

Opinion on a notification for prior checking received from the Data Protection Officer of the Court of Auditors concerning the "promotion procedure"

Brussels, 24 November 2008 (Case 2007-292)

1. Procedure

By e-mail dated 3 May 2007, a notification within the meaning of Article 27(3) of Regulation (EC) No 45/2001 was made by the Data Protection Officer of the Court of Auditors concerning the "promotion procedure" dossier.

A number of questions were put to the DPO of the Court of Auditors by e-mail on 7 June 2007. Partial replies were provided on 29 June 2007, with definitive replies on 7 November 2008. Other questions were put by e-mail on 2 July 2007; partial replies were provided on 6 November 2007 at the meeting organised by the Court of Auditors, and definitive replies were provided on 7 November 2008. On 13 November 2008 the draft opinion was sent to the DPO of the Court of Auditors for comments. Those comments were received on 18 November 2008.

2. The facts

On 19 November 2005 the Court of Auditors adopted a Decision (No 45/2005) on promotions, in application of Article 45 of the Staff Regulations of Officials of the European Communities. That Decision lays down the criteria applicable in the promotion procedure. Promotions are made on the basis of staff reports which are managed using the COMPASS application¹.

Procedure set out in Decision No 45/2005 of the Court of Auditors

Officials are promoted on the basis of a comparative assessment of the merits which they have shown in their current grade and their potential to perform the duties associated with the higher grade.

The Decision applies to promotions for which the Secretary-General is the Appointing Authority, namely promotions in categories D*, C* and B* (AST) and A* (AD), up to promotions to grade A* 12 (AD 12). Every year, the Appointing Authority determines the number of posts, by grade, available for promotion. All staff are informed of that number.

¹ See EDPS opinion 2005-152 of 19 July 2005 on COMPASS (appraisal system of the Court of Auditors).

For each group/entity, the Director and the various heads of division/unit meet to establish a list, by grade, of the eligible officials who are felt to be most deserving of promotion. For staff working in the private offices, the Director makes prior contact with the Member concerned.

All the Directors of all the groups/entities then meet to agree on a joint list, by grade, of the eligible officials who are felt to be most deserving of promotion. The number of officials appearing on this list must not exceed twice the number of promotion possibilities indicated by the Appointing Authority. The list is drawn up in alphabetical order and sent to the joint promotions board.

The conduct of this procedure is the subject of a separate Decision of the Court (No 93/41).

For the application of the above two paragraphs, group/entity means:

- each vertical audit group,
- the horizontal audit group, including the departments coming under the Presidency,
- all the administrative departments, taken together (except for the translation directorate),
- the translation directorate.

Before the promotions exercise is launched, the joint promotions board adopts its own criteria and informs the Appointing Authority and all staff.

After it has examined the files on the officials who are eligible for promotion, in particular in the light of the relevant article of the Staff Regulations and the list referred to above, the joint promotions board draws up an opinion addressed to the Appointing Authority, proposing a list of officials to be promoted; in principle, the number of names on the list must not exceed the number of promotion possibilities announced. That opinion is then forwarded to the Appointing Authority. The Appointing Authority is empowered to take the final decision on which officials are to be promoted.

The Court of Auditors has also adopted an internal promotion procedure for staff in grades A 13 and A 14. This is an internal document which has not been the subject of a Decision by the Court; its main points are as follows:

Annual procedure for promotions to grades A*13 and A*14

Document DEC 56/05 presents general proposals concerning arrangements for the 2005 promotions exercise. This document states the need which has arisen since the entry into force of the new Staff Regulations to lay down permanent procedures for promotions to grade A*13 (and subsequently to A*14), for which the Court exercises the powers devolved to the Appointing Authority.

The members of the Court's Administrative Committee have set up a preparatory group to examine the merits of staff in grades A*12 and A*13 who are eligible for promotion. It consists of the most senior members of the audit groups, assisted by the Secretary-General. They may ask to be represented by some other member of the group. The preparatory group submits an opinion to the Court, which takes the promotion decisions.

The Court is also the Appointing Authority for promotions to grade A*15 (Director). However, such nominations do not require any changes to the provisions which currently apply. There are no permanent posts in grade AD 16 at the Court (there is only one

temporary staff member at that grade, in a temporary post). This procedure is followed as required, depending on the vacancies available.

Other information arising from the notification

Officials of the European Court of Auditors with at least two years' seniority in their grade are eligible for promotion.

The categories of data processed are:

- surname, first name, date of birth, administrative status as referred to in Article 35 of the Staff Regulations;
- staff number, grade, seniority;
- all the data contained in the reports provided for in Article 43 of the Staff Regulations (COMPASS²)

For the three main parties (appraisee, appraiser and reviewing appraiser), the following personal data is contained in the COMPASS application: administrative data, languages, type of report, activities covered by the staff report, appraisee performance according to criteria and competences, qualitative assessment of the achievement of objectives, deliverables and overall performance, contribution to other activities in the interest of the court, general evaluation of professional training and career development, signature.

Information is provided to the data subjects by means of a staff note at the beginning of the exercise, containing a draft list of staff eligible for promotion. That staff note refers to Decision No 93/41 setting out the promotions procedure, but not to Decisions No 45/2005 or 77/2006. Officials are able to put forward their observations on that list, which is followed by the list of officials who have definitively been recognised as eligible for promotion. A note is sent to staff containing the promotion criteria selected by the joint promotions board, and the list of those promoted. The individual promotion decision is addressed to the person concerned.

The procedures guaranteeing the rights of data subjects (rights of access, rectification, blocking, and erasure, and the right to object) are contained in Article 10 of Appointing Authority Decision No 77/2006 implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data in the context of the human resources policy.

The processing procedures are automatic and manual: automatic for the part relating to appraisals (COMPASS), manual for the referral to the Appointing Authority and the joint promotions board.

The storage of data is physical (files) during the procedure. In accordance with Article 26 of the Staff Regulations, a paper copy of the staff reports is filed in the personal file of staff, and that paper copy is used for the comparative examination of merits in the context of the promotion procedure. Storage of staff reports is by automatic means.

² The COMPASS guide relates to the system of appraisal of the competence and performance of all staff at the Court of Auditors. The competences listed are as follows: ABILITIES: professional knowledge, analytical, judgment and problem-solving skills, communication skills, people management and leadership; EFFICIENCY: delivery of results, management, documentation and organisation of work, resource management; CONDUCT: service culture, working with others, sense of responsibility, integrity and professional conduct.

The recipients or categories of recipients to whom data are likely to be transmitted are the Appointing Authority, the Secretary-General, and the Members of the Court/members and secretaries of the joint promotions board/Legal Service (in the event of an appeal under Article 90).

Regarding the policy on storing personal data (or categories of data), during the procedure the data are kept in a room which is locked with a key and used only for that purpose. Access is strictly limited to authorised staff and to members of the joint board or ad hoc group. Regarding promotions from grade AD13, documents are transferred in a locked case to the Secretary-General who submits them to the Members of the Court at a restricted ad hoc meeting. Finally, the Court has specified that the retention period for data is the same as for data relating to appraisals (COMPASS). Data on the appraisal are kept online for three years and are then archived for two more years.

Regarding the time limits for the blocking and erasure of various categories of data, and for the data retention period, the Court refers to Decision No 77/2006 implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data, in the context of the human resources policy.

There is no processing for statistical purposes.

Security measures have been taken [...].

3. Legal aspects

3.1. Prior checking

The notification received by e-mail on 3 May 2007 with regard to the handling of data concerning the promotion procedure relates to 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 in the context of the promotion procedure is partly by automatic means, within the meaning of Article 3(2) of Regulation (EC) No 45/2001. It is automatic for the part relating to appraisal (COMPASS), and manual for the various possible referrals. This processing is manual but the content is intended to form part of a filing system. Article 3(2) is thus applicable in this case.

Accordingly, the processing falls within the scope of Regulation (EC) No 45/2001.

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

The processing operation is also covered by the provisions of Article 27(2)(b): *"The following processing operations are 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"*, which is the case here.

Notification from the DPO at the Court of Auditors was received on 3 May 2007. In accordance with Article 27(4) of the Regulation, the two-month time limit within which the EDPS must deliver an opinion was suspended. The EDPS therefore has to deliver his opinion by 9 December 2008 at the latest (4 July + 464 + 5 days for comments + two Augusts).

3.2. Lawfulness of the processing operation

The lawfulness of the processing must be examined in the light of Article 5(a) of Regulation 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 promotion procedure for staff of the Court of Auditors, which involves collecting and processing personal data relating to officials, falls within the legitimate exercise of official authority vested in the institutions.

The legal basis for the data processing operation is Article 45 of the Staff Regulations, which relates to promotions. The legal basis in the Staff Regulations of Officials of the European Communities supports the lawfulness of this processing.

3.3. Data quality

Article 4 of Regulation (EC) No 45/2001 lays down certain obligations as regards the quality of personal data. Data must be *"adequate, relevant and not excessive"* (Article 4(1)(c)). The processed data described at the beginning of this opinion must be regarded as fulfilling these processing conditions. The data required are administrative in nature and are necessary to ensure that the various stages of the promotion procedure run smoothly. The EDPS is satisfied that Article 4(1)(c) of Regulation (EC) No 45/2001 is duly complied with 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 3.2 above). Fairness relates to the information provided to data subjects. See point 3.9 below on this point.

Lastly, the data must be *"accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that 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"* (Article 4(1)(d) of the Regulation).

The description of the system gives reasonable grounds to believe that data will be accurate and kept up to date (particularly via the COMPASS system), since the controller is obliged to check their accuracy and to update them. The data subject has the rights of access and rectification, to make the file as complete as possible. This is a second way of ensuring the quality of the data. See point 3.8 below on the rights of access and rectification.

3.4. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 posits the principle 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"*.

It is specified that the retention period for data is the same as for data relating to appraisals (COMPASS). Data on the appraisal are kept online for three years and are then archived for two more years. Given the obvious link between the two procedures, the EDPS considers that this period is reasonable and that Article 4(1)(e) of the Regulation has been complied with.

3.5. Change of purpose/Compatible use

Most of the data have been extracted from staff databases. The processing operation under review here involves no general change of the specified purpose of staff databases and is not incompatible with that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 is not applicable to the case in point, and Article 4(1)(b) of the Regulation is complied with, given that the purposes are compatible.

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

The current case involves transfer within a single institution (Appointing Authority, the Secretary-General, and the Members of the Court/members and secretaries of the joint promotions board, as well as the Legal Service in the event of an appeal under Article 90).

It also involves transfer between institutions, insofar as an official may also appeal against a decision to the Court of Justice (Article 91 of the Staff Regulations), and appeal to the EDPS (Article 90(3) of the Staff Regulations).

Care should therefore be taken to ensure that 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, furthermore, are *"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". It must be laid down that any person involved in the Court's promotion procedure who receives and processes data must be informed that they may not use them for other purposes.

3.7. Processing including the staff or identifying number

In the current case, the Court of Auditors uses the personnel number. While the use of an identifier is, in itself, no more than a means (and a legitimate one in this case) of facilitating the task of the personal data controller, such use may have significant consequences. This is 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 European Data Protection Supervisor. The point here is not to establish the conditions under which the Court of Auditors may process the personnel number, but rather to draw attention to that provision of the Regulation. In this instance, the use by the Court of Auditors of the personnel number is reasonable because it is a means of facilitating the processing task.

3.8. Right 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. Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification.

Appointing Authority Decision No 77/2006³ provides in a general fashion for the right of access and rectification granted to any data subject. Point 4 of that Decision guarantees the rights of access and rectification for data subjects. That Decision must specify the very close link between the appraisal and promotion procedures, and must indicate that all the headings in that Decision which are referred to for COMPASS also apply for the promotion procedures. Subject to this reservation, Articles 13 and 14 of Regulation (EC) No 45/2001 have been complied with.

3.9. Provision of information to data subjects

The personal data referred to during the promotion procedure are a copy or reproduction of some of the data in the official's personal file. The other data are provided by participants in the promotion procedure. Information is provided to the data subjects by means of a staff note at the beginning of the exercise, containing a draft list of officials eligible for promotion. That staff note refers to Decision No 93/41 setting out the promotions procedure, but not to Decisions No 45/2005 or 77/2006. Officials are able to put forward their observations on that list, which is followed by the list of officials who have definitively been recognised as eligible for promotion. A note is sent to staff containing the promotion criteria selected by the joint promotions board, and the list of those promoted. The individual promotion decision is addressed to the person concerned.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) therefore also apply in this case.

Appointing Authority Decision No 77/2006⁴ must make clear the close link between COMPASS and the promotion procedure (see above on rights of access and rectification), so that the provisions of Article 12 of Regulation (EC) No 45/2001 are also complied with.

An addition must also be made to Decision No 45/2005, when a revised version is planned, explicitly referring to Appointing Authority Decision No 77/2006, to ensure that exhaustive information is provided and to guarantee the transparency of the processing operation.

³ Decision No 77/2006 of the Appointing Authority implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data in the context of the human resources policy. This Decision concerns the implementation of all EDPS recommendations as regards the dossiers of the human resources department of the Court of Auditors relating to data protection.

⁴ See footnote 3.

In the light of these various considerations, the European Data Protection Supervisor would like Decision No 77/2006 of the Court to be referred to in Decision No 45/2005 relating to promotions.

The EDPS would also recommend that every staff note drawn up for each promotions exercise should refer to Decisions No 45/2005 and 77/2006 of the Court, to ensure that proper information is provided to data subjects.

3.10. Security

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

Having examined all of the security measures taken, the EDPS considers that they may be regarded as appropriate for the purposes of Article 22 of the Regulation, both organisationally and technically (particularly as regards information security: [...]).

Conclusion

The proposed processing operation as described does not seem to involve any infringement of the provisions of Regulation (EC) No 45/2001, as long as account is taken of the observations below. This means in particular that the Court of Auditors should:

- ensure that any person involved in the Court's promotion procedure who receives and processes data is informed that they may not use those data for other purposes;
- indicate, in the table on promotions annexed to Appointing Authority Decision No 77/2006 dated 31 October 2006, in the COMPASS column, that it also applies to promotions procedures, so that all the matters referred to in Articles 12, 13 and 14 of the Regulation are covered (rights of access and rectification and provision of information to the data subject);
- include in Decision No 45/2005 on promotions, when a revised version is planned, a reference to Appointing Authority Decision No 77/2006 of 31 October 2006 implementing Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data in the context of the human resources policy;
- in the staff notes drawn up for each promotions exercise, refer to Decisions No 45/2005 and 77/2006 of the Court, to ensure that proper information is provided to data subjects.

Done at Brussels, 24 November 2008

(Signed)

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