



Opinion on the notification for prior checking from the Data Protection Officer of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) on the "Annual exercise for early retirement without reduction of pension rights" dossier

Brussels, 16 June 2008 (Case 2008-154)

1. Procedure

A notification under Article 27(3) of Regulation No 45/2001 was issued by the EMCDDA's Data Protection Officer (DPO) in a letter received on 10 March 2008 concerning the "*Annual exercise for early retirement without reduction of pension rights*" dossier.

In the context of this notification, certain questions were put to the EMCDDA's DPO by e-mail on 28 March 2008 and the replies were received on 7 April 2008. Additional information was requested on 23 April and replies were received on 5 May. Another set of questions were asked on 27 May and on 3 June and answers were given on 30 May and 11 June 2008. On 12 June 2008 the EDPS sent the draft Opinion to enable the DPO to make comments. Comments were received on 13 June 2008.

2. The facts

This case involves a processing operation carried out by the EMCDDA. The processing relates to the implementation of the annual exercises for early retirement without reduction of pension rights in the interests of the service. The procedure is very similar to the one of the Commission. Indeed, the EMCDDA has adopted by analogy the European Commission decision of 28 April 2004 as amended by the decision of 10 August 2006 and Council Regulation (EC, EURATOM) n°1746/2002 of 30 September 2002.

A general description of the facts of the processing operation is given in the Opinion 2006-577 issued by the European Data Protection Supervisor (EDPS) on 20 March 2007. Only the facts described below differ.

In general, the processing operation is manual. If an applicant sends an expression of interest by e-mail, it is stored electronically on the human resources directory.

After a data conservation period of 5 years, statistical data will be kept. Those data will not allow to identify directly or indirectly a given person.

The Applicants may withdraw their application at any time, as well as access the information, and correct, erase and deal with their personal data by contacting the human resources management sector.

The recipients of the data are restricted to the human resources management sector and the PMO for implementation of the early retirement.

The EMCDDA will publish the list of the applicants with their name, surname, function group and grade internally.

Information to the data subject is given through a *declaration of confidentiality and data protection*. The declaration provides for information about the controller, the purpose and the recipients of the processing operation, the rights of the data subject, the time-limit for storing the data, the right to have recourse at any time to the EDPS and the categories of data processed. The declaration also mentions the longer storage of the data for statistical reasons. These data will remain anonymous.

3. Legal aspects

3.1. Prior checking

The processing under examination is very similar to that put in place by the Commission. The Commission's Annual exercise for early retirement without reduction of pension rights processing operation has already been checked by the EDPS in his Opinion on the notification for prior checking from the European Commission's DPO (Case: 2006-577) published on 20 March 2007. The analysis below will therefore address the main issues and the points of difference between the processing operation under examination and the one already checked. The recommendations made by the EDPS for Case 2006-577 obviously also apply to the processing operation under examination and must be taken into account by the EMCDDA when relevant.

Article 27.2.b provides that "The following processing operations are likely to present such risks: processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct", which is the case here, especially as regards evaluation of ability (Article 27.2.b). 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 (profile and individual abilities).

The EMCDDA also describes the inter-agency procedure that takes place each year in order to determine which agency will have the possibility of offering an early retirement without reduction of pension rights to its staff. The last exercise of this procedure did not involve any processing of personal data and was therefore not subject to the Regulation 45/2001. If in the future, a processing of personal data would take place, the EMCDDA should of course notify the processing operation to the EDPS in compliance with Article 27, if it is the case.

Official notification was received by post on 10 March 2008. In accordance with Article 27.4 of the Regulation, the two-month period within which the EDPS has to deliver an opinion was suspended for 34 days. The EDPS will therefore issue his opinion no later than 16 June 2008, 14 June being, a Saturday (11 May plus 34 days suspension).

3.2. Lawfulness of the processing

Article 5.a of Regulation (EC) No 45/2001 stipulates that the processing must be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution*".

In the case in point, the procedure is established in accordance with Article 9.2 of Annex VIII of the Staff Regulations and of Article 39 of the Conditions of Employment of Other Servants, which allows a limited number of officials and temporary agents to retire before the pensionable age without reduction of pension rights each year. The EMCDDA Decision Admin/2004 establishes the provisions implementing a scheme for early retirement without reduction of pension rights.

The EDPS is satisfied that the processing described is necessary for the procedure established by the Staff Regulations and EMCDDA administrative decision and is therefore lawful under Article 5.a of Regulation 45/2001.

3.3. Data quality

According to 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/or further processed".

The data needed for evaluating the application are collected by means of a specific application form. The EDPS considers that the data collected are adequate in the light of the purpose of the processing. EMCDDA will publish the list of the applicants with their name, surname, function group and grade internally. The EDPS is of the opinion that the publication of the list of applicants and their grade is excessive. Indeed, the purpose of the publication of such a list is to allow applicants to exercise their right of appeal. This purpose can be achieved with the publication of the final list of elected persons, since all applicants can thus exercise their rights under Article 90 of the Staff Regulations if they wish to do so. Therefore the EDPS recommends that the EMCDDA does not publish this list of candidates but only the final list of elected persons. This list should only include adequate, relevant and non excessive data that is to say the name, surname and function group of the persons.

Data must also be "processed fairly and lawfully" (Article 4.1.a of the Regulation). Lawfulness has already been discussed in paragraph 3.2 above. Concerning fairness, this relates to the information which is to be communicated to the data subject (see below, paragraph 3.7).

Finally, data must be "accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified " (Article 4.1.d of the Regulation). The fact that the applicant fills in the forms him/herself and that a new form must be completed each year for any new application, contributes to keeping the data accurate and up to date. Furthermore, as will be seen below, the data subject has access and rectification rights, in order to ensure that the file is as complete as possible.

3.4. Data conservation

Regarding the conservation of the data, the EMCDDA has adopted the same rule as the Commission one. The EDPS made precise recommendation in his 2006-577 Opinion and invites the EMCDDA to take it into account to define its data conservation policy.

Regarding the storage of data for a longer period for statistical use, the EDPS would like to remind that data shall not be used for any purpose other than for statistical purposes, in compliance with Article 4.1.e. Indeed, the EDPS would like to draw the attention of the EMCDDA to the fact that the statistics will only be based on a restricted number of people, even one person. This makes the identification of a person by statistics inference for instance very easy and therefore it is highly questionable that Regulation does not apply.

3.5. Transfer of data

The processing operation must also be scrutinised in the light of Article 7.1 of Regulation 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"*.

For the record, the case in point involves the transfer within one institution and to other Community bodies. The data recipients are the human resources managers, the Appointing Authority and the PMO. 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"*.

3.6. Right of access and rectification

Article 13 of Regulation No 45/2001 provides for a right of access upon request by the data subject, and lays down details concerning that right. Under Article 13 of the Regulation, the data subject has the right to obtain from the controller, without constraint, the 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 gives data subjects a right of rectification.

In the case in point, the rights of access and rectification and the right to block data can be exercised by the data subjects upon application to the human resources management unit.

The EDPS therefore considers that the conditions of Articles 13 and 14 of Regulation (EC) No 45/2001 have been fully met.

3.7. Information to be given to the data subject

Articles 11 and 12 of Regulation No 45/2001 cover the information to be given to data subjects in order ensure transparent treatment of their personal data. These Articles list a series of obligatory and optional particulars. These apply insofar as, having regard to the specific circumstances in which the data are collected, they are necessary to guarantee fair processing in respect of the data subject. In the present case, some of the data are collected directly from the data subjects themselves and some come from other sources.

The provisions of Article 11 concerning the information to be given to the data subject (*Information to be supplied where the data have been obtained from the data subject*) apply in this case, since the data subjects themselves fill in the application form for early retirement.

The provisions of Article 12 concerning the information to be given to 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 EMCDDA human resources manager in charge concerning the evaluation criteria and the level of priority, on the basis of the forms filled in by the data subjects.

A declaration of confidentiality together with the full procedure of early retirement without reduction of pension rights is posted on the EMCDDA Intranet.

The EDPS welcomes the fact that the longer conservation period for statistical reasons is mentioned in the declaration. Nevertheless taking into account what has been said in point 3.4, the EDPS recommends that the sentence "the mentioned statistics are not subject to the Regulation 45/2001 since they are anonymous and do not allow to identify direct or indirectly one or more person" is deleted from the declaration as data are not anonymous in the sense that the persons concerned are still easily identifiable.

The information message complies with Articles 11 and 12 of Regulation No 45/2001, except for the information on the legal basis of the processing operation.

3.8. Security

In accordance with Article 22 of Regulation 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*".

In the case in hand, access to the data is restricted to human resources staff dealing with the issue and the EMCDDA ICT security policy applies.

In the light of information received on the security measures taken to ensure maximum security of processing, the EDPS considers them to be considered adequate in terms of Article 22 of the Regulation.

Conclusion:

The proposed processing operation does not appear to infringe the provisions of Regulation (EC) No 45/2001, subject to the comments made above. This implies, in particular, that EMCDDA should:

- not publish the grade of the applicants;
- make sure that the data kept for a longer period for statistical use shall not be used for any purpose other than for statistical purposes;
- inform applicants of the legal basis of the processing operation in the declaration of confidentiality and data protection;

- delete the sentence "The mentioned statistics are not subject to the Regulation 45/2001 since they are anonymous and do not allow to identify direct or indirectly one or more person" from the declaration of confidentiality.

Done at Brussels, 16 June 2008

(signed)

Peter HUSTINX
European Data Protection Supervisor