

## **Opinion on the notification for prior checking from the Data Protection Officer of the Court of Justice on data processing in connection with retirement without reduction of pension rights**

Brussels, 17 March 2008 (Case 2007-579)

### **1. Procedure**

By letter received on 1 October 2007, the European Data Protection Supervisor (EDPS) received notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the Court of Justice concerning data processing in connection with retirement without reduction of pension rights insofar as it involves the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)) and has the purpose of excluding individuals from a right, benefit or contract (Article 27(2)(d)).

A number of questions were put to the Court of Justice DPO by e-mail on 12 November 2007. The reply was forwarded to the EDPS on 13 November 2007. Further questions were asked by e-mail on 13 November 2007 and answered on 13 February 2008. The DPO asked for, and was given, 16 days in which to comment on the draft EDPS opinion.

### **2. Facts**

The purpose of the processing is the implementation of the annual exercises for early retirement without reduction of acquired pension rights (application procedure and procedure for determining persons eligible for such retirement conditions).

#### **Procedure**

The number of Court of Justice officials and temporary staff eligible for the measure is determined each year on the basis of inter-institutional consultation.

The Appointing Authority publishes the number of staff who are eligible for the measure and then invites those interested to apply, setting a deadline for applications.

In order to be considered for the measure, staff must be at least 55 years old on the date at which they wish to retire and have worked no less than 15 years as an official or temporary staff member, excluding any periods of leave on personal grounds or unpaid leave.

Staff, who so wish and who meet the conditions under Article 3, submit their applications to the Appointing Authority via hierarchical channels, specifying the date on which they wish

to retire and the reasons for their application. The head of unit forwards the application together with an assessment of its merits in the light of the interests of the service.

The Appointing Authority forwards the list of officials and temporary staff applying for the measure to the Joint Committee, which within 15 working days of receiving it, sends the Appointing Authority a list ranking the officials and temporary staff which it considers, having regard to the interests of the service, to be eligible for the measure. The following objective criteria are taken into account in compiling that list:

- the applicant's work situation following, inter alia, departmental reorganisation;
- age;
- length of service;
- the applicant's contribution to the activity of the institution;
- the applicant's personal and/or family situation.

As far as possible, the number of names on the list should be double the number of staff eligible for the measure under the Court of Justice's allocation for the year in question.

The Appointing Authority determines the order in which the candidates on this list will be allowed to benefit from the measure and designates in that order the official(s) and temporary staff member(s) who will in fact benefit.

Applicants are informed individually of the Appointing Authority's decision in their case. Applicants have ten working days in which to withdraw their retirement application. If a successful applicant withdraws his application, the next person on the list under Article 6 becomes eligible in his place.

### **Information from the notification**

The data processed are as follows: surname, first name, staff number, sex, age, nationality, length of service, grade, function, assignment, head of unit's assessment of the applicant's contribution to the institution's activities (for evaluation purposes, account is taken of the official's contribution throughout his career to the activities all Community institutions; that contribution is assessed on the basis of merit, i.e. the entries under the headings "Efficiency" and "Conduct in the service" and other analytical assessments in the official's reports throughout his career), copies of the two most recent reports, the Joint Committee's opinion on the applications, the Appointing Authority's assessment (i.e. the order in which the applicants will be allowed to benefit from the measure). In addition, applicants may provide information regarding their personal and/or family situation (including their own health or that of members of their family or of their dependants).

Data subjects receive the following information: at the start of each exercise a call for applications is issued; this sets out the applicable rules and specifies the number of officials eligible to benefit from the measure.

Prospective applicants receive information pursuant to Articles 11 and 12 of Regulation (EC) No 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. The information, which is published on the Personnel Directorate's intranet site, is referred to explicitly in the call for applicants.

Applicants are informed individually of the outcome of their applications and may ask to be informed of the reasons for rejection.

The procedures safeguarding data subjects' rights are as follows: applicants may send the controller a written request (memo, e-mail) to exercise the right of access; the same applies to the right of rectification. However, data provided by the applicants themselves must be rectified within the deadline for the submission of applications. If applicants exercise their blocking, erasure or objection rights, they will be informed that this may result in disqualification of their application for the exercise in question.

Regarding the processing method, the procedure is partly manual (files of paper documents) and partly automatic (creation of data files using Word and/or Excel programs: list of candidates; text files for the opinions).

The data are stored in folders and electronic files.

The recipients of the data are: the Personnel Directorate, the members of the Joint Committee, and the Appointing Authority (Director-General for Personnel and Finance).

The data may also be sent to the following individuals and authorities:

- the Court of Justice, the Court of First Instance (CFI) and/or the Civil Service Tribunal (CST), national courts, and counsel for the parties in the event of a dispute;
- the Court of Justice, CFI or CST body which deals with complaints; the President and Registrar of the court or tribunal concerned, and the legal adviser for administrative matters in the event of a complaint brought under Article 90(2) of the Staff Regulations;
- OLAF in the event of an investigation under Regulation No 1073/1999 and the Court of Justice decision of 26 October 1999;
- the Court of Auditors, as necessary for it to fulfil its duties under Article 248 of the EC Treaty;
- the European Parliament, as necessary for it to fulfil its duties under Article 276 of the EC Treaty;
- the internal auditor, as necessary for him to fulfil his duties under Articles 85 to 87 of the Financial Regulation;
- the specialised financial irregularities panel set up under Article 66(4) of the Financial Regulation and Article 8 of the internal Financial Regulation;
- the President and the Registrar of the Court of Justice, and any officials assisting them, in connection with their duties under Article 23 of the Court's Rules of Procedure;
- the European Data Protection Supervisor in accordance with Article 47(2) of Regulation (EC) No 45/2001;
- the Data Protection Officer of the institution in accordance with paragraph 4 of the Annex to Regulation (EC) No 45/2001;
- the European Ombudsman, where a complaint has been made to him under Article 195 of the EC Treaty.

Data storage practice is as follows: a file is kept for ten years from the date on which it has been closed. This storage period applies both to successful and to unsuccessful applicants. The data stored include the Joint Committee's opinion, the Appointing Authority's decisions and the files which served as a basis for the Court's decisions. Data may be blocked for three months and erased, if necessary, during the three months following the blocking decision.

The following depersonalised data may be stored for statistical purposes and in order to ensure that the rules for granting early retirement without reduction in pension rights are

consistently applied over time: age, gender, nationality, function, grade, length of service, last assignment, and the gain represented by the non-reduction of pension rights.

As far as security measures are concerned, paper files are kept in locked cupboards and electronic files are password protected and accessible to authorised persons only.

### **3. Legal aspects**

#### **3.1. Prior checking**

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

Processing of the procedure for retirement without reduction in pension rights is partly automated, i.e. for management purposes, the lists of applicants and the text files of the opinions are produced within the units as Word and/or Excel documents. The data are also kept in paper form at the human resources department. Article 3(2) is therefore applicable in this case.

The processing thus falls within the scope of Regulation (EC) No 45/2001.

Article 27 of Regulation (EC) No 45/2001 submits processing operations presenting specific risks to the rights and freedoms of data subjects to prior checking by the EDPS. Article 27(2) contains a list of processing operations that are likely to present such risks, including, in Article 27(2)(b), "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct.*" These are personal data processed for the purpose of evaluating certain aspects of the applicant's professional situation (organisational aspects, services rendered to the institution, scope for training) and personal situation (applicant's profile and individual abilities).

Under Article 27(2)(d) "processing operations for the purpose of excluding individuals from a right, benefit or contract" are also considered to be operations likely to present such risks. However, the processing of personal data in connection with the right to early retirement without reduction in pension rights is not - as the notification maintains - within the scope of Article 27(2)(d), since the purpose of this procedure is to enable certain individuals to exercise a right and not to exclude them from it.

Although not mentioned in the notification, the processing in this case also falls within the scope of Article 27(2)(a), i.e. "processing of data relating to health", in that the data subject provides information about his family and personal situation, including details, where appropriate, regarding their state of health.

In principle, checks by the EDPS should be performed before the processing operation is implemented. In this case, processing was set up before the EDPS was consulted, so checking necessarily has to be performed ex-post. This does not alter the fact that the recommendations of the EDPS should be implemented.

The formal notification was received through the post on 1 October 2007. In accordance with Article 27(4) of the Regulation, the EDPS was to issue his opinion by 2 December 2007. That deadline was suspended by 109 days (93+16). The EDPS's opinion will

therefore be delivered on 20 March 2008 (2 December 2007 plus the 109-day suspension period).

### **3.2. Legal basis and lawfulness of the processing operation**

The lawfulness of the processing must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which stipulates that the processing must be "*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 procedure for evaluating and possibly selecting officials and temporary staff who are eligible for early retirement falls within the legitimate exercise of official authority vested in the institutions, in particular in order to maintain suitably skilled staff in the interests of the service. The processing operation is therefore lawful.

The legal basis for the processing is Article 9(2) of Annex VIII to the Staff Regulations, Article 39 of the CEOS and the general implementing provisions of 20 October 2004.

Article 9 of Annex VIII to the Staff Regulations stipulates that "An official leaving the service before reaching the age of 63 years may request that his retirement pension be deferred until the first day of the calendar month following that in which he reaches the age of 63 or be paid immediately, provided that he is not less than 55 years of age. In this case, the retirement pension shall be reduced by an amount calculated by reference to the official's age when he starts to draw his pension".

Article 9(2) of Annex VIII to the Staff Regulations states that: "The Appointing Authority may decide, in the interests of the service on the basis of objective criteria and transparent procedures introduced by means of general implementing provisions, not to apply the above reduction to the officials concerned. The total number of officials and temporary servants, who retire without any reduction of their pension each year, shall not be higher than 10 % of the officials in all institutions who retired the previous year. The annual percentage may vary from 8 % to 12 %, subject to a total of 20 % over two years and the principle of budget neutrality...".

Similarly, Article 39 of the CEOS stipulates that Article 9(2) of Annex VIII shall apply subject to certain conditions, in particular "... the Appointing Authority may decide [...] not to apply any reduction to the pension of a temporary servant, up to a maximum of eight temporary servants in all institutions in any one year. The annual number may vary, subject to an average of ten every two years and the principle of budget neutrality....".

The general implementing provisions of the Court of Justice of 20 October 2007 lay down the specific procedure to be followed.

The legal basis in the Staff Regulations is therefore valid and supports the lawfulness of the processing operation.

From the description provided of the processing operation, the EDPS understands that it may also involve sensitive data within the meaning of Article 10 of Regulation (EC) No 45/2001.

### **3.3. Processing of special categories of data**

Under Article 10 of Regulation (EC) No 45/2001, the processing of personal data concerning health is prohibited unless it is justified on the grounds provided for in Article 10(2) and (3) of the Regulation. Data concerning health can indeed be processed in the case under examination, since data subjects may provide information on their family and personal situation, including, where appropriate, details regarding their state of health.

Article 10(2)(a) applies: "*Paragraph 1 (prohibition of the processing of data concerning health) shall not apply where the data subject has given his or her express consent to the processing of those data*", which is the case here, given that, where appropriate, the data subject volunteers the information on his or her health. Data subjects have a degree of discretion in deciding what information they wish to provide to the Court.

Article 10(2)(b) may also apply to the present case: "*Paragraph 1 (prohibiting the processing of data concerning health) shall not apply where processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof ...*". Article 9(2) of Annex VIII to the Staff Regulations allows the Appointing Authority to waive the reduction in pension rights provided for in Article 9(1) of that Annex. The controller's purpose in performing the processing operation is to have the data for taking as fully informed a decision as possible.

### **3.4. Data quality**

In accordance with Article 4(1)(c) of Regulation (EC) No 45/2001, personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and further processed. The processed data described at the beginning of this opinion are to be regarded as satisfying these conditions. The data requested are necessary for evaluating a number of aspects of the data subject's professional and personal situation, so that he or she may apply for early retirement. The EDPS considers that, overall, Article 4(1)(c) of Regulation (EC) No 45/2001 seems to be complied with in this respect but that each case should be examined on its merits.

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 section 3.2 above). Fairness relates to the information given to the data subjects, a point discussed in section 3.10 below.

Article 4(1)(d) of the Regulation stipulates that data must be "*accurate and, where necessary, kept up to date*". The system itself ensures that data are accurate and kept up to date. Staff, wishing to reapply for the measure, has to make a new application each year, which helps ensure that the information is up-to-date. The data subject has the right to access and the right to rectify data to ensure that the file is as comprehensive as possible. These rights represent the second means of ensuring data quality. For a discussion of these rights, see section 3.9 below.

### **3.5. Data storage**

The general principle set out in Regulation (EC) No 45/2001 is that 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"* (Article 4(1)(e) of the Regulation).

It is to be noted that data are kept for ten years from the date on which the file is closed.

The EDPS considers that, both for successful and unsuccessful applicants, this ten-year storage period is not fully substantiated in the light of the purposes for which the data were collected (application for early retirement) and are further processed (possible appeals within the meaning of the Staff Regulations, building up an archive of decisions to ensure more consistent treatment).

As far as appeals are concerned, any appeal must be made within three months and any further appeal will relate only to specific cases, the data of which will need to be kept until the end of proceedings.

As regards consistency of treatment, the EDPS sees the point in keeping decisions for a certain length of time, particularly those rejecting applications for retirement without reduction of pension rights. The Court, however, has provided for the long-term storage of data in depersonalised form to ensure that the rules on granting early retirement without reduction in pension rights are consistently applied over time. The data concerned are: age, gender, nationality, function, grade, length of service, last assignment, and the gain represented by waiving the reduction of pension rights. These depersonalised data can also contribute to building the archive of decisions to ensure consistency of treatment.

The EDPS considers the blanket storage of data that have not been depersonalised for a period of more than five years to be unwarranted.

In any specific case a period of five years gives ample time for the appeal options, including appeals to higher courts which may exceed five years, given that the relevant facts are those taken into consideration when the appeal is introduced.

With regard to general data storage policy in connection with complaints against the general practices of the administration, a five-year period for storage of data in depersonalised form (if that is a reasonable option) is sufficient.

The EDPS has consistently taken this approach in similar cases submitted by the other institutions.

The EDPS hopes that the Court will reconsider the data-storage period in the light of his comments.

Storage of depersonalised data for statistical purposes and in order to ensure that the rules for granting early retirement without reduction in pension rights are consistently applied over time complies with Article 4(1)(e) of Regulation (EC) No 45/2001.

### **3.6. Change of purpose/Compatible use**

Data are retrieved from or entered into the staff databases (Centurio personnel management application). The processing under review involves no general change to the purpose of staff databases, of which the procedure for retirement without reduction of pension rights is only one aspect. Article 6(1) of Regulation (EC) No 45/2001 does not therefore apply in this instance and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

### **3.7. Transfer of data**

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

The case under consideration involves a transfer within one and the same institution. The principal recipients of the processed data are the Personnel Directorate, the Joint Committee and the Appointing Authority. The transfer thus complies with Article 7(1), since the data collected are necessary for the processing operation and are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

This case also involves a transfer between institutions, in that the official's data may also be transferred to many other institutions (see recipients listed above in the Facts section on page 3). Care should therefore be taken to ensure that, here too, the conditions of Article 7(1) are fulfilled; this is indeed the case, since the data collected are needed to carry out the processing and are also "*necessary for the legitimate performance of tasks covered by the competence of the recipient*". In this case, the task is the responsibility of the institution itself or the institutions concerned and Article 7(1) is therefore duly complied with.

Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". The general implementing provisions do not mention, for example, the fact that individual applications may be used only for managing the system of retirement without reduction of pension rights. The EDPS notes that it would have been good practice to include the provisions of Article 3 in the general implementing provisions, and recommends that, when next revised, they should be amended accordingly.

Pending such revision, the EDPS recommends that the Court of Justice sees to it that the recipients of the data are made aware of the provisions of Article 7(3) of the Regulation.

### **3.8. Processing including an identifying number**

Under Article 10(6) of Regulation (EC) No 45/2001, the EDPS "*shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body*".

The personal number of the official or temporary staff member is collected and processed as part of the early retirement exercise; Article 10(6) therefore applies. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the data controller's task, such use may have significant consequences. That is, incidentally, why the European legislator decided to regulate the use of identifying numbers under Article 10(6) of the Regulation, which makes provision for action by the EDPS. This is not the place to determine the conditions under which the Court may process personal numbers; the aim is to stress the attention that must be paid to this point of the Regulation. In this instance the Court's use of personal numbers is reasonable in that it is a means of facilitating the processing task, i.e. in the process of evaluating and, where appropriate, selecting applicants.



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

Article 13 of Regulation (EC) No 45/2001 makes provision, and sets out the rules, for right of access at the request of the data subject. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, communication in an intelligible form of the data undergoing processing and any available information as to their source. Article 14 of the Regulation provides the data subject with a right of rectification.

Data subjects may exercise their rights of access, rectification, blocking, erasure and objection by submitting a written request to the controller. As the EDPS sees it, data subjects' right of rectification covers only their factual personal data and not the evaluation data. Moreover, data communicated by the data subject after the closing date for applications may not be modified, the purpose being to ensure that applicants for retirement without reduction of rights are treated equally. This is in accordance with Article 20(1)(c), which allows restriction of the right of rectification where such restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others.

The EDPS would point out that the rights of the applicant's relations and/or dependants also need to be safeguarded if their data are processed by the Court. The restriction on the right of rectification as laid down in Article 20(1)(c) is also legitimate in this case.

### **3.10. Information to be given to the data subject**

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. Those articles list a series of compulsory and optional items. The optional items are applicable insofar as, having regard to the specific circumstances in which the data are processed, they are necessary to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subject and some from other persons.

The provisions of Article 11 on informing the data subject (*Information to be supplied where the data have been obtained from the data subject*) apply in this case, as applications for early retirement are sent to the Appointing Authority by the data subjects.

The provisions of Article 12 on informing the data subject (*Information to be supplied where the data have not been obtained from the data subject*) also apply in this case, since data are supplied by the head of unit, who appraises the data subject's contribution, and by the joint committee, which gives its opinion on the data subject's application.

It should be noted that in this case data subjects receive the requisite information from the data protection information note, which contains all the items referred to in Articles 11 and 12 of Regulation (EC) No 45/2001 and is incorporated into the form which has to be used when applying for early retirement.

The EDPS would again stress that data subjects such as the applicants' family members, etc. must also be given information in accordance with Article 12. The EDPS welcomes the fact that the administration, (which receives general information on the applicants' family members), is considering informing applicants that that information may be disclosed to their family members and that the latter may exercise their rights under the Regulation. The EDPS recommends that the Court of Justice implement this plan.

### **3.11. Security**

Under Article 22 of Regulation (EC) No 45/2001 (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*".

Organisational and technical measures are taken to maximise data processing security.

Having examined all those measures, the EDPS considers them to be satisfactory within the meaning of Article 22 of Regulation (EC) No 45/2001.

### **Conclusion**

The proposed processing would not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the above comments are taken into account. This implies, in particular, that the Court of Justice should:

- draw recipients' attention to Article 7(3) of the Regulation and amend the general implementing provisions during a forthcoming revision exercise to draw them into line with that Article;
- revise the period during which the data of successful and unsuccessful applicants may be stored;
- amend the information note for data subjects accordingly;
- for long-term storage purposes, lay down appropriate measures for the transmission and conservation of personal data;
- ensure that applicants' family members and dependants whose data are processed by the Court have rights of access and rectification;
- implement its plan to inform applicants that the family members concerned may access the information and exercise their rights under the Regulation.

Done at Brussels, 17 March 2008

(Signed)

Peter HUSTINX  
European Data Protection Supervisor