

Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Justice concerning the attestation procedure file

Brussels, 3 October 2007 (Case 2007-435)

1. Procedure

By letter received on 25 June 2007 the Data Protection Officer (DPO) of the Court of Justice notified the European Data Protection Supervisor (EDPS), within the meaning of Article 27(3) of Regulation (EC) No 45/2001, of the attestation procedure file to the extent that it contains data on the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)). The letter was accompanied by several annexes on the subject. A period of 7 days was allowed to enable the DPO to make comments on the draft opinion of the EDPS.

2. The facts

2.1. Outline of the procedure

The Regulation which reforms the Staff Regulations is Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities (JO L 124, 27.4.2004, p. 1; hereinafter "Regulation No 723/2004").

This Regulation provides for a new career structure. It abolished the former categories (A, B, C and D) and the Language Service (LA) and replaced them with two "function groups", – administrators (AD) and assistants (AST). Officials in the former B and C categories were included in the AST function group and officials in category A now form part of the AD function group.

The new career structure is coupled with transitional provisions which are set out in Annex XIII to the Staff Regulations of officials of the European Communities (hereinafter the "Staff Regulations"), as amended by Regulation No 723/2004.

Article 10(1) of that Annex defines "career streams". Officials in categories C and D on 1 May 2004 are likely to have promotions capped respectively at grades AST 7 and AST 5. These ceilings may be abolished, however, by an "attestation" procedure.

Article 10(3) of Annex XIII enables the abovementioned officials to become members of the assistants' function group without restriction if they pass an open competition or on the basis of an attestation procedure. This procedure is based on criteria relating to seniority, experience, merit and level of training and depends on the availability of posts in the AST function group.

This provision specifies that each institution will adopt implementing rules. The Court adopted its implementing rules by decision of the Administrative Committee of the Court of 15 June 2005 (hereinafter "decision"). They entered into force on 1 July 2005. They are published on the Intranet site of the Court's Personnel and Finance Directorate and are attached in Annex 1 to this notification. All the institutions have adopted similar implementing rules.

Working methods

An attestation exercise is launched annually by decision of the Registrar. It starts in September and finishes in the autumn of the following year. Hitherto, the Registrar adopted such a decision on 28 March 2006 (Annex 2). The first exercise (2005) involved 80 applicants.

The attestation procedure comprises **three stages**:

1. determination by the Appointing Authority of the number of possible attestations and publication of an invitation to apply (Article 4 of the Decision);
2. identification of the applicants eligible and listing of those applicants in order of priority (Articles 5 and 6 of the Decision);
3. inclusion in the assistants' function group "without career restrictions" (Article 7 of the Decision).

During this procedure the Appointing Authority is assisted by a *Joint Committee for the Attestation Exercise*. It is composed of a Chairman and four members designated by the Appointing Authority and four members designated by the Staff Committee. All the members and the Chairman must be at least grade A*8/B*8, AD 8/AST 8. The Committee may not deliver an opinion unless, in addition to the Chairman, at least two members designated by the Appointing Authority and two members designated by the Staff Committee are present. Opinions are adopted by a simple majority of the members present. The Chairman votes only if the vote is tied (Article 8 of the Decision).

Determination by the Appointing Authority of the number of possible attestations and invitation to apply

Before 30 September each year the Appointing Authority determines the number of possible attestations that may be granted for the following year, in the light of budget possibilities and estimated staffing requirements.

When that decision has been taken, the Appointing Authority publishes an invitation to apply determining the time-limits for submitting applications and specifying the supporting documents required (Annex 3). Those officials who are interested complete an application form (Annex 4) and attach the supporting documents and any information and any document of relevance to their application.

Listing the eligible applicants

After obtaining the opinion of the abovementioned Joint Committee, the Appointing Authority draws up the list of eligible applicants. These are all officials employed in categories C and D before 1 May and who satisfy the conditions set out in Articles 1 and 5 of the Decision. This list is published (Article 5(2) of the Decision; Annex 5).

Listing and ranking the eligible officials

After consulting the abovementioned Joint Committee, the Appointing Authority draws up the list of eligible applicants.

They are placed in order of priority on the basis of the following criteria: seniority in career stream C and/or D, experience, merit assessed on the basis of the staff reports available and level of training. The weighting of the criteria, measured in terms of points, is determined by the Appointing Authority after consulting the Joint Committee. It may be adjusted using the same procedure after consulting the same Committee. These decisions are published within the institution.

Each eligible applicant is informed of his position on the list drawn up by the Appointing Authority and of the number of points obtained, on the basis of the criteria, values and weightings determined.

The list is published (Article 6(4) of the Decision). Eligibility and ranking are determined on the basis of the criteria mentioned below.

Listing the officials awarded attestation

The Appointing Authority draws up the list of eligible applicants in order of priority. The list comprises the first officials on the list of eligible officials: the number corresponds to the number of possibilities determined by the Appointing Authority in accordance with Article 4 of the Decision.

The list is published on the Intranet.

Each applicant is informed of the outcome of his application. Eligible applicants are informed of their place on the list drawn up by the Appointing Authority and of the number of points obtained on the basis of the value and weighting of each criterion provided for in Article 8.

The other officials on the list of eligible applicants, but who have not been awarded attestation, will automatically be deemed eligible if they submit a new application for an attestation exercise. They are informed that they may request additional information (ranking, points for each criterion).

What happens to the applicants deemed to have been awarded attestation and the other applicants?

Those applicants awarded attestation are included in the assistants' functions group without career restrictions. Attestation in itself does not automatically give entitlement to promotion. The career progression of the officials deemed to have been awarded attestation is still conditional on actual taking up of a post of assistant without career restrictions, identified as such.

Those applicants who are eligible but who are not selected for attestation are automatically eligible for the following attestation procedure.

This procedure determines the number of officials and the criteria for assessing applications. Following this decision, an invitation to apply is published by the Appointing Authority.

2.2. Other information from the notification

Categories of data subjects

The data needed to select applicants are contained in the following documents :

- applicant's identification data which are taken from the Centurio database;
- application form (name, first name, date of birth, personnel no., title, administrative position, level of training, professional experience, seniority in the service and in the AST functions group, see Annex 4);
- staff reports (relevant extracts);
- certificates of length of service in the European institutions;
- where appropriate, certificates from external employers if applicants need these years to make up for their diploma;
- copy of the highest diploma;
- any vocational training certificates;
- assessments by the Appointing Authority and the Joint Committee (assessment of experience, of staff reports and of training).

Information to be given to the data subjects

For each exercise a staff note informs applicants that the procedure is to take place and contains a call for applications.

The call for applications contains information on the documents to be provided by applicants and on the practical details of the procedure. Attached to the call for applications is an application form setting out the information prescribed by Articles 11 and 12 of Regulation No 45/2001. This information note will be included, as from the second exercise, in the application form (see Annex 4).

Procedures safeguarding the rights of the data subject

The data subject has the possibility of checking and correcting his individual record (application and supporting documents) for the attestation procedure, except during the period of the Joint Committee's discussions. He is unable to add to or amend the documents he has attached to his application after the time-limit for the submission of applications.

The data subject also has the possibility of lodging a complaint under Article 90(2) of the Staff Regulations.

Manual/automated processing

The processing procedure is partly manual and partly automated. The automated procedure consists solely of drawing up in-house lists of applicants in Word and/or Excel with the aim of facilitating the management of applications and publishing lists of applicants awarded an attestation.

Storage medium

The files for the procedure are on hard copy (files). The lists of applicants are drawn up on Excel format computer files.

Recipients of the data

- the Personnel Directorate (Director-General of Personnel and Finance, Director of Personnel and Head of the employment, recruitment and careers section);
- the Joint Committee for the Attestation Exercise;
- the Appointing Authority;
- the President of the Court and the Registrar of the Court, and officials assisting them, may have access to the data as part of the responsibilities conferred on them by Article 23 of the Court's Rules of Procedure;
- the Court, CFI or CST body responsible for examining the complaints, the President and the Registrar of the court concerned, and the legal counsellor for administrative affairs in the event of a complaint brought under Article 90(2) of the Staff Regulations;
- the Civil Service Tribunal may receive these files in the course of appeals, the Court of First Instance in the event of an appeal against judgments of the Civil Service Court and the Court of Justice in the event of a review, and the lawyers and agents of the parties;
- OLAF in the event of an investigation conducted in accordance with Regulation No 1073/1999 and the decision of the Court of Justice of 26 October 1999;
- the internal auditor as part of the tasks conferred on him by Articles 85 to 87 of the Financial Regulation;
- the European Data Protection Supervisor in accordance with Article 47(2) of Regulation No 45/2001;
- the institution's Data Protection Officer in accordance with point 4 of the Annex to Regulation No 45/2001.

Data storage period

15 years as from the creation of the first file.

Anonymous statistics

Anonymous statistics may be compiled to ensure the procedure is monitored (e.g. in relation to the number of applicants following the exercises) and to ensure the decision-making practice is consistent.

Security

Only staff directly concerned by the processing have access to the data. Documents are locked in a secure cupboard. Access to electronic data is also protected by a log-in system.

3. Legal aspects

3.1. Prior checking

The notification received on 25 June 2007 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" - Article 2(a)). The processing of data presented is carried out by an institution, in the exercise of activities all or part of which fall within the scope of Community law (Article 3(1)).

The processing for the certification procedure is partly by automatic means, insofar as the lists of applicants are drawn up in-house in Word and/or Excel, for the purpose of managing the

applications and so that the Appointing Authority can publish a list of applicants. The data are also kept on paper. Article 3(2) therefore applies.

Consequently, such processing comes under Regulation (EC) No 45/2001.

Under Article 27 of Regulation (EC) No 45/2001, processing operations that present specific risks to the rights and freedoms of data subjects are subject to prior checking by the EDPS. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to present such risks *"processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct"*. The attestation procedure for Court of Justice officials is a personal data processing operation for evaluation purposes and is therefore covered by Article 27(2)(b) and subject to prior checking by the EDPS.

Checking by the European Data Protection Supervisor should take place prior to processing. In the present case, processing began before the EDPS was consulted and the checking is therefore ex-post. This in no way reduces the desirability of introducing the recommendations submitted by the EDPS.

Official notification was received by letter on 25 June 2007. In accordance with Article 27(4) of the Regulation the EDPS will deliver his opinion by 26 August. The EDPS informed all the DPOs by e-mail on 10 July 2007 that the EDPS was suspending the time-limit for any prior checks under way or new during August 2007. This means that the month of August will not count in the calculation of the two-month period. A period of 7 days was allowed so that the DPO could make his comments on the draft opinion of the EDPS. The EDPS will therefore deliver his opinion on 3 October 2007.

3.2. Legal basis and lawfulness of the processing operation

The lawfulness of the processing operation should be considered in the light of Article 5(a) of Regulation No 45/2001 which specifies that *"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 in the legitimate exercise of official authority vested in the Community institution"*.

The attestation procedure for staff of the Court of Justice which involves the collection and processing of personal data on officials comes within the legitimate exercise of official authority vested in the institution. The processing of data as presented is necessary for the implementation of the attestation procedure. The lawfulness of the proposed processing is therefore observed.

The legal basis for the data processing operation in question is to be found in:

- Article 10(3) of Annex XIII to the Staff Regulations concerning the attestation procedure;
- the Decision of the Court of Justice of 15 June 2005 on the implementing rules for the attestation procedure;
- the decision of the Registrar determining, for the attestation exercise in question, the value and weighting of the criteria for ranking the applicants eligible for attestation.

The legal basis provided by the Staff Regulations of officials is sufficiently clear, raises no particular questions and supports the lawfulness of the processing operation.

3.3 Data quality

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 satisfying these conditions as regards processing. The data required are administrative in nature and necessary to assess the work of officials. The EDPS considers that Article 4(1)(c) of Regulation (EC) No 45/2001 has been fulfilled in this respect.

The data must also be processed *"fairly and lawfully"* (Article 4(1)(a) of Regulation (EC) No 45/2001). The lawfulness of the processing has already been discussed (see point 2 above). As regards fairness, this relates to the information given to the data subjects. See point 3.8 below on this matter.

Under Article 4(1)(d) of the Regulation, *"data must be accurate and, where necessary, kept up to date"*. The data subject has the right to access and the right to rectify data, so that the file can be as comprehensive as possible. This also makes it possible to ensure the quality of data. See point 3.7 below on the dual rights of access and rectification.

3.4 Data storage

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle 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 are collected or for which they are further processed"*.

All the documents necessary for the attestation files are kept for 15 years starting from the creation of the first file.

The attestation file of applicants awarded attestation is added to their personal file. The 15-year storage period therefore does not apply. In that case, Article 26 of the Staff Regulations applies, in particular *"an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them"*.

Data are thus stored for a long, but unspecified period. The EDPS considers that the period during which data may be stored needs to be set. In a similar case¹, the EDPS considered that it was reasonable to fix the storage period at 10 years, starting from the moment when the staff member leaves or after the last pension payment.

This long-term data conservation will have to be accompanied by appropriate guarantees; in particular, the provisions of Article 22 of Regulation No 45/2001 continue to be applicable. The stored data are personal. The fact that they are archived for long-term storage does not divest them of their personal nature. For that reason, even data stored over a long period must be covered by adequate measures for transmission and storage, like any other personal data.

The EDPS considers that a storage period should also be set for the files of applicants not selected. He also recommends that the information note to the data subjects should also be amended (see point 3.8 below).

¹ Case 2004/274 – Staff appraisal procedure – European Central Bank.

Finally, there is the prospect of data being stored for statistical reasons. Since the statistics are to be rendered anonymous, Article 4(1)(e) of the Regulation is complied with.

3.5 Change of purpose/Compatible use

Data are retrieved from or entered into the staff databases. The processing operation under review involves no general change to the stated purpose of staff databases, of which the attestation procedure is only one aspect. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and Article 4(1)(b) is complied with.

3.6 Transfer of data

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 Community institutions or bodies *"if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient"*.

The data will be circulated between various departments at the Court of Justice, viz.: the Personnel Directorate (the Director-General of Personnel and Finance, the Director of Personnel and the Head of the employment, recruitment and careers section); the members and the secretary of the Joint Committee for the Attestation Exercise; the Appointing Authority; the President of the Court and the Registrar of the Court, and officials assisting them (they may well have access to the data as part of the responsibilities conferred on them by Article 23 of the Court's Rules of Procedure); the Court, CFI or CST body responsible for examining complaints, the President and the Registrar of the court concerned, and the legal counsellor for administrative affairs in the event of a complaint brought under Article 90(2) of the Staff Regulations.

Personal data may be transferred within an institution only if they are necessary for the legitimate performance of the tasks for which the recipient is responsible.

In the current case, transfer to all the abovementioned persons is consistent with the legitimate performance of the tasks of those involved.

Moreover, OLAF, the EDPS, the internal auditor and the Court's DPO may also be recipients of such data. Lastly, the Court of First Instance (CFI) may receive these files in connection with appeals to the CFI².

Such transfers are legitimate since they are necessary for the legitimate performance of the tasks for which the recipient is responsible.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

3.7 Rights of access and rectification

Article 13 of Regulation (EC) No 45/2001 establishes a right of access – and the arrangements for exercising it – upon request by the data subject. In the case in point, data

² The European Union Civil Service Tribunal, established by the Decision of the Court of Justice of 2 November 2004 (2004/752/EC, Euratom) is competent in place of the Court of First Instance. The latter is the appeal body.

subjects have access to their attestation files so that they can complete all the sections required for the procedure to take its course.

Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification. In the same way that the data subject has a right of access, he or she may also directly change factual personal data or have them changed, if necessary.

In this case, these rights are safeguarded by the information note on the protection of data containing all the information specified in Articles 11 and 12 of the Regulation. This note is included in the application form which has to be completed for the attestation procedure and also sets out in full Articles 13 and 14 of Regulation No 45/2001.

These Articles have been complied with in this case.

3.8 Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed when his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and other from other persons.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case. Inasmuch as the official or staff member personally fills in the data required of him or her, the data subject provides the data himself or herself.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case, since the information is collected from the different participants in the process (reporting officers, countersigning officer, committees, etc.).

In this case, the data subject is informed by the information note on the protection of data containing all the information specified in Articles 11 and 12 of the Regulation. This note is included in the application form which has to be completed for the attestation procedure.

Article 11(d) (whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply) is the only one not mentioned in the note. The EDPS recommends that this point be included in the various documents providing information on the certification procedure as well as the change concerning the data storage time-limit.

3.9 Security

Under Article 22 of Regulation (EC) No 45/2001, concerning the security of processing, *"the controller shall 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"*.

The organisational and technical measures are taken to ensure maximum security of data processing.

In the light of all these measures, the European Data Protection Supervisor considers that they can be considered as appropriate within the meaning of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means in particular that the Council should:

- determine a precise period for which data relating to applicants not selected may be kept;
- amend accordingly the information note to data subjects;
- in connection with long-term data storage, establish appropriate measures for the transfer and storage of personal data;
- refer to the provisions relating to Article 11(d) of Regulation No 45/2001 in the information note on the protection of data containing all the information specified in Articles 11 and 12 of the Regulation, which is included in the application form which has to be completed for the attestation procedure.

Done at Brussels, 3 October 2007

(signed)

Peter HUSTINX
European Data Protection Supervisor