LE CONTRÔLEUR EUROPÉEN
DE LA PROTECTION DES DONNÉES

Public hearing in Case F-35/08 (1 December 2009)

Pleading of the EDPS

Mr. President of the First Chamber, Judges,

This is the first time the European Data Protection Supervisor has applied to intervene before the Civil Service Tribunal and it is an honour to plead in this case.

The EDPS intervenes in support of the form of order sought by the Mr Pachtitis, which concerns EPSO's decision to reject his request to access some of the competition's documents and specifically to the questions that he answered. The EDPS has already made a detailed analysis of the specific right of access under Article 13 of Regulation 45/2001 in his statement in intervention submitted to your honourable Court as well as to the Court of First Instance. We argued that Mr Pachtitis would only be able to evaluate his performance and verify EPSO's decision if he received the questions posed to him during the pre-selection tests. This is in essence why Mr Pachtitis is entitled to have access to his data!

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My pleading today will concentrate mainly on the new elements that the Commission raised in its observations on our statement in intervention.

Specifically, I will address the following points:

1. The purpose of the intervention, namely the access to the data that were refused;

2. The statement of the Commission that the Civil Service Tribunal is not competent to judge on issues relating to Regulation 45/2001;

3. The statement of the Commission that Regulation 45/2001 cannot be applied because the Staff Regulations apply as *lex specialis*;

4. The administrative requirement of the Commission to be able to use the questions in future competitions.

1. The purpose of the intervention, namely the access to the data that were refused

i) Why questions should be considered as personal data

Firstly, there is no dispute that the answers given by Mr Pachtitis are personal data. The questions that were posed to him also constitute his personal data because they are inextricably linked to the answers he gave. On the basis of this

"package" of personal data, EPSO evaluated his performance and made a decision regarding his application. Mr Pachtitis has the fundamental right to know in which questions he failed to obtain adequate marks and why. The system may be prone to error, and without the questions, Mr Pachtitis can neither understand which questions he answered incorrectly nor assess whether the system produced the mark appropriate to his performance. This is exactly why Regulation 45 gives additional protection in situations involving automated decisions.

ii) Why Mr Pachtitis' request for access should be examined in the light of Regulation 45/2001 and not Regulation 1049/2001

The processing of the questions and answers was carried out by EPSO, a Community body. Mr Pachtitis requested the questions he answered himself from EPSO and not the questions which were posed to other candidates. This is therefore not a request for access to public information but a clear request for access to information which relates directly to him. He has a legitimate right to obtain his own data which is protected by Regulation 45/2001. Article 13 of this Regulation is the legal basis which guarantees Mr Pachtitis' access to his own data in an intelligible form and gives him stronger enforceable rights than Regulation 1049/2001. His request should therefore be examined in the light of Regulation 45/2001.

2. The statement of the Commission that the Civil Service Tribunal is not competent to judge on issues relating to Regulation 45/2001

It is surprising to note that the Commission claims that "*the Civil Service Tribunal is not competent in examining cases concerning the alleged violation of Regulation 45/2001, since its competence is limited to the examination of cases regarding Staff Regulations*". The Civil Service Tribunal is indeed competent to hear disputes between the EU institutions and their civil servants as well as the participants in EPSO competitions, but in the framework of such cases, it must fully apply Community law where necessary. Furthermore Community legislation cannot be ignored otherwise your Court will be prevented from hearing a case and delivering a judgment. In fact, in the recent case **Vinci v European Central Bank (**F-130/07), your Court already examined a dispute in the light of the provisions of Regulation 45/2001. This illustrates that the application of Regulation 45/2001 cannot fall outside the field of the competence of this Court. Therefore, the statement of the Commission cannot be accepted.

3. The Statement of the Commission that Regulation 45/2001 cannot be applied because the Staff Regulations apply as *lex specialis*

This brings me to the Commission's argument that Regulation 45/2001 cannot be applied because the Staff Regulations and in particular Article 6 of Annex III of the Staff Regulations applies as *lex specialis*. The Commission cited three cases from the Court of First Instance, namely **Hendricx**, **Le Voci** and **Pyres**. The EDPS categorically refutes such an unjustified position for the following reasons:

First, Article 6 of Annex III of Staff Regulations states that the proceedings of the jury should remain secret but is silent on the matter of access to data by candidates. Since Mr Pachtitis was evaluated through an automated decision process, there is no jury involved. Article 6 cannot therefore be invoked in the present case and the three cases mentioned by the Commission are irrelevant to it.

Second, if Article 6 were to be considered as *lex specialis*, it should contradict or specify a *lex generalis*, which in this case would be Article 13 of Regulation 45/2001. However, there is not such contradiction or specification in the present case. The Staff Regulations remain silent as to any data protection rules, let alone any principle on the specific right of access of an EPSO candidate to personal data, that would be relevant to the present case. Regulation 45/2001 however, lays down a general legal framework for data protection law. Given that there is no provision in the Staff Regulations relating to the restriction of access of an EPSO candidate to personal data, the right of access as laid down in Article 13 of Regulation 45/2001 must fully apply.

Third, Article 8(2) of the Charter of Fundamental Rights recognises that everyone has a right of access to data concerning him/her and confers positive obligations on Community institutions. We are convinced that a *lex specialis* can never deprive an individual from a subjective right that was given to him and *a fortiori* not from a fundamental right, unless a restriction of the right meets the conditions

set out in Regulation 45/2001. Mr Pachtitis' request for access should therefore be examined under the provisions of Regulation 45/2001.

Four, if we apply the reasoning of the Court of First Instance in the 3 cases mentioned by the Commission, we should consider that Regulation 45/2001, which entails a system of checks and balances, contains exceptions according to which the right of access can be limited. On the basis of Article 20 of Regulation 45/2001, the application of Article 13 can be exempted and restricted where such restriction constitutes a necessary measure to safeguard specific interests and rights. In the present case however, the application of Article 13 should not be limited since there is no particular right or interest that falls within the scope of Article 20. Mr Pachtitis' request of access did not concern other candidates' questions and the secrecy of the jury is not relevant.

4. The administrative requirement of the Commission to be able to use the questions in future competitions.

Examining the Commission's administrative need in light of Article 20 of Regulation 45/2001, we conclude that it cannot fall within any of the exemptions of this provision. Therefore, the Commission restricted the right of access of Mr Pachtitis without any legal basis.

Moreover, the Commission could have ensured the right of access while at the same time protecting the objectivity of the comparative selection procedures. Article 13 allows for this. EPSO could develop a method to prevent any publication or dissemination of the questions that might jeopardise the system. For instance, it could invite the candidates to the EPSO centre of the Member State where they took the pre-selection tests for on-the-spot access to only the questions posed to each. They may take notes of the questions but they should not be allowed to take them away from the EPSO centres. It is in the Commission's interest to find appropriate ways of giving access to the questions allowing the applicants to both receive their data in an intelligible form and gain a comprehensive knowledge of all the personal data related to them. Otherwise, the candidates' legitimate interests and data protection rights will continue to be prejudiced.

3. Concluding remarks

With this pleading I have tried to demonstrate that the arguments presented by the Commission are not convincing and that Mr Pachtitis' request for access to his personal data should be examined under Article 13 of Regulation 45/2001. Since the Commission has not provided any legitimate reasons for justifying a restriction in accordance with Article 20 of Regulation 45/2001, it has infringed the fundamental right of access to his personal data.

Thank you.

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Agent of the European Data Protection Supervisor