

Opinion on the notification for prior checking from the Data Protection Officer of the Court of Auditors on the "Annual exercise for early retirement without reduction of pension rights" dossier

Brussels, 9 January 2009 (Case 2008-552)

1. Procedure

By email received on 12 September 2008, 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 Auditors (hereinafter "the Court") concerning the annual exercise for early retirement without reduction of pension rights.

A number of questions were put to the DPO of the Court of Auditors by e-mail on 19 September 2008. The reply was sent to the EDPS on 24 November 2008. The draft opinion was sent for comments to the DPO on 5 January 2009. The comments were received on 8 January 2009.

2. Facts

The purpose of the processing operation is to implement annual exercises for early retirement without reduction of pension rights in compliance with Article 9 of Annex VIII to the Staff Regulations and the second and third subparagraphs of Article 39(1) of the CEOS.

Procedure

Decision 100-2004 of 21 December 2004 laying down general implementing provisions on early retirement without reduction of pension rights mentions the following points:

- The number of early retirement possibilities concerned by the measure provided for in Article 9(2) of Annex VIII of the Staff Regulations (hereinafter "the measure") is calculated each year on the basis of the number of officials and former officials who began to receive a retirement pension in course of the the previous year. The number of Court officials and temporary staff eligible for the measure is determined each year on the basis of interinstitutional consultation.
- Each year, after publishing the number of officials and temporary staff who are eligible for the measure, the Appointing Authority invites those interested to apply, setting a deadline for applications. Applications may not be submitted by officials benefiting from the provisions of Article 40 of the Staff Regulations (leave on

personal grounds) or temporary staff benefiting from the provisions of Article 17 of the CEOS (unpaid leave).

- 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 12 years as an official or temporary staff member. Any leave on personal grounds or unpaid leave under Article 17 of the CEOS may be taken into account up to a maximum of one year.
- Staff who so wish and who meet the conditions 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 hierarchical superior 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. Within 15 working days of receiving it, the Joint Committee sends the Appointing Authority a list of the officials and temporary staff which it considers, having regard to the interests of the service, to be eligible for the measure. This list is drawn up on the basis of the following objective criteria in particular, arranged in order of priority:
 - o the applicant's work situation following, inter alia, departmental reorganisation;
 - o the applicant's contribution to the activity of the institution;
 - o age;
 - o length of service with Community institutions;
 - o 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 Auditors' allocation for the year in question.
- The Appointing Authority determines the order in which the applicants on this list will be allowed to benefit from the measure and designates the official(s) and temporary staff member(s) who will benefit from the measure.
- The officials and temporary staff not chosen are not automatically transferred to the list for the following year. Inclusion on the list for a previous year does not give priority.
- Applicants are informed individually of the Appointing Authority's decision in their case.
- Applicants then have ten working days in which to withdraw their retirement application. Where a successful applicant withdraws his/her application, the Appointing Authority designates another candidate from the above-mentioned list.

Staff note 15/2008 of 29 February 2008 sets out the arrangements for the 2008 early retirement exercise and applies the same procedure adapted specifically for 2008.

Information from the notification

The following data are collected:

- Surname and first name(s):
- Staff number
- Sex, age
- Current post
- Function group, grade
- Situation vis-à-vis eligibility criteria
- Evaluation in the light of DGE criteria (organisational aspects, personal situation, services rendered)

More generally speaking, all information given by candidates or by their hierarchical superiors relates to the evaluation criteria in question. The attention of applicants is drawn to the importance of completing their applications with the greatest care and supplying all the information requested, particularly as regards the reasons for their application, so as to prevent any aspects of their individual situation from being overlooked when their application is being evaluated.

Data subjects receive the following information: at the beginning of the exercise, a call for applications is published in a Staff Note, circulated in paper form and made available on the Court's Intranet. At the end of the exercise, an individual e-mail informs applicants of the outcome of their application.

The procedures to guarantee the rights of the data subject are the following: 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.

Processing is manual as regards the call for applications and consultation of the Joint Committee and automated as regards the processing of individual files (Excel table).

The data are stored on paper (applications from candidates) and in electronic files (individual files in the form of tables containing details on candidates, their career, etc.).

The recipients of the data are the officials responsible for the files, the Joint Committee which examines the requests, the Appointing Authority as regards the decision, the departments concerned (human resources department), the ex ante unit, the accounts department and, where appropriate, the legal service.

Data storage policy is as follows: three years for unsuccessful candidates and 10 years as from the start of early retirement in the case of successful candidates, and 5 years for purely administrative data. The individual decision is added to the personal file.

Requests to modify the information contained in the application may be made up to the meeting of the Joint Committee. All applicants may ask to have their applications withdrawn up to the time the decision is taken.

Security measures are established [...]

3. Legal aspects

3.1. Prior checking

The notification received on 12 September 2008 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The processing operation is carried out by an institution in the context 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 individual files containing details relating to candidates and their careers are drawn up internally in the form of Word and/or Excel tables. The data are also kept in paper form at the human resources department. Article 3(2) is thus applicable in this case.

This processing therefore falls within the scope of Regulation (EC) No 45/2001.

Under Article 27 of Regulation (EC) No 45/2001, processing operations likely to 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*". 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).

Although not mentioned in the notification, the processing may also fall, in a significant number of cases, within the scope of Article 27(2)(a), i.e. "processing of data relating to health", in that the data subjects may provide information about their 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 specific case, the processing was set up before consultation of the EDPS, so the check necessarily has to be performed ex-post. This does not make it any less desirable that the recommendations issued by the EDPS be implemented.

Official notification was received by letter on 12 September 2008. In accordance with Article 27(4) of the Regulation, the time limit within which the EDPS must deliver an opinion was suspended. Consequently, the EDPS will issue an opinion on 20 January 2009 at the latest (13 November + 65 days' suspension + 3 days for comments).

3.2. Legal basis and lawfulness of the processing operation

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides that 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 proposed is therefore lawful.

The legal basis for the processing operations is Article 9(2) of Annex VIII to the Staff Regulations, Article 39 of the CEOS and the general implementing provisions in Decision No 100-2004 of 21 December 2004 which lay down the specific procedure.

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 in this case: "paragraph 1 (prohibiting 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. With regard to family members, the applicant must obtain their consent and inform them (see point 3.9 below).

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 implementing the processing operation is to have as comprehensive a dossier as possible with a view to taking a decision.

3.4. Data quality

In accordance with Article 4(1)(c) of the Regulation, 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 point 3.2 above). Fairness relates to the information given to the data subjects. On this see point 3.9 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 have to make a new application each year, which helps ensure that the information is up-to-date. The data subject has rights of access and rectification, in order to make the file as complete as possible. These rights represent the second means of ensuring data quality. For a discussion of these rights, see section 3.8 below.

3.5. Data retention

The general principle set out in Regulation 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).

As already mentioned, data are kept for three years for unsuccessful applicants and 10 years as from the start of early retirement in the case of successful applicants, and 5 years for purely administrative data.

The EDPS welcomes the introduction of a shorter data storage period for unsuccessful candidates. However, he considers that there appears to be insufficient justification for the period of 10 years for successful applicants in the light of the purposes for which the data were collected (application for early retirement) and the purposes for which they are subsequently processed (appeals pursuant to the Staff Regulations).

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 for which will need to be kept until the end of proceedings.

If the Court were concerned about consistency of treatment, it could provide for the long-term storage of depersonalised data in order to ensure that the rules for granting early retirement are consistently applied over time. The data concerned are: age, gender, nationality, function, grade, length of service, last assignment, and the gain represented by the non-reduction of pension rights. These depersonalised data could also contribute to building the archive of decisions to ensure consistency of treatment.

The EDPS considers the blanket storage of data not rendered anonymous 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 which may last for over five years, given that the relevant facts are those taken into consideration when the appeal is lodged.

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. This has been the EDPS's consistent position.

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

3.6. 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 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 case under consideration involves a transfer within one and the same institution. More specifically, the recipients of the data are the officials responsible for the files, the Joint Committee which examines the requests, the Appointing Authority as regards the decision, the departments concerned (human resources department), the ex ante unit (internal control), the accounts department and, where appropriate, the legal service. 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 (Court of Justice, OLAF, EDPS, Ombudsman, Auditors). 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 falls within the competence 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 the purpose of 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 7(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 ensures that the recipients of the data are made aware of the provisions of Article 7(3) of the Regulation.

3.7. 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 personnel 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 task of the personal data controller, such use may have significant consequences. That 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 EDPS.

This is not the place to determine the conditions under which the Court may process personnel 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 personnel numbers is reasonable in that it is a means of facilitating the processing task, i.e. the annual exercise of early retirement without a reduction in pension.

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. According to Article 13 of the Regulation, the data subject has the right to obtain, without constraint, from the controller, communication in an intelligible form of the data undergoing processing and of any available information as to their source. Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification.

Here, data subjects may exercise their rights of access, rectification, blocking, erasure and objection (for the last three, up to the meeting of the Joint Committee). These rights are guaranteed by Decision No 77/2006 of the Court 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. As the EDPS sees it, the right of rectification of data subjects 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.

3.9. 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. These articles list a series of compulsory and optional items of information. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required 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 information is in this case supplied to the data subject in the call for applications published in a staff note circulated on paper and posted on the Court's intranet. The call for applications does not mention any of the points required by Articles 11 and 12.

The EDPS recommends making explicit mention of Decision 77/2006 of the Court (see above) in the call for applications, so that data subjects receive accurate information, as the Decision is sufficiently detailed.

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 recommends that the administration inform applicants that they must obtain the consent of the family members concerned for the processing operation and inform them that they can have access to that information and are entitled to exercise their rights under the Regulation.

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*".

Organisational and technical measures are taken to ensure maximum security of processing.

Having examined all of these measures, the EDPS considers that they are appropriate for the purposes of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This implies, in particular, that the Court of Auditors should:

- revise the period during which the data of successful applicants may be stored;
- amend the information note addressed to data subjects and Decision 77/2006 accordingly;
- draw the attention of recipients to Article 7(3) of the Regulation and amend the general implementing provisions during a forthcoming revision exercise to bring them into line with that Article;
- ensure that applicants' family members and dependants whose data are processed by the Court have rights of access and rectification;
- mention Decision 77/2006 of the Court in the call for applications;
- inform applicants that they must obtain the consent of the family members concerned for the processing operation and inform them that they can have access to that information and are entitled to exercise their rights under the Regulation.

Done at Brussels, 9 January 2009

(Signed)

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