

Opinion on the notification for prior checking from the Data Protection Officer of the European Economic and Social Committee regarding the EESC internal administrative investigations and disciplinary proceedings" dossier

Brussels, 9 November 2009 (Case 2008-569)

1. Procedure

On 25 September 2008 the European Data Protection Supervisor (EDPS) received a letter from the Data Protection Officer (DPO) of the European Economic and Social Committee (EESC) giving notification within the meaning of Article 27 of Regulation (EC) No 45/2001 concerning the "EESC internal administrative investigations and disciplinary proceedings" dossier.

Further information was requested from the DPO on 20 October 2008. A reply was sent on 22 June 2009. Additional questions were put on 1 July 2009, the replies to which were received on 31 August 2009; however, as a result of the suspension clause applying to August, the replies were considered as having been received on 1 September 2009. The draft opinion was sent to the DPO for comment on 18 September 2009. The comments were received on 25 September 2009. Further to those comments additional questions were put on 28 September 2009, the answers to which were received on 30 October 2009.

2. The facts

Under Article 86 of the Staff Regulations, "any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action". Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX to the Staff Regulations.

Articles 49, 50, 50a and 119 of the Conditions of Employment of other Servants apply the same regime to temporary and contractual staff.

Under Article 2(3) of Annex IX to the Staff Regulations, "the institutions shall adopt implementing arrangements for this Article, in accordance with Article 110 of the Staff Regulations". The EESC adopted general implementing provisions (GIP) governing disciplinary procedures and administrative investigations on 7 December 2005 (Decision 635/05A).

Disciplinary procedures:

1. Initiation of disciplinary proceedings

Depending on the nature of the facts at issue, recourse to disciplinary proceedings may be proposed by the director or the head of the unit to which the official concerned belongs, by the Director for Human and Financial Resources (DHFR), or directly by the Appointing Authority.

2. Decision to open disciplinary proceedings

The decision to open disciplinary proceedings lies with the Appointing Authority, which sends the official in question written notice setting out the preliminary charges levelled against him and calling him, within a reasonable time limit, to the preliminary hearing provided for in Article 3 of Annex IX to the Staff Regulations. The Legal Affairs Unit and any other service which may be concerned by the facts may be consulted.

3. Administrative investigation

Before initiating disciplinary proceedings, the Appointing Authority must launch an administrative investigation in accordance with Article 86(2) of the Staff Regulations.

4. OLAF

In cases of alleged financial fraud in which OLAF has launched an enquiry or intends to do so, the Appointing Authority may postpone the launch of an administrative investigation and/or, where appropriate, disciplinary proceedings until OLAF has completed its enquiry.

Under Article 4 of Decision No 363/09A concerning the terms and conditions for internal investigations in relation to the prevention of fraud, corruption and any illegal activity detrimental to the Communities' interests, the Appointing Authority may ask OLAF to carry out an administrative investigation. The EESC has not so far used this option.

Administrative investigations

1. Launching an investigation

- Directors and heads of unit may ask the Appointing Authority to launch an administrative investigation pursuant to Article 86(2) of the Staff Regulations and Article 2 of Annex IX to the Staff Regulations.
- The Appointing Authority may also launch an administrative investigation of its own motion, particularly in cases where it needs to gather additional information in order to decide on a request to initiate disciplinary proceedings.
- The decision to open an administrative investigation specifies the subject and scope of the enquiry and instructs one or more officials or other servants to carry it out.
- An official who may be concerned by an administrative investigation is to be kept informed, provided this is not harmful to the investigation.

2. Conducting the investigation

- The official responsible for conducting the investigation exercises his powers independently, thoroughly and as quickly as possible. He is empowered to obtain documents, request information from any person he sees fit to question and carry out on-the-spot checks. In conducting the investigation, he neither requests nor receives instructions.
- Conclusions referring to an official of the Institution by name may not be drawn at the end of the investigation unless that official has had the

opportunity to express an opinion on all the facts which relate to him in the presence of the official responsible for conducting the investigation.

- The official under investigation may be accompanied by a person of his choice. Any costs pertaining thereto are to be borne by the official.

3. Closure of the administrative investigation

- When the investigation is complete, the official responsible for conducting it submits a report to the Appointing Authority. The report sets out the facts and circumstances in question; it establishes whether the rules and procedures applicable to the situation were respected; it takes note of any aggravating or mitigating circumstances; it details the extent of the damage suffered by the Institution, and puts forward a recommendation on the action to be taken.
- Copies of all relevant documents and records of any hearings are attached to the report.
- The Appointing Authority informs the official concerned of the conclusion of the investigation and communicates to him the conclusions of the investigation report and, on request and subject to the protection of the legitimate interests of third parties, all documents directly related to the allegations made against him in accordance with the provisions of Article 2(2) of Annex IX to the Staff Regulations.

3.1. Preliminary hearing

- The preliminary hearing provided for in Articles 3 and 11 of Annex IX is held by the Appointing Authority. The latter is assisted by an official from the Directorate for Human and Financial Resources, a member of the Legal Affairs Unit and, if necessary, by a representative of the directorate or unit in which the official concerned is employed and/or a representative of any other service concerned by the facts.
- The official concerned may be accompanied by a person of his choice. Any costs pertaining thereto are to be borne by the official.
- The record of the hearing is forwarded to the official concerned by registered letter with acknowledgement of receipt, for signature. The other participants in the hearing receive a copy.
- The official forwards the signed record and/or his comments and remarks within 15 calendar days from receipt of the record. Failure to do so within that period will result in the record being considered approved.
- On the basis of the conclusions of the preliminary hearing, the Appointing Authority takes one of the decisions provided for in Article 3 of Annex IX to the Staff Regulations.

The DPO also consulted the EDPS on whether the hearing could be recorded under the following conditions: request for the data subject's consent and destruction of the recording after transcription on paper.

3.2. Decision to close the procedure with no further action

If the Appointing Authority decides, pursuant to Article 3(1)(a) of Annex IX to the Staff Regulations, that no case can be made against the official concerned, it informs him by registered letter with acknowledgement of receipt. The official may request that a copy of this letter be inserted in his personal file.

3.3. Decision to address a warning

If, however, the Appointing Authority decides, pursuant to Article 3(1)(b) of Annex IX to the Staff Regulations, to take no disciplinary measure or to address a warning to the official concerned, the latter is informed by registered letter with acknowledgement of receipt. No copy of this letter is inserted in the official's personal file.

3.4. Decision to initiate disciplinary proceedings without consulting the Disciplinary Board

If the Appointing Authority decides to apply the provisions of Article 11 of Annex IX to the Staff Regulations, it may decide on the penalty to be imposed without consulting the Disciplinary Board. This decision is inserted in the official's personal file.

A copy of the decision is forwarded to the official concerned by registered letter with acknowledgement of receipt.

Disciplinary procedure: decision to initiate disciplinary proceedings before the Disciplinary Board

1. Consultation of the Disciplinary Board

If the Appointing Authority decides to initiate disciplinary proceedings before the Disciplinary Board, pursuant to Article 12 of Annex IX to the Staff Regulations, it does so by means of a report submitted to the chairman of the Board. A copy of the report is forwarded to the official concerned and to the Legal Affairs Unit.

Pursuant to Article 16(2) of Annex IX to the Staff Regulations, the Appointing Authority informs the chairman of the Disciplinary Board of the name of the official representing the Institution.

As soon as proceedings are initiated before the Disciplinary Board, its chairman or secretary informs the official concerned, pursuant to Article 14 of Annex IX to the Staff Regulations, of the possible consequences of acknowledging his misconduct.

2. Opinion of the Disciplinary Board

The opinion of the Disciplinary Board is forwarded to the Appointing Authority, the official concerned and the Legal Affairs Unit.

3. Withdrawal of the case from the Disciplinary Board

If the Appointing Authority decides, pursuant to Article 14 of Annex IX to the Staff Regulations, to withdraw the case from the Disciplinary Board, it requests the opinion of the Board's chairman on the penalty being considered and informs the official concerned in writing. The official concerned may ask to be heard or may submit his views in writing.

The original of the Appointing Authority's decision is inserted in the official's personal file. The official concerned receives a copy by registered letter with acknowledgement of receipt. The opinion of the chairman of the Disciplinary Board is also forwarded to the official concerned.

4. Decision on disciplinary measures after consulting the Disciplinary Board

On receipt of the opinion of the Disciplinary Board and after hearing the official concerned, the Appointing Authority decides on the disciplinary penalty. The Human Resources Directorate implements that penalty.

The original of the decision is inserted in the personal file of the official concerned. The latter receives a copy of the decision by registered letter with acknowledgement of receipt.

Other facts emerging from the notification

Processing: In internal EESC administrative investigations and disciplinary proceedings: processing of data concerning

1. the behaviour, action or failure to act of persons under investigation and/or subject to disciplinary proceedings;
2. the legal definition of such action or failure to act with regard to the Staff Regulations and to other obligations by which the persons in question are bound;
3. the data subjects' personal, including financial, liability (Article 22 of the Staff Regulations);
4. where applicable, the penalties imposed on the data subjects.

Files are compiled in both paper and electronic form. Files contain the following items:

- documents relating to the initial complaint;
- decision to open an administrative investigation;
- decision to delegate the administrative investigation;
- records of interviews with all persons heard in connection with the administrative investigation;
- conclusion of the administrative investigation;
- preliminary hearing of the person under investigation organised pursuant to Article 3 of Annex IX to the Staff Regulations prior to the decision to impose a penalty;
- decision to impose a penalty (administrative investigation) or decision to initiate disciplinary proceedings (with or without convening the Disciplinary Board);
- decision to delegate disciplinary proceedings;
- records of interviews with all persons heard in connection with disciplinary proceedings;
- conclusion of the disciplinary proceedings;
- preliminary hearing of the person under investigation organised pursuant to Article 11 of Annex IX to the Staff Regulations prior to the decision to impose a penalty; decision imposing a penalty; appeal under Article 90 of the Staff Regulations.

Categories of data: The categories of data in the personal file and/or requested of the Medical/Social service are limited. Regarding the latter, a delegate of the Appointing Authority may need to put specific questions to the Medical/Social service; this is done by confidential internal mail. Examples of such questions: where there is abuse of alcohol in the workplace, the Medical/Social service may be asked whether to their knowledge X is receiving any specific medical treatment that could affect his behaviour. Information provided by the Medical/Social service in reply to specific questions of this type are also dealt with by confidential internal mail. Information received remains confidential and is not added to the disciplinary file; no reference to it is made in the investigation file.

Purpose: The purpose of the data processing operation is to put together a file that enables the Appointing Authority to determine whether an official or other servant has failed to fulfil his/her obligations under the Staff Regulations and, where appropriate, impose a disciplinary penalty in accordance with the Staff Regulations.

Information for data subjects: The data subject is notified of the decision to open an administrative investigation, in accordance with Article 1 of Decision No 635/05A and under the conditions laid down therein. The decision to open an administrative investigation sets out the preliminary charges that have been levelled against the official.

The data subject is notified of the decision to open disciplinary proceedings, in accordance with Article 3 of Annex IX to the Staff Regulations and under the conditions laid down therein. If the official concerned has not been notified of the opening of the investigation because disclosure may potentially be harmful to the investigation, he will be informed by the DHFR as soon that situation ceases to obtain. The withholding of information, as authorised under Article 1 of Annex IX to the Staff Regulations, may continue only as long as is necessary for the proper conduct of the investigation.

All those with a role in disciplinary proceedings, at whatever level, whether the data subject or any other person involved, receives with the invitation to attend the hearing a copy of the clause on the protection of individuals with regard to the processing of personal data and on the free movement of such data. This contains information on the recipients of the data, the purpose of the processing operation and the rights of access and rectification.

Procedures safeguarding the data subjects' rights: Under Articles 1, 2 and 3 of Annex IX to the Staff Regulations the data subject receives the conclusions of the administrative investigation report and, on request and subject to the protection of the legitimate interests of third parties, all the documents directly related to the allegations made against him. He has the right to comment on the conclusions of the investigation report that refer to facts which concern him. Under Article 13 of Annex IX to the Staff Regulations, the person subject to disciplinary proceedings has the right to obtain the complete file concerning him and to copy all documents relevant to the proceedings.

Automated/manual processing: Manual processing and electronic storage of current files

Medium on which data are stored: Paper files are stored in a safe throughout the investigation and the ensuing proceedings. The Head of Unit of the Staff Support Services, Individual Rights and Equal Opportunities Unit (the Unit responsible for disciplinary cases) and two of the Head of Unit's assistants are the only persons with access to the safe.

When the disciplinary proceedings are completed the file is sent to the archives department of the Human Resources Directorate to be inserted in the official's personal file or to be filed in a locked metal cupboard/cabinet, to which the Head of the Staff Support Services Unit is the only person to have a key. The file in electronic form is stored on a hard disk accessible only to the Head of the Staff Support Services Unit and his assistant.

A recording may be made of the hearing with the data subject's consent; the recording is destroyed once it has been transcribed on paper.

Recipients: Only authorised staff of the EESC (e.g. the official responsible for the investigation) are in receipt of the information, except where the data subject brings his case before the Court of First Instance or the Court of Justice. The complete file of the administrative investigation is passed to the disciplinary authority (the Appointing Authority), i.e. the Secretary-General of the EESC and, where appropriate, the President of the EESC and the EESC Bureau (for Committee members, and officials and other staff at grades A14 to A16). It is also passed to the official (Director, Head of Unit, etc.) to whom the Appointing Authority has delegated its powers. The file is also passed to the Disciplinary Board if disciplinary proceedings are initiated.

The penalty decided on is communicated to the Director of Personnel, the data subject's Director and to the Legal Service; it is then sent to the archives department for inclusion in the official's personal file. If necessary, the file may also be brought to OLAF's attention. It may

also be sent to the Brussels Court if the disciplinary case being handled by the EESC gave rise to a complaint to that Court.

Data storage: Disciplinary files (administrative investigations and/or disciplinary proceedings) that have been closed are sent to the archives department of the Human Resources Directorate and may be added to the official's personal file; if not they are filed in the metal cupboard. Without prejudice to Article 27 of Annex IX to the Staff Regulations, the maximum storage period for files is 50 years from the date on which the case in question was brought to the attention of the Appointing Authority, the Secretary-General or the Directorate for Human Resources and/or until the age of 70.

Blocking: immediately follows receipt of the instruction from the Appointing Authority.

Erasure: with regard to keeping disciplinary decisions in officials' personal files, Article 27 of Annex IX to the Staff Regulations lays down the dates from which a data subject may request the deletion of all reference to the disciplinary penalty imposed on him: an official against whom a disciplinary penalty other than removal from post has been ordered may, after three years in the case of a written warning or reprimand, or after six years in the case of any other penalty, submit a request for the deletion from his personal file of all reference to such measure. The decision lies with the Appointing Authority.

Security measures [...]

3. Legal aspects

3.1. Prior checking

The notification received on 25 September 2008 relates to the processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2(a) of Regulation (EC) No 45/2001, hereinafter "the Regulation") by a Community body in the exercise of activities all of which fall within the scope of Community law. The management of data in connection with disciplinary proceedings and administrative investigations involves the collection, recording, organisation, storage, retrieval, consultation, etc. of personal data (Article 2(b) of the Regulation). These activities constitute processing which is manual but also partly automated (electronic storage of current files), and the data are contained in a file within the meaning of Article 3(2). The data processing therefore falls within the scope of the Regulation.

Article 27(1) of the Regulation 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*".

Article 27(2) of the Regulation lists the processing operations likely to present such risks. Disciplinary files qualify for prior checking on various grounds. They may contain data relating to suspected offences, offences, criminal convictions or security measures, within the meaning of Article 27(2)(a). Furthermore, the documents are intended to evaluate personal aspects relating to the data subject, in particular his or her conduct (Article 27(2)(b)).

The prior check set out below concentrates on administrative investigations and disciplinary files. It applies to personal files only to the extent that such files include disciplinary measures. Moreover, it only concerns the processing of personal data in connection with administrative investigations or disciplinary files. Its purpose is not to give an opinion on the procedures themselves.

In principle, checks by the EDPS should be performed before the processing operation is implemented. Otherwise the checking necessarily becomes ex post. This does not alter the fact that the recommendations made by the EDPS should be implemented.

The DPO's notification was received on 25 September 2008. Under Article 27(4) of the Regulation, the EDPS should have delivered his opinion within two months. On 20 October 2008 some questions were put to the DPO, and the answers were received on 22 June 2009 (245 days). Additional questions were put on 1 July 2009, the replies to which were received on 31 August 2009; however, as a result of the suspension clause applying to August, the replies were considered as having been received on 1 September 2009 (62 days). The EDPS's draft opinion was sent to the DPO for comment on 18 September 2009. The DPO's comments were received on 25 September 2009 (7 days). Further to those comments, additional questions were put on 28 September 2009, the answers to which were received on 30 October 2009 (32 days' suspension). On account of the 346 days' suspension, the opinion of the EDPS was due on 9 November 2009.

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of the Regulation, 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*".

It is therefore necessary to determine, firstly, whether the processing operation has been carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments and, secondly, whether the operation is necessary in order to perform the task involved.

Under Article 86 of the Staff Regulations, "*Any failure by an official or former official to comply with his obligations under these Staff Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action.*" Article 86(3) provides that "*Disciplinary rules, procedures and measures and the rules and procedures covering administrative investigations are laid down in Annex IX*" ¹. In accordance with Article 2(3) of Annex IX to the Staff Regulations, the EESC has adopted general implementing provisions governing disciplinary procedures and administrative investigations. Processing is therefore based on a task to be performed in the public interest, as provided for in the Staff Regulations, and is necessary for the performance of that task. A disciplinary file and the related investigation are therefore pre-requisites for issuing a disciplinary penalty. The legal basis therefore supports the lawfulness of the processing.

3.3. Processing of special categories of data

The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership, and of data concerning health or sex life, is prohibited in principle pursuant to Article 10(1) of the Regulation.

The possibility cannot be ruled out that particular categories of data within the meaning of Article 10 of the Regulation may be processed in the course of administrative investigations or

¹ Under Articles 49, 50, 50a and 119 of the Conditions of employment of other servants, these arrangements also apply to temporary and contract staff.

disciplinary proceedings. In such cases the EDPS would stress that the processing operation must be covered by one of the exemptions provided for under Article 10(2) of the Regulation, which waives the prohibition.

Article 10(2)(b) provides that the prohibition on processing sensitive data does 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. Processing of sensitive data in connection with an administrative investigation or disciplinary proceedings may be based on Article 86 of the Staff Regulations and thus qualify for the exemption provided for in Article 10(2)(b) on condition that proof is provided that the data are necessary in the context of that investigation or those proceedings. The official responsible for the investigation should be reminded that the data are particularly sensitive and that he may process the data only if they are necessary for the purposes of Article 86 of the Staff Regulations.

The Appointing Authority may also ask the Medical/Social service for information on the data subject. The information received remains confidential and is not included in the disciplinary file. Nor is it mentioned in the investigation file. The EDPS welcomes the fact that this information is processed confidentially but recommends that the Medical Service be reminded that the data are particularly sensitive.

The processing of the data is also covered by Article 10(5) of the Regulation, insofar as the data may relate to offences. However, such processing is permitted only by virtue of the fact that it is based on a legal obligation as referred to in Article 86 of the Staff Regulations.

3.4. Data quality

Article 4 of the Regulation sets out a number of obligations regarding the quality of personal data.

The data must be "*processed fairly and lawfully*" (Article 4(1)(a)). The lawfulness of the processing operation has already been discussed (see point 3.2 above). Fairness relates to the information provided to data subjects (see point 3.8 below).

Personal data must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed" (Article 4(1)(c)). The EDPS recognises that it is difficult to identify from the outset which data are relevant for the purposes of the investigation. There is no systematic rule regarding the nature of data which can be included in administrative investigation or disciplinary procedure files. The nature of the data to be kept in these files depends to a large extent on the case in point. Article 2(1) of the Decision on general implementing provisions governing disciplinary procedures and administrative investigations stipulates that "the decision to open an administrative investigation shall specify the subject and scope of the enquiry". That is a significant provision given the extent of the data collected and stored in the course of the procedure. Article 2(2) of the Decision on general implementing provisions governing disciplinary proceedings and administrative investigations provides that "*the official responsible for conducting the investigation is empowered to obtain documents, request information from anyone he/she sees fit to question and carry out on-the-spot checks.*" Given this – necessarily broad – access to documents, the EDPS considers that the inclusion of such data in the investigation files must be governed by instructions quoting Article 4(1)(c) of the Regulation with a view to encouraging greater caution with respect to collecting evidence or data in an investigation file. Staff called upon to conduct administrative investigations must

be given these instructions and follow them. The instructions applicable to the investigation files should also be applicable to Disciplinary Board reports (Article 15 of Annex IX to the Staff Regulations) and to disciplinary files.

Medical service staff providing data in connection with an investigation must also observe Article 4(1)(c). The medical service should be informed accordingly.

Article 4(1)(d) of the Regulation stipulates that "*data must be accurate and, where necessary, kept up to date*". The procedure itself must ensure data accuracy. The EDPS is satisfied that the data subject receives the conclusions of the investigation and, on request, all documents directly linked to the allegations made against him, subject to the protection of the legitimate interests of third parties, and is thus in a position to verify that the data are accurate and up to date. The EDPS recognises that it is difficult to ensure that the data are accurate given their subjective nature. However, it is possible by making a recording to ensure that the data are accurate prior to transcription. Nevertheless, increased vigilance is required to ensure data accuracy.

When consulted on the possibility of recording the hearing subject to a request for the data subject's consent and destruction of the recording once it has been transcribed on paper, the EDPS gave a favourable opinion provided that all the persons present at the hearing give their consent. A recording also makes it possible to ensure data accuracy prior to transcription. The EDPS recommends that the consent of all persons present be obtained if a hearing is to be recorded.

The record of the hearing is also forwarded to the data subject by registered letter with acknowledgement of receipt, for signature. The data subject has 15 calendar days from receipt in which to return the signed record and/or his comments and remarks. That also contributes to ensuring that the data are accurate and up to date (see also point 3.8).

3.5. Storage of data

Under Article 4(1)(e) of the Regulation, personal 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*".

Disciplinary files (administrative investigations and/or disciplinary proceedings) that have been closed are sent to the archives department of the Human Resources Directorate for inclusion in the official's personal file or for filing. Without prejudice to Article 27 of Annex IX to the Staff Regulations, the maximum storage period for files is 50 years from the date on which the case in question was brought to the attention of the Appointing Authority, the Secretary-General or the Human Resources Directorate, and/or until the data subject reaches the age of 70 (drawing on Article 10 of Annex IX to the Staff Regulations, which provides that when deciding upon the disciplinary penalty to be imposed, the Appointing Authority should take account in particular of repeated action and the conduct of the official throughout the course of his career).

If hearings are recorded, the EDPS recommends that the recordings should not be kept but rather destroyed once they have been transcribed on paper.

- *Storage in the data subject's personal file*

In accordance with the GIP, all decisions taken in the context of disciplinary proceedings are inserted in the personal file except for decisions by the Appointing Authority not to take any disciplinary action (unless an official requests otherwise), and any warnings addressed to the official.

The institution justifies the storage of these data in the personal file throughout an official's career on the basis of Article 10 of Annex IX to the Staff Regulations, which provides that "*the severity of the disciplinary penalties imposed shall be commensurate with the seriousness of the misconduct. To determine the seriousness of the misconduct and to decide upon the disciplinary penalty to be imposed, account is taken in particular of ... (h) whether the misconduct involves repeated action or behaviour; (i) the conduct of the official throughout the course of his career*".

Pursuant to Article 27 of Annex IX to the Staff Regulations, an official against whom a disciplinary penalty other than removal from post has been ordered may, after three years in the case of a written warning or reprimand or after six years in the case of any other penalty, submit a request for the deletion from his personal file of all references to such measure. The Appointing Authority will decide whether to grant this request. Certain information may therefore be removed from the personal file, but this is done at the discretion of the Appointing Authority. Accordingly, the data subject does not have an automatic right to deletion of the data after a certain lapse of time.

However, it follows from the rules applicable to data protection that the Appointing Authority must justify the need to store the data and justify any refusal to erase the data if an official requests erasure under Article 27 of the Staff Regulations.

The provisions of Article 10 of Annex IX to the Staff Regulations are also invoked to justify storing disciplinary data in the personal file *after* the end of the career of the official or other servant, until he reaches the age of 70. The EDPS does not, however, consider that storing such information in the personal file until the data subject reaches the age of 70 is justified. The EDPS recommends that the EESC set a storage period in line with that of the disciplinary files themselves. If the period were longer, the storage period for the disciplinary files would be pointless: if the information were deleted from the disciplinary file, it would still be available in the personal file. The time limits for both the personal and disciplinary files could be extended if an ongoing administrative or legal procedure required consultation of the files.

The EDPS would therefore recommend that the period for the storage of data in the personal file be reviewed to bring it into line with Article 4(1)(e) of the Regulation.

- *Storing data in disciplinary files*

At the end of an administrative investigation or disciplinary proceedings, the disciplinary file is filed in a locked metal cupboard in the room where personal files are kept (known as "Archives"). The storage of all data in the disciplinary files in Archives must be evaluated in the light of the principle of necessity as established in Article 4(1)(e) of the Regulation.

The EDPS therefore invites the EESC to review that data storage period. Once the time limit for appeal has passed, the intended purpose needs to be determined, since the purpose of storing data in the disciplinary file in addition to the personal file might infringe the double jeopardy principle as far as information common to both files is concerned.

On those two matters, the EDPS recalls the letter of 9 January 2008 addressed to the President of the Board of Heads of Administration².

- *Storage of traffic data*

Article 37(1) provides for specific rules as regards storage of traffic data, i.e. data relating to calls and other connections on telecommunications networks. Data processed and stored to establish calls and other types of connections over telecommunications networks must be erased or made anonymous upon termination of the call or other connection.

If the EESC were to process data relating to Internet connections and the use of e-mail or the telephone in the course of an administrative investigation or disciplinary proceedings, it would have to do so in accordance with Article 37 of Regulation (EC) No 45/2001.

Article 20 of the Regulation provides for exemptions from the erasure of data relating to calls and other connections as provided for in Article 37(1), in particular when the storage of data constitutes a necessary measure to safeguard "*the prevention, investigation, detection and prosecution of criminal offences*" or "*the protection of the data subject or of the rights and freedoms of others*". The EDPS interprets the restriction constituting "*a necessary measure to safeguard the prevention, investigation, detection and prosecution of criminal offences*" (Article 20(1)(a)) as applying to administrative investigations and disciplinary measures³. That provision therefore allows traffic data to be stored if necessary during a specific administrative investigation or specific disciplinary proceedings. The EDPS recommends, however, that steps be taken to ensure the destruction of any such data at the end of the investigation.

The EDPS would stress in the context of disciplinary proceedings that lawfulness and similar guarantees must be assured under the Regulation where use is made of traffic data obtained or processed for purposes other than establishing calls or communications.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of the Regulation which relates to the transfer of personal data within or to other Community institutions or bodies. Personal data may not be transferred unless they are "*necessary for the legitimate performance of tasks covered by the competence of the recipient*".

In this instance, the data circulate between various people within the EESC, i.e. the Appointing Authority (the Secretary-General of the EESC and possibly the President of the EESC and the EESC Bureau (for Committee members and officials and other staff at grades A14 to A16). The data are also passed to the official (Director, Head of Unit, etc.) to whom the Appointing Authority has delegated its powers. The file is also forwarded to the Disciplinary Board if disciplinary proceedings are initiated. The penalty decided on is communicated to the Director of Personnel, the data subject's Director and to the Legal Service; it is then sent to the archives department for inclusion in the official's personal file.

² EDPS website - Supervision - Administrative measures.

³ See EDPS opinion of 21 March 2005 on data-processing in the context of European Parliament disciplinary files (2004-0198)

The data may also be communicated to persons involved in the investigation and to the Civil Service Tribunal. Where data are transferred within or between Community institutions or bodies, Article 7 is applicable. That being so, the EDPS is satisfied that the transfers are necessary for the legitimate performance of tasks covered by the competence of the recipients. It should be noted that parties such as OLAF and the EDPS are not regarded as recipients within the meaning of Article 2(g), as they are covered by the exemption provided for in that article, given that they are likely to receive data in the framework of a particular investigation or a disciplinary procedure. All transfer of data must be regarded as taking place "*in the framework of an inquiry*". But, taken in context, Article 2(g), is to be understood as an exception to the right to information rather than as an exception to the application of Article 7 (see point 3.8. Information to be given to the data subject).

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*". There must be an explicit guarantee that no-one receiving and processing data in the context of an administrative investigation or disciplinary procedure within the EESC can use those data for other purposes. The latter point is particularly important where a person from outside the relevant department is involved in the investigation. The EDPS recommends particular attention to the fact that personal data should be processed solely and strictly within the framework of administrative investigations and disciplinary proceedings.

It may happen that data are transmitted to the competent national authorities where there is an infringement of national law. Data may also be sent to the Brussels Court if the disciplinary case being handled by the EESC gave rise to a complaint to that Court.

Transfers of this kind need to be examined in the light of Article 8 of the Regulation ("*Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC*"). In this case (transfer to the Brussels Court), such transfers are covered by Article 8(a), since "*the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority*". If data are transferred at the request of a national authority, it must therefore establish the "necessity" for the transfer. If, on the other hand, data are transferred on the sole initiative of the EESC, it will be for it to establish the "necessity" for the transfer in a reasoned decision.

For Member States that have not extended implementation of Directive 95/46/EC to their judicial authorities, Article 9 of the Regulation has to be taken into consideration. In those countries, Council of Europe Convention 108, which can be regarded as providing an adequate level of protection for our purposes here, applies in any case to judicial authorities.

3.7. Right of access and rectification

According to Article 13 of the Regulation, "*the data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller [...] information at least as to the purposes of the processing operation, the categories of data concerned, the recipients [...] to whom the data are disclosed [and] communication in an intelligible form of the data undergoing processing and of any available information as to their source*". Article 14 provides that "*the data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data*".

Right of access and rectification is granted under Regulation (EC) No 45/2001 to all data subjects within the limits of the possible exemptions set out in Article 20. In the context of

administrative investigations and disciplinary proceedings, those rights are granted not only to the person who is the subject of the investigation ("the suspect") but also to all other persons whose personal data are processed in the course of the investigation or disciplinary proceedings.

The EDPS therefore requests that right of access, as provided for by Regulation No 45/2001, be explicitly granted to the data subject, within the limits of the exemptions set out in Article 20. The EDPS is satisfied that in the case of an administrative investigation Article 2(3) of the GIP allows the data subject to request all documents directly linked to the allegations made, subject to the protection of the legitimate interests of third parties. He is also satisfied that the record of the preliminary hearing provided for in Articles 3 and 11 of Annex IX to the Staff Regulations is sent to the official or other servant heard. The EDPS is pleased that in the case of proceedings before the Disciplinary Board the official concerned has the right to obtain the complete file concerning him/her and to copy all documents relevant to the proceedings, including exonerating evidence (Article 13 of Annex IX to the Staff Regulations).

The restriction on the right of access as a safeguard for third parties is in accordance Article 20 of the Regulation, which allows the right of access to be restricted in order to protect interests, notably if this restriction constitutes a necessary measure to safeguard the protection of the data subject or of the rights and freedoms of others. It must, however, be balanced against the person's right of access in relation to his right of defence. The EDPS would therefore stress that rights of access must also be granted to all persons mentioned in the investigation report or disciplinary file, within the limits of the exemptions set out in Article 20.

As regards the right of rectification, the data subject has the right to obtain from the controller rectification without delay of inaccurate or incomplete personal data (Article 14 of the Regulation). The EDPS notes that, in the context of an "evaluation of conduct", it is difficult to establish whether personal data are "inaccurate" or not. The fact that the data subject can send comments in writing and other documents (as provided for in Article 3 of the GIP) and that these comments and other documents are inserted in the investigation file is a means of ensuring that the file is complete and that the right of rectification can be exercised. The data subject's right of rectification is therefore observed in the case under consideration. The other persons involved in the investigation should also, as far as possible, be granted the right to rectify their personal data.

3.8. Information to be given to the data subject

Under Articles 11 and 12 of the Regulation, whenever personal data are processed, data subjects must be provided with sufficient information about the processing operation. This information should usually be given at the latest when the data are obtained from the data subject if the data subject has not already been informed (Article 11). If the data are not obtained directly from the data subject (Article 12), the information must be provided at the time the data are recorded or, if disclosure to a third party is envisaged, no later than the time the data are first disclosed.

Personal data in an investigation file can be obtained not only from the data subject but also from third parties. Information about the processing operation must therefore be provided when the data are collected, i.e. before they are recorded or forwarded to third parties. Data subjects (officials and other servants of the EESC) must be informed of personal data processing operations in the context of administrative investigations and disciplinary proceedings in general. Moreover, in the event of a specific administrative investigation and/or specific disciplinary proceedings against an individual, the principle of fair processing would require

that the individual be informed of the opening of proceedings relating to him and of the resulting processing of personal data, which is the case according to the notification of the processing operation under review, unless Article 20 applies.

According to the notification received, a personal data protection clause is now transmitted not only to persons subject to an administrative investigation and/or disciplinary proceedings but also to any person with a role in the enquiry who will be heard.

The clause is not fully satisfactory to the EDPS because it does not mention all the information items covered by Articles 11 and 12. The information concerning the identity of the controller and the purposes of the processing operation is not sufficiently explicit. There is no mention of the time-limits for storing the data. The right of access of other persons mentioned in the investigation file, within the limits of the exemptions set out in Article 20, should also be added.

The information concerning the recipients of the data must be complete. The Civil Service Tribunal and the EDPS are missing. Information concerning transfer of data to authorities acting in the context of a specific investigation does not need to be given to the data subject *per se* because those recipients are not recipients within the meaning of Article 2(g) of the Regulation, but it is nonetheless desirable for such general information to be given to ensure the transparency of the procedure. Furthermore, mention should be made of the possibility of recording the hearing subject to the following conditions: consent of the data subject and destruction of the recording once it has been transcribed on paper.

The EDPS recommends that the personal data protection clause be completed as described above.

3.9. Security measures

The processing operation as described seems to comply with the Regulation. However, the EDPS would point out that, under Article 22 of the Regulation (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 operation does not seem to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means in particular that:

- the official responsible for the investigation should be reminded that the data are particularly sensitive and that he may process the data only if they are necessary for the purposes of Article 86 of the Staff Regulations;
- the Medical Service should be reminded that the data are particularly sensitive;
- instructions quoting Article 4(1)(c) of Regulation (EC) No 45/2001 with a view to encouraging greater caution with respect to collecting evidence or data in an investigation file should be established; staff called upon to conduct administrative investigations must be given those instructions and follow them; instructions applicable to investigation files should also be applicable to Disciplinary Board

reports (Article 15 of Annex IX to the Staff Regulations) and to disciplinary files; the above information should also be given to the Medical Service;

- increased vigilance is required to ensure data accuracy;
- the consent of all persons present should be obtained if a hearing is recorded;
- if a hearing is recorded, the recording should not be kept but rather destroyed once it has been transcribed on paper;
- the storage period for data in the personal file should be reviewed to bring it into line with Article 4(1)(e) of the Regulation; once the time limit for appeal has passed, the intended purpose should be determined since the purpose of storing data in the disciplinary file in addition to the personal file might infringe the double jeopardy principle as far as information common to both files is concerned;
- data relating to Internet connections and the use of e-mail or the telephone processed by the EESC in the course of an administrative investigation or disciplinary proceedings should be processed in accordance with Article 37 of the Regulation, and, in the context of disciplinary proceedings, lawfulness and similar guarantees under the Regulation must be assured where use is made of traffic data obtained or processed for purposes other than establishing calls or communications;
- traffic data kept in connection with a disciplinary investigation should be destroyed at the end of the investigation;
- particular attention needs to be given to the fact that personal data should be processed solely and strictly within the framework of administrative investigations and disciplinary proceedings;
- rights of access should be granted to all persons mentioned in an investigation report or disciplinary file, within the limits of the exemptions set out in Article 20;
- other persons involved in an investigation should, as far as possible, be granted the right to rectify their personal data;
- the personal data protection clause should be completed as described in point 3.8 (information to be given to the data subject);
- specific information concerning processing of personal data should be given to data subjects, subject to the limitations of Article 20.
- [...]

Done at Brussels, 9 November 2009

[Signed]

Giovanni BUTTARELLI
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