



Opinion on the notification for prior checking from the Data Protection Officer of the Economic and Social Committee on the annual exercise for early retirement without reduction of pension rights

Brussels, 1 April 2009 (Case 2008-719)

1. Procedure

By letter received on 27 November 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 European Economic and Social Committee (hereinafter the "EESC") concerning the annual exercise for early retirement without reduction of pension rights.

A number of questions were put to the EESC's DPO in an e-mail dated 5 January 2009. The reply was sent to the EDPS on 24 February 2009. The draft opinion was sent for comments to the DPO on 16 March 2009. Those comments were received on 31 March 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 No 271/07 A of 13 June 2007 laying down general implementing provisions on the possibility of not applying the reduction in pension rights to officials and other servants who leave the service before the age of 63 and request that their retirement pension be paid immediately, and Decision No 144/08 A of 4 April 2008 amending the previous Decision, mention the following points:

The number of officials who can benefit from the facility of receiving their pension immediately after retirement without its being subject to a reduction (hereinafter "the facility") must not be higher than 10 % of the total number of officials in all the institutions who retired during 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 budgetary neutrality.

The number of temporary servants in all the institutions who can benefit from the facility must not be higher than eight in a single year, subject to an average of ten over two years.

The number of officials to whom the facility can be offered is calculated on the basis of the number of officials who retired the previous year across the institutions. This figure is

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established each year for each institution by means of interinstitutional consultation. The number of temporary servants to whom the facility can be offered is also established each year by means of interinstitutional consultation.

In January or February¹ of each year, the EESC administration invites officials, and, where possible, temporary servants interested in benefiting from the facility to come forward. The invitation states the EESC's quota and the deadline for submitting applications, and includes the information contained in the implementing provisions. Applications are valid for a single calendar year, but may be re-submitted. Applicants state the date on which they wish to start receiving their pension within a period laid down by the administration.

In order to be eligible, the officials or temporary servants concerned must fulfil the following conditions:

- be in active employment within the meaning of Article 36 of the Staff Regulations,
- have reached at least 55 years of age before the end of the calendar year specified in the application during which the facility provided for in Article 9(2) of Annex VIII to the Staff Regulations is to be implemented,
- have completed at least 15 years of service as an official and/or other servant in one of the institutions or bodies of the European Communities pursuant to Article 1a and Article 1b of the Staff Regulations. Only periods of active employment within the meaning of Article 36 of the Staff Regulations will be counted as periods of service.

In order to identify which applications best serve the interests of the service and in order to ensure complete transparency when drawing up the list of officials who can benefit from the facility, a points system has been introduced, taking account of (a) the age of the person concerned², (b) length of service³ and (c) the arithmetical average of the points awarded in their assessment reports for the previous five years⁴:

When drawing up the list of officials who can benefit from the facility, the Appointing Authority takes into consideration the total number of points obtained (a+b+c) under the above system. In the event of a tie, the average number of points awarded in performance reports over five years decides. The Appointing Authority may only depart from this system in exceptional cases and upon receipt of an opinion from the Joint Committee, which is consulted in all cases.

On the basis of the quotas and the above criteria, the Appointing Authority adopts the list of officials and other servants who can benefit from the facility, in the interests of the service, for the year in progress. This list is supplemented by a reserve list, where necessary. The lists are published in the institution and sent to the applicants, who then have ten working days to decide whether to withdraw their application. If applicants on the main list withdraw, names are taken from the reserve list.

¹ For 2007 alone (transitional measure for when the text came into force) different dates could be laid down.

² Full years as calculated on 31 December of the year of application of the early retirement facility.

³ Actual periods of employment which have been duly substantiated as calculated on 31 December of the year of application of the early retirement facility.

⁴ If the period covered by a performance report covers this period of five years even partially, it is taken into consideration when calculating the average.

Other information arising from the notification

Brief description of the processing operation:

- Intranet publication and circulation by e-mail of the call for applications from officials and temporary servants wishing to be admitted to early retirement without a reduction of pension rights
- Evaluation and comparison of applications recorded electronically (form and supporting documents)
- Selection and establishment of the list of officials and temporary servants authorised to retire without a reduction of their pension rights during the current financial year, as well as a reserve list
- Intranet publication of the list of successful applicants.

Specification of data

- Surname, forename, personal number, gender, age, grade, function, current assignment, situation in relation to the eligibility criteria, evaluation under the criteria of the general implementing provisions in Decision No 271/07 A and Decision No 144/08 A.
- Applicants' attention is drawn to the importance of completing their applications with the greatest care and supplying all the information requested so as to prevent any aspects of their individual situation from being omitted when their application is being evaluated.
- The data subjects may consult these data via the pensions department.

Information to data subjects

- At the beginning of the exercise, a call for applications is published on the EESC intranet.
- At the end of the exercise, an individual e-mail informs applicants of the outcome of their application and, if requested, of the reasons for the decision.
- A list of successful applicants is published on the EESC intranet.
- In the interest of protecting personal data, the reserve list is not published.
- Applicants are informed in writing of the decision concerning them.
- For the 2008 exercise and in accordance with Regulation (EC) No 45/2001, they were informed verbally of their rights by the head of the pensions department and a clause will be put in the forthcoming staff note for the 2009 exercise.

Procedures guaranteeing the rights of data subjects (rights of access, rectification, blocking, erasure and objection)

All data subjects may have access to their files simply by making an appointment with the pensions department. This will be specified in the call for applications for the 2009 exercise.

Procedures for automated/manual processing

- Applications go to the Director for Human and Financial Resources who forwards them to the head of the pensions section.
- The pensions department sends applicants an acknowledgement of receipt.
- The head of the pensions section processes the applications and extracts certain details (applicant's age, professional experience, staff report points, etc.) for storage on an Excel file for subsequent processing.

Data-storage medium

- Applications and details from the applicant's individual file are kept in a folder locked in a cupboard.
- Details of the applicants are presented in an Excel file.
- The Head of Unit of staff support services, the head of the pensions section and his assistant have access to the file and the folder.

Recipients or categories of recipient to whom the data may be disclosed

The Joint Committee, the Appointing Authority and the pensions department of the staff support services unit for implementing early retirement for the applicants on the list and/or reserve list.

Policy concerning the storage of personal data (or categories of data)

The storage period will be five years, for both successful and unsuccessful applicants. All officials and temporary servants aged at least 55 are eligible. A person may re-apply for several successive exercises. Since there might be successive applications from the same person over the years, it may turn out to be necessary to store the application of a person who subsequently withdraws it. First of all, in the event of an appeal it makes it possible to prove that the application was indeed submitted and then withdrawn for a given exercise. Secondly, it also makes it possible to prove consistency in how the applications have been processed even though the exercises are independent and the evaluations conducted previously have no bearing on evaluations in future exercises. Once the Appointing Authority has taken its decision, successful applicants still have 10 working days in which to state that they no longer wish to take early retirement.

An applicant's notification of his desire to withdraw his application or forego the opportunity to avail himself of the facility is recorded. That operation ends the processing for that person but does not erase the application, which remains on record for the purpose of duly documenting the procedure for a period of five years so that any appeals can be processed and proof can be provided that an application was indeed submitted and then withdrawn. The EESC ensures that the long-term archiving of data is accompanied by appropriate guarantees (see below).

Deadlines for blocking and erasure of the various categories of data (following a legitimate request from the data subject)

A person having submitted an application may ask the data controller to withdraw the application, and ask to check his/her personal data and consult his/her application file. The deadline for the data controller's reply to a request for rectification, blocking or erasure of data is 15 working days.

Historical, statistical and scientific purposes

When this five-year period is up, only data relevant to an overview of the exercise in question are kept, for statistical or historical purposes. These data concern in particular the number of eligible and ineligible applications and the total number of applications per Directorate-General and per function group and sex. Consequently, the statistics collected over this five-year period are not personal data and do not come under Regulation (EC) No 45/2001, inasmuch as they are anonymous and do not enable any data subject(s) to be identified either directly or indirectly.

Security measures are taken.

3. Legal aspects

3.1. Prior checking

The notification received on 27 November 2008 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)).

The processing for early retirement without reduction of pension rights is partially automated, insofar as details of the applicants are presented on Excel and the applicant evaluation and comparison are recorded electronically. The data are also kept in paper form at the staff support department. Article 3(2) is thus applicable in this case.

Consequently, such processing comes under 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) refers to "*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 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 might provide information about his family and personal situation, including details of their health, where appropriate. The application file may, where appropriate, be accompanied by any supporting document needed to evaluate the application and not contained in the applicant's personal file.

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. That does not make it any less desirable that the recommendations issued by the EDPS be implemented.

The formal notification was received through the post on 27 November 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 3 April 2009 at the latest (28 January + 50 days' suspension + 15 days for comments).

3.2. Lawfulness of processing

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 servants 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 271/07 A of 13 June 2007 as amended by Decision No 144/08 A of 4 April 2008 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 of the processing operation provided, the EDPS understands that it may also involve sensitive data within the meaning of Article 10 of the Regulation.

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 processed in the case under examination may indeed include data concerning health, since data subjects may provide information on their family and personal situation, including, where appropriate, details regarding their health. The application file may, where appropriate, be accompanied by any supporting document needed to evaluate the application and not contained in the applicant's personal file.

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 EESC.

Article 10(2)(b) may also apply in this 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 to take as fully informed a decision as possible.

The EDPS considers the data processing operation described to be in compliance with the provisions of Article 10 of the Regulation.

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 in order to evaluate 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 in particular to the information given to the data subjects. See point 3.9 below regarding this point.

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. Officials or temporary servants wishing to reapply have to make a new application each year, which helps ensure that the information is up-to-date. The data subject can use the rights of access and rectification to make the file as complete as possible. This is a second way of ensuring the quality of data. See point 3.8 below on the rights of access and rectification.

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).

As stated earlier, data concerning successful applicants, applicants who have withdrawn their applications and unsuccessful applicants are kept for five years.

With regard to general data storage policy in connection with complaints against the general practices of the administration, the five-year period for storage of data in depersonalised form already in operation corroborates the position repeatedly adopted by the EDPS.

3.6. Transfer of data

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

The data are disclosed to other departments of the institution, in particular the Joint Committee, then the Appointing Authority and finally the pensions department of the staff support services unit in order to implement early retirement for the applicants on the list and/or reserve list, and this complies with the Regulation.

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 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 covered by 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*". It is stated in the clause on the protection of individuals with regard to the processing of personal data and on the free movement of such data that the data will be used only in the context of the provisions relating to Article 9(2) of Annex VIII to the Staff Regulations and will be disclosed only to the departments concerned. Even though that clause will only be added for the 2009 exercise, Article 7(3) is being complied with.

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*".

Since the personal number of the official or temporary servant is collected and processed as part of the early retirement exercise, Article 10(6) 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, its effects may nevertheless be significant. 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.

Here, it is not a case of establishing the conditions under which the EESC may process the personal number, but rather of drawing attention to this point in the Regulation. In this instance the EESC's use of personal 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. 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 its 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). All data subjects may have access to their files simply by making an appointment with the pensions department. This will be specified in the call for applications for the 2009 exercise. A person having submitted an application may ask the data controller to withdraw the application, and ask to check his/her personal data and consult his/her application file. The deadline for the data controller's reply to a request for rectification, blocking or erasure of data is 15 working days.

As the EDPS sees it, data subjects' right of rectification covers only their factual personal data and not the evaluation itself, which is subjective. 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 as part of the file submitted by the data subject to the EESC departments and recommends that action be taken to that effect.

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 necessary in order 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 because the Appointing Authority evaluates the data in order to give its opinion.

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 EESC's intranet. The call for applications does not mention any of the points required by Articles 11 and 12. The EESC says that a clause on the protection of individuals with regard to the processing of personal data and on the free movement of such data will be available for the 2009 exercise. That clause does not contain all the points required under Articles 11 and 12 of the Regulation (identity of the controller, recipients of the data, time limits for storing the data) and the requisite additions therefore need to be made.

The EDPS recommends that the clause be expressly mentioned in the forthcoming call for applications so that data subjects are informed, the requisite additions having been made to the Decision.

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 (which receives general information on the applicants' family members) inform applicants that the information may be disclosed to family members in relation to whom data are processed and that the latter may exercise their rights under the Regulation.

3.10. Security

The processing operation as described seems to comply with the Regulation. However, the EDPS would point out that, 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*".

Conclusion

The proposed processing does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means in particular that the EESC should:

- ensure that applicants' family members and dependants whose data might be processed by the EESC have rights of access and rectification;
- refer to the clause on the protection of individuals with regard to the processing of personal data and on the free movement of such data in the forthcoming call for applications;

- add all of the points provided for in Articles 11 and 12 of the Regulation to that clause;
- inform applicants that the family members concerned by the processing operation may access the information and exercise their rights under the Regulation.

Done at Brussels, 1 April 2009.

(Signed)

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