

Data Protection Rules Concerning the Transfer of Personal Data of EU Institutions' and Bodies' Staff to Member States' Governments

Introduction

EU institutions and bodies are subject to Regulation (EC) 45/2001 on the protection of individuals with regards to the processing of personal data by the Community institutions and bodies and on the free movement of such data (the Regulation).¹ This Regulation sets out the rules for the processing of personal data by the EU institutions and bodies, in a manner similar to national data protection acts for public administrations in the Member States. Requests for transfers of personal data relating to staff by Member States are subject to this Regulation. This note explains under which conditions and in which way such transfers can be carried out.

Legal framework

Treaty on the Functioning of the European Union

Member State governments are entitled to receive certain data about their nationals working in the institutions; see Article 15, second subparagraph of Protocol Nr. 7 (privileges and immunities of the Union) to the TFEU:

"The names, grades and addresses of officials and other servants included in such categories [i.e. those benefitting from the privileges and immunities] shall be communicated periodically to the governments of the Member States".

This provision does not state the purpose of this transfer. However, it may be assumed that it serves to enable national administrations to follow up on the privileges granted to officials and other servants. If this is to be considered as the initial purpose, this would then imply that such data could not be used for other, incompatible purposes, in line with the general data protection principle of purpose limitation. Please also note that it only applies to staff enjoying these privileges – other staff, such as trainees or interim staff, are not covered.

Interaction with Regulation (EC) 45/2001

Two aspects of the Regulation need to be considered: Article 5 on lawfulness and Article 8 for transfers.

Article 5 sets out the grounds for lawfulness. The relevant parts are point (a), legitimising processing *"necessary for the performance of a task carried out in the public interest [...] in the legitimate exercise of official authority vested in [...] a third party to whom the data are disclosed"*, point (b), legitimising processing *"necessary for compliance with a legal obligation to which the controller is subject"* and point (d), legitimising processing to which *"the data subject has unambiguously given his or her consent"*.

For requests based on Article 15, second subparagraph of Protocol Nr. 7 to the TFEU, the processing is lawful under Article 5(b) of Regulation 45/2001 (the Regulation), as providing this information constitutes a legal obligation on the institutions and under point (a), as the Member State governments (e.g. via the Permanent Representation) are entitled to request this information under Article 15, second subparagraph of Protocol Nr. 7 to the TFEU.

¹ OJ L 8/1, 12/01/2001

Additionally, the rules on transfers apply. In this case, it is a transfer to a recipient subject to national legislation implementing Directive 95/46/EC², so Article 8 needs to be taken into account for the transfer. This Article reads as follows:

"Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,

- a) if 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, or*
- b) if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced."*

It is for the recipient to show that either of these conditions is fulfilled.

If Member States request such transfers for reasons that are not related to Protocol No. 7, such as inviting their citizens to social events, Article 5(b) of the Regulation cannot be considered as a valid legal ground for lawfulness. Article 5(a), the relevant parts of which establish that processing is lawful if it is *"necessary for a task carried out [...] in the legitimate exercise of official authority vested in [...] a third party to whom the data are disclosed"* likely cannot be used either, as e.g. invitations to social events would not fall under this provision. While organising such events is obviously a legitimate activity for Permanent Representations, obtaining contact information for persons who did not actively want to be included in the distribution list would most likely not fall under the "exercise of public authority". This term is reserved for more coercive activities.

However, staff may want to keep contact with their home Member State, for which such events provide possibilities. For this reason, another possibility is to ask staff for their unambiguous consent to the processing (Article 5(d) of the Regulation). This would not have to be repeated for every single instance of such transfers, but could be done in a general way, e.g. in a declaration signed by staff members. Article 8(b) of the Regulation would be relevant in this case. The data subjects' consent constitutes an additional safeguard to protect their legitimate interests.

Conclusion

To conclude, the possibilities for transfers of staff data of staff enjoying privileges and immunities under Protocol No. 7 to the TFEU to Permanent Representations or other similar Member State entities can be summarised as follows:

Kind of request	Intended use	Remarks
Based on Article 15, second subparagraph of Protocol No. 7 to the TFEU	Administrative follow-up to privileges granted	No further use for incompatible other purposes, provision is legal obligation
Other	As announced in request, e.g. invitation to social events.	Only use for stated purposes, lawfulness based on consent of person concerned for purposes like social events

Please note that if only statistical data not allowing re-identification of individual staff members are requested (e.g. nationality balance), the information can be provided without further complications under the principle of loyal cooperation, as such information is outside the scope of the Regulation.

² OJ L 281/31, 23/11/1995