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Court of Justice
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Dear Mr. Grass,

As you will be aware, the EDPS has expressed concerns, especially in his opinions on prior checking notifications relating to administrative inquiries and disciplinary proceedings, about the interpretation of several provisions of Annex IX of the Staff Regulations and the subsequent practices as to the conservation of data about disciplinary penalties imposed on staff members of the institutions and bodies of the European Union.

I briefly mentioned this issue during my presentation to the College of Chiefs of Administration on the conservation of medical data, when pointing out that there is another field where the present practice of keeping data appears to be in conflict with the principles of data protection and other fundamental rights. I promised to come back to you on this issue and to propose some remedies to achieve the due respect of those fundamental rights while taking into account the administrative needs of the institutions.

The common constitutional and legal traditions of the Member States of the Union include the extinction of liability, both criminal and disciplinary, by the lapse of time. This extinction (*prescription*, in French) has several aspects, namely the time limits for the punishment after the facts have taken place, for the execution of the penalties after they have been imposed and for the keeping of the records of penalties after they have been executed. The last one is addressed in Article 27 of Annex IX of the Staff Regulations¹ in the following terms:

An official against whom a disciplinary penalty other than removal from post has been ordered may, after three years in the case of a written warning or reprimand or after six years in the case of any other penalty, submit a request for the deletion from his

¹ The first time limit, from the date of the facts, is relevant in the context of Article 28 of Annex IX: *Where new facts supported by relevant evidence come to light, disciplinary proceedings may be reopened by the Appointing Authority on its own initiative or on application by the official concerned.*

personal file of all reference to such measure. The Appointing Authority shall decide whether to grant this request.

This provision also reflects the principle of time limits in the conservation of data and the right of erasure, as provided for in Articles 4(1)(e) and 16 of Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (hereafter "the Regulation").

However, Annex IX of the Staff Regulations presents a first problem in its Article 27: the discretionary character of the decision of deletion to be taken by the Appointing Authority (AA). This is in contrast with the Regulation which – among other conditions – requires that data are kept ‘no longer than is necessary for the purposes for which the data were collected or for which they are further processed’. In a future revision of the Staff Regulations it would be advisable to reconsider the present time limits on this basis and to make it mandatory to delete all reference to disciplinary measures after the set time limits. One obvious exception would be that the staff member is subject to a new investigation for new improper behaviour. For the time being, such interpretation could be commonly developed and adopted by the Chiefs of Administration. In any case, as the EDPS has recommended in several opinions, the denial of deletion has to be motivated, according to Article 41(2)(c) of the Charter of Fundamental Rights of the European Union.

A second problem in Annex IX is the relationship between Article 27 and Article 10(h) & (i), which reads:

The severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed, account shall be taken in particular of:

[...]

(h) whether the misconduct involves repeated action or behaviour,

(i) the conduct of the official throughout the course of his career.

Some AAs interpret this provision as implying the need to keep record of any disciplinary measures while the staff member is still active. Such interpretation voids Article 27 of real effect and leads to a practice of data retention outside the personal file, even when the AA has granted the deletion of the data in the personal file. A correct interpretation of Article 10(h) & (i), does not imply any contradiction with the true purpose of Article 27, as the former has to be read "without prejudice" of the latter, and not vice versa. A common interpretation, here again, could avoid harm to the fundamental rights of staff members.

A third issue of conservation stems from the above. Disciplinary files are kept in some cases for ever, even after the reference to the sanction has been deleted from the personal file². In that case, the keeping of the disciplinary file has no purpose. To keep it longer not only violates Article 4(1)(e) of the Regulation but also the case law of the Court of First Instance, when declaring the prohibition of parallel files³.

A fourth issue is worth mentioning in this context, also referred to in Annex IX. Its Article 13 uses the term "personal file" meaning "disciplinary file of the individual". Other interpretation would add nothing to Article 26 of the Staff Regulations and would void Article 13 of any

² The decision of closing the disciplinary file may contain no sanction. In that case, the official may choose as to its recording in his personal file (Article 22(2)). Time limit from the date of the facts may be relevant in that context for the conservation of the disciplinary file; see previous footnote.

³ *Baltsavias v Commission*, T-39/93 and T-553/93

meaning, as an instance of the right of the staff member pursuant to Article 41(2)(b) of the Charter of Fundamental Rights.

I hope these considerations are useful for the College you preside over and contribute to find a reasonable way to avoid cases of data of staff members being processed following an interpretation of the Staff Regulations not compatible with fundamental rights such as data protection. I will be most pleased to present these concerns and discuss them on the occasion of a future meeting of the College, if you find it appropriate.

Yours sincerely,

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Cc. Mrs. Monique LEENS, Chief of Administration of the EDPS