in question,
- the opinions on the officials to be promoted. Should there be diverging opinions within the Committee this is mentioned in the report,
- the tables setting out the precise numbers of promotion points accumulated by each member of staff in the grade in question.

2.1.2. The processing operation

The processing operation is partly automated and partly manual.

The data collected in the Oracle database (Notations Promotions) are the following: name, service, grade, date since last promotion, promotion points awarded, marks awarded in staff report.

Opinions of the Promotion Committee on the data subject are collected in a report.

The recipients to whom the data might be disclosed are the following: members of the Promotion Committee, members of the Personnel Division managing the promotions procedure, the Appointing Authority for promotions and in the event of an appeal under Article 90 of the Staff Regulation the legal advisor and the Complaint Committee. The members of the "division de l'informatique et des nouvelles technologies" may have access to information whilst carrying out maintenance. When a staff member is transferred to another institution, information regarding the number of promotion points acquired may be sent to the competent authorities in that other institution.

The "general opinion" - the reports of the Promotion Committee - are stored indefinitely in files belonging to the Personnel Division. The Personnel Division of the Court of Justice has raised for discussion with other institutions (in the *Comité de préparation des questions statutaires*) the question of the time during which personal data contained in administrative files should be kept.

Four officials (three A grade and one B grade) have access to these files. The data subject does not have access to the "general opinion" of the Committee. However, if a complaint is lodged, the Committee will draft another opinion in response to the complaint. The Decision on promotions provides for an appeal procedure in which members of staff may contest points awarded or seek correction of the data recorded.

Each year, the officials are informed about the points awarded for the year in question. At the same time, they are reminded of the information contained in the application regarding the points awarded in the previous years since their last promotion.

2.2. Legal aspects

2.2.1. Prior checking

The processing of promotion points is linked to the processing of data in staff reports as the attribution of points is based mainly on staff reports. The EDPS has already prior checked staff reports (see case 2004/281).

The notification received on 11 May 2005 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)) by a Community institution in the exercise of activities within the scope of Community law. Processing of personal data in the promotion procedure implies the collection, recording, organisation, storage, retrieval, consultation, etc. of personal data (Article 2 (b) of Regulation (EC) 45/2001). These activities form part of a processing partly automated (the promotion points are stored in electronic version in an Oracle database) and and partly manual (data form part of a filing system in the sense of Article 3 (2)). The reports of the Promotion Committee (general opinion) are stored in files belonging to the Personnel Division. The processing therefore falls within the scope of the Regulation.

Article 27 (1) of Regulation (EC) 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 the Regulation contains a list of processing operations that are likely to present such risks such as "processing operations intended to evaluate certain aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). Promotion procedures typically qualify as processing of personal data intending to evaluate personal aspects relating to the data subject and are therefore subject to 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 the Staff appraisal procedure has already been established. However, this does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The notification of the DPO was received on 11 May 2005. The initial deadline of the present opinion was the 12 July 2005, after the two months following receipt of the notification. The suspension for 276 days postpones the deadline to 14 April 2006. Taking into account that during Easter period, the institutions are closed, the opinion on the notification is to be issued no later than 18 April 2006.

2.2.2. Legal basis and lawfulness of processing

The legal basis of processing promotion points can be found in Articles 43 and 45 of the Staff Regulation for Officials of the European Communities (Staff Regulation). Those Articles are implemented in the *Décision de la Cour de Justice du 19 octobre 2005 relative aux promotions*.

The lawfulness of the processing is defined by the Article 5 (a) of the Regulation (EC) 45/2001. The processing of personal data may be processed only if the processing is necessary for the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities and in the legitimate exercise of an official authority vested in the Community institution. Moreover the preamble (§ 27) provides that it "includes the processing of personal data necessary for the management and functioning of those institutions and bodies". As promotion procedures which involve collecting and processing of personal data relating to officials are necessary for the legitimate exercise of official authority vested in the institution, the processing operation is lawful. The legal basis found in the Articles 43 and 45 of the Staff

Regulation and in the *Décision de la Cour de Justice du 19 octobre 2005 relative aux promotions* support the lawfulness of the processing operation.

2.2.3. Data Quality

According to the Article 4 (1) (c), data must be adequate, relevant and non excessive in relation to the purposes for which collected and/or further processed. The data collected in the case of promotion points seem to be adequate, relevant and non excessive for the promotion management. Nevertheless, as the Promotion Committee reports are a general evaluation of the officials, the EDPS is of the opinion that a general requirement of vigilance should be laid down in the respect of the adequacy, the relevance and the necessity of the data introduced in the report.

The Article 4(1) (d) provides that the data must be accurate and where necessary kept up to date. The Regulation further provides "that every reasonable step must be taken to ensure that the 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 system itself is designed to guarantee the accuracy of the data. The invitation to exercise the right of access and rectification of the data subject to his/her own data is a means of guaranteeing the accuracy and keeping the data up to date (see rights of access and rectification 2.2.7).

Moreover, data must be processed fairly and lawfully, Article 4 (1) (a). The lawfulness was analysed above (see point 2.2.2.). The fairness is linked to the information transmitted to the data subject (see below 2.2.7, Information to the data subjects).

2.2.4. Compatible use and change of purpose

Article 4(1) (b) of the Regulation provides that "personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes". The processing of promotion points involves further processing of data processed in the appraisal procedure in the Court of Justice. Moreover the administrative data (name, points already awarded) are collected from existing databases. The purpose of processing promotion points involves no general change of the specified purposes of the various databases involved and is not incompatible with those purposes. Thus Article 4(1)b) is fully respected.

2.2.5. Conservation of data

According to Article 4(1)(e) of the Regulation, 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 are collected or for which they are further processed.

The Personnel Division of the Court of Justice has raised for discussion with other institutions (in the *Comité de préparation des questions statutaires*) the question of the time during which personal data contained in administrative files should be kept. Nevertheless, the EDPS insists on the establishment of a reasonable time frame within which the data in the Oracle database as well as the Promotion Committee reports should be kept. The EDPS is of the opinion that a time-limit proportional to the purposes for which the data have been collected should be established in both cases.

2.2.6. Transfer of data

Article 7 of the Regulation, provides 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 the tasks covered by the competence of the recipient.

As mentioned above, the data are transferred to the Promotion Committee, to the members of the Personnel Division managing the promotion procedure (the Notations Promotions database) and to the Appointing Authority for promotions. Data might be transferred to the legal advisor and to the head of the Personnel Division in case of written claims. The members of the "*Division de l'informatique et des nouvelles technologies*" may have access to information whilst carrying out maintenance. These transfers are based on a legitimate purpose as they are necessary for human resource management, maintenance or in the context of a claim.

The transfer of a staff member to another Community institution entails the legitimate transfer of promotion points acquired to the competent authority in that other institution. Transfers of promotion points are necessary for the legitimate performance of the tasks covered by the competences of the recipient. Therefore, Article 7 of the Regulation is respected.

2.2.7. Right of access and rectification

According to Article 13 of the Regulation 45/2001, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 provides the right for the data subject to rectify any inaccurate or incomplete personal data without delay.

According to the instructions related to the promotions (annex to the "*Décision de la Cour de Justice du 19 octobre 2005 relative aux promotions*"), Article 6 the data subject has a right of access to the Oracle database. The EDPS welcomes the fact that the Decision on promotions provides for an appeal procedure in which members of staff may contest points awarded or seek correction of the data recorded. Articles 13 and 14 are fully respected for the Oracle database.

Concerning the access to the report of the Promotion Committee, the EDPS accepts that deliberations are secret. On the other hand, there is no ground to restrict the right of access to the report of the Promotion Committee to the data subject once the Promotion Committee has finished deliberating and has established a report, provided that the report does not attribute specific opinions to Committee members so as to protect the member's opinions. This limitation is based on the restriction provided for in Article 20. 1. c): the protection of the right of others. This concerns the Committee members whose independence has to be guaranteed which in turn ensure that others officials are treated fairly and lawfully. Article 20. 1 c) states: "The community institutions and bodies may restrict the application of Articles (...) 13 to 17 (...) where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedom of others."

As all the opinions on concerned staff are included in the same report, the EDPS is of the opinion that the Court of Justice should find a way to protect opinions on other officials when the data subject requests the access to his personal data.

It is difficult to determine whether the data are accurate or not as the data involved consist of a subjective evaluation of the data subject. Nevertheless, an additional means to guarantee that the Article 14 is respected is to ensure the completeness of the report. The EDPS therefore welcomes the fact that the Committee of promotions will draft another opinion in response to the complaint but is of the opinion that any complaint of the data subject, irrespective of its result, should be incorporated in the file in order to ensure the completeness of his/her file.

2.2.8. Information to be supplied to the data subjects

The Regulation 45/2001 states that a data subject must be informed of the processing of data relating to himself/herself and lists a range of compulsory items of information which must be provided (identity of the controller, purposes of processing, recipients, right of access and rectification). Insofar as such information is necessary to guarantee the fair processing, additional information has to be supplied regarding legal basis, time-limits for storing the data and the right to have recourse to the EDPS. In this instance, Article 12 of the Regulation applies, since data are collected mainly from the staff report of the data subject or from the human resources unit concerning administrative data.

The officials of the Court of Justice are informed indirectly through the "*Décision de la Cour de Justice du 19 octobre 2005 relative aux promotions*". The annex to the Decision on promotions gives instructions on the procedure of the promotion but not on the processing operation itself. The data subjects have access to their promotion points and are informed about it, but that is just a part of the procedure and cannot be considered as information on the processing operation. The EDPS is of the opinion that the two e-mails exchanged with the data subject are the opportunity to provide information on the identity of the controller, the recipients, the right to have a complete report, the legal basis, the time-limits for storing the data and the right to have recourse to the EDPS as it is necessary to fully ensure that the data subject is in a position to exercise all means at his disposal.

2.2.8. Security measures

Security measures have been adopted by the Court of Justice. The Oracle database is password protected and the Promotion Committee reports access is restricted.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account.

- A general requirement of vigilance should be laid down in the respect of the adequacy, the relevance and the necessity of the data introduced in the Promotion Committee report.
- The EDPS insists on the establishment of a reasonable time frame within which the Promotion Committee reports may be stored.
- A reasonable time-limit should also be established for the data stored in the Oracle database.
- There is no ground to restrict the right of access to the report of the Promotion Committee to the data subject once the Promotion Committee has finished

deliberating and has established a report, provided that the report does not attribute specific opinions to Committee members and that data concerning officials are not disclosed to the official who claimed his right of access. Appropriate measures should be taken in that respect.

- Any complaint of the data subject about the Promotion Committee report, irrespective of its result, should be incorporated in the file, in order to ensure the completeness of the data subject's file.
- The two e-mails exchanged with the data subject should be used as an opportunity to provide them with information on the identity of the controller, the recipients, the right to have a complete report, the legal basis, the time-limits for storing the data and the right to have recourse to the EDPS.

Done at Brussels, 7 April 2006

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