EDPS pleading before the General Court
Case T-115/13 *Dennekamp* v *European Parliament*
Luxembourg, 19 November 2014

Dear President, honourable members of the Court,

The present case offers this honourable Court the opportunity to interpret and apply the *Bavarian Lager* ruling in some very specific circumstances.

In essence, three conditions set out in Article 8(b) of Regulation 45/2001 have to be fulfilled before personal data can be lawfully disclosed (Case C-28/08 *Bavarian Lager*, para. 78):

- An applicant has to "demonstrate the necessity" for the transfer of the data;

- The institution (in the present case, the Parliament) has to "weigh up the various interests of the parties concerned"; and

- It has to verify whether there is any reason to assume that the legitimate interests of the individuals concerned might be prejudiced.

Let me make three basic points about our position in this case, as set out in the EDPS written statement.

First, the applicant has requested access to documents which reveal which Members of the European Parliament participated in the additional pension scheme. Disclosure of such information would without a doubt constitute processing of personal data subject to the provisions of Regulation 45/2001.

Second, Regulation 45/2001 applies regardless of whether the personal data relates to professional or private activities. The distinction between the professional and private nature of data is not relevant for determining the applicability of the Regulation, but it is very important when balancing the various interests at stake. In the case at hand, it is very

significant that the data subjects are public representatives and that the data at issue concern, in effect, a perk – an additional benefit – of their public function.

Third, when balancing the interests concerned, it is equally significant that the person requesting the disclosure of personal data is a journalist. This function is accorded great deference in the data protection rules.

Balancing all these factors, our position is that the Parliament's decision to refuse access should be annulled, since all three requirements of Article 8(b), as set out in *Bavarian Lager*, have been fulfilled.

It might seem counter-intuitive that the European Data Protection Supervisor is – once again – intervening in this case in support of the applicant. However, we consider it very important to get clarity on the criteria to be applied in practice when assessing the necessity under Article 8(b) and balancing the various interests at stake. Indeed, we believe that effective protection of personal data does not necessarily require secrecy of such data, nor does it imply non-transparency. We trust the wisdom of your Court to strike an appropriate balance in the present case.

Necessity is the first of the three conditions. On the one hand, under Regulation 1049/2001 on public access to documents, the profession of the person requesting access is irrelevant. On the other hand, the fact that the applicant is a journalist is a very relevant factor under Article 8(b) of the data protection Regulation 45/2001.

In general, the gathering of information by representatives of the media and other public "watchdogs" is an essential step in creating forums of public debate (ECtHR in *Társaság*, Application No. 37374/05, para. 27). In the data protection area, the high public interest attributed to journalistic activities is enshrined in the broad derogation for the processing of personal data for journalistic purposes under Article 9 and recital 37 of the data protection Directive 95/46.

We respectfully submit that the *Bavarian Lager* necessity standard must be interpreted to respect this important public role journalists play in a society. Otherwise, they will not be able to perform their tasks of "public watchdogs" effectively. They need to be free to decide

what information is “necessary” for their investigations, and to pursue whatever path of inquiry they consider appropriate.

Let me now turn to the second element of the analysis: striking the appropriate balance between privacy and data protection on the one hand, and transparency and openness on the other hand.

Once again, the fact that information relates to the sphere of professional activities of a public figure is an important element which should tilt the balance towards greater openness.

In fact, the information whether MEPs are members of the additional Pension Scheme and as such draw additional benefits financed by EU taxpayers should belong to the public domain as a matter of principle. Indeed, information about the remuneration and pension systems of Members of national Parliaments is public in a number of Member States (Finland, France, Germany, Romania, Sweden and the United Kingdom - see paras. 48-53 of the applicant's Reply). At the level of the Union, quite detailed information regarding the remuneration and pension contributions of EU civil servants, including Judges of this Court, is also publicly available through a publication in the Official Journal. It is hard to understand why Members of the European Parliament should not be subject to a comparable level of public scrutiny.

Finally, I would recall the honourable record of the Parliament in insisting on more transparency in the functioning of the institutions of the Union in general. More specifically, the Parliament's own Committee on Budgetary Control has held in the past that, “*as the Voluntary Pension Fund is primarily financed by a public subsidy (...), the names of members of the fund should be made public”*.

Under these circumstances, the Parliament's determination to withhold information from the applicant is simply puzzling.

This brings me to the last element of analysis: the data subject's legitimate interests and the special status of elected representatives and public figures.

The European Court of Human Rights has held that “a fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society,

such as those relating to politicians in the exercise of their official functions, and reporting details of the private life of an individual who does not exercise such functions" (*i.a. von Hannover v. Germany*, Application No. 59320/00, para. 63).

The information at issue only reveals some non-sensitive elements of the personal financial situation of an MEP. It is far from providing the "full picture". It is therefore difficult to conceive the actual harm that the disclosure of this information would cause to the MEPs.

Even more importantly, the membership of the additional pension scheme is directly related to the public mandate of the MEPs as elected public officials. It is in effect an additional privilege or profit of being an MEP. Public scrutiny of such perks cannot prejudice any legitimate interest of the public officials concerned.

**To conclude:**

All the conditions for lawful disclosure of personal data under Article 8(b) of Regulation 45/2001 are met in the present case. In particular, the applicant has sufficiently demonstrated the necessity for the transfer.

The EDPS believes that journalism has a special status under the data protection rules. As a result, the threshold of necessity in Article 8(b) should pay considerable deference to the appreciation of journalists, that is, full consideration should be given to their important societal role of public "watchdogs". The requirement to prove necessity must not prevent them from instigating public debate on issues which they consider necessary in the public interest, or from obtaining the information they deem relevant, in so far as the request is not manifestly inappropriate or abusive.

Consequently, in the case at hand, access cannot be denied on the basis of Article 4(1)(b) of Regulation 1049/2001 and the contested decision should be annulled.

I thank you for your attention.

Anna Buchta
Agent for the EDPS