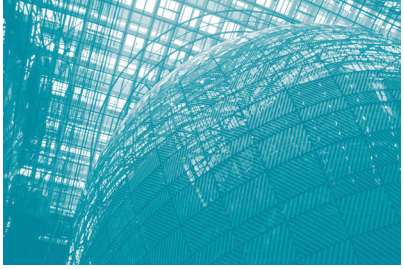

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EDITO

Dear readers,

For this last edition before the summer period, we propose to take look at the protection of personal data of EU agents and officials in disciplinary proceedings.

On the case law side, we will elaborate on the recent decision of the General Court concerning the justification of discrimination based on language in the context of EPSO competitions.

With regard to Belgian family law, we will explore the children's right to be heard by the judge.

We wish you an excellent reading and a very nice summer break!

The DALDEWOLF team

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FOCUS

PERSONAL DATA OF STAFF AND OFFICIALS: THE EXAMPLE OF DISCIPLINARY DATA

For the EU as a whole, the rules on data protection are set out in Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, commonly known as the General Data Protection Regulation (GDPR).

With regard to personal data processed by the EU administration, a "related" regulation applies to the protection of personal data of individuals in their relations with the institutions: the Regulation (EU) 2018/1725 on the protection of individuals with regard to the processing of personal data by the Union institutions, agencies and bodies. This Regulation offers to individuals the same level of protection and rights as the GDPR and is, as far as possible, interpreted and applied in the same way.

Actually, a significant part of the personal data processed by the EU administration concerns EU officials and other servants. It is therefore interesting to look at some selected aspects of the application of Regulation 2018/1725 to the processing of staff data of the European institutions, agencies and bodies.

In the first place, the processing of data must be lawful and related to an identified purpose. As regards the relationship between the institutions and their officials and other servants, the processing of personal data is justified by the role of employer and as such falls within the performance of a task carried out in the public interest or in the exercise of official authority vested in the Union institution or body within the meaning of Article 5 of the Regulation.

Moreover, in each EU institution, agency or body, a controller must keep a register of the personal data processing activities carried out under its responsibility. The information in the register includes the name and description of the processing operation, its legal basis, purpose, data subjects and categories of data, retention period, recipients of personal data or a general description of technical and organisational measures.

For instance, the processing of data collected in the context of disciplinary proceedings may only serve to establish the facts and circumstances in which an official has failed to fulfil his/her obligations and to enable the competent bodies to carry out their activities (i.e. to enable the Disciplinary Board to deliver an opinion, or the Appointing Authority to adopt a possible decision to impose a penalty). The data processed may belong both to the staff members (or former staff members) concerned by the disciplinary procedure and to persons contacted in the course of the investigation (witnesses, victims). The processing operation may involve personal data, including sensitive data, such as administrative data and data relating to the criminal record of the data subject. It should also be noted that some of these data may be made known to authorised staff, but also to the person concerned by the investigation carried out and to certain witnesses where necessary.

As regards the retention period for these data, data relating to investigation and disciplinary procedures are kept in a disciplinary file for a long time, up to 15 or 20 years in some institutions.

Such a retention period may raise questions as to its justification and proportionality.

Indeed, the data contained in individual disciplinary decisions is kept in the data subject's personal file (Article 26 of the Staff Regulations) and may in principle be removed from it at the request of the data subject and, at the discretion of the Appointing Authority, after three to six years, depending on the seriousness of the sanction (Article 27 of the Staff Regulations).

So why keep the same data in a separate disciplinary file for a longer period? In general, the institutions justify this long retention period by the need to take into account any recidivism and the conduct of the official throughout his career in the event of the opening of another disciplinary procedure

The EU officials and other servants concerned who question the relevance of this retention period have, in principle, the possibility of requesting the deletion of these data if the processing operation does not comply with the principles laid down by Regulation 2018/1725, such as the principle of proportionality.

If the administration and the data subject disagree, for example on the appropriateness of deleting data, Article 90b of the Staff Regulations provides for the possibility for Eu agents and officials to lodge a complaint directly with the European Data Protection Supervisor, whose task is to ensure, in an independent manner, that each institution applies the data protection rules correctly.

Finally, it should be noted that in addition to the right to protection of their own personal data, the Regulation 2018/1725 also provides for sanctions in case of failure by officials and other servants to comply with their obligations in this area. Article 69 of the Regulation provides that in the event of failure to comply with the obligations laid down, the official or other servant concerned shall be liable to disciplinary action or other penalty in accordance with the provisions of the Staff Regulations. This provision applies whether the failure in question was committed intentionally or through negligence.

CASE LAW

EPSO competition and language discrimination

In a judgment of 6 July 2022 (T-631/20), the EU General Court annulled a decision to not include a candidate to an EPSO competition in a reserve list, finding that the discrimination based on the language in which the tests could be held as provided in the competition notice was unjustified.

In this case, the applicant, an Italian national, challenged the decision not to include her name on the reserve list for a competition for the recruitment of administrators (AD 7) in the fields of customs and taxation. In her action, she claimed, inter alia, that the competition notice was unlawful in that it restricted the choice of the second language in which the tests were to be held to French and English. In her view, this limitation constituted discrimination on the basis of language, prohibited by Article 1d of the Staff Regulations.

The General Court found admissible the argument as the applicant would have had a chance to obtain a better mark if she had been able to take part of the tests in her mother tongue, namely Italian.

It then examined the existence of discrimination on the basis of language. In this case, the preference given to English or French as a second language was likely to have benefited candidates who have a better command of one of these two languages, to the detriment of other candidates with sufficient knowledge of a second language among the official languages of the Union, other than English and French. Hence, the competition notice introduced a difference in treatment based on language, which is in principle prohibited by the Staff Regulations.

Finally, the Court considered whether such discrimination was justified and proportionate.

According to the Staff Regulations, the particular nature of the posts to be filled may lead the administration to limit the choice of the second language of a competition (Article 1.f of Annex III to the Staff Regulations). But this possibility does not constitute a general authorisation. A satisfactory knowledge of another EU language may be required only to the extent necessary for the performance of the duties, in accordance with Articles 27 and 28 of the Staff Regulations.

In this case, the administration argued that the limitation of the notice of competition was justified by the nature of the tests, which had to be held "in a vehicular language or, in certain cases, in the main language of the competition only", and by the need to have officials available for immediate use, in particular because of the widespread knowledge of French in the Directorates-General concerned by the recruitment.

The first justification was immediately rejected by the General Court as being too broad and general. For the second justification, the Court checked the evidence provided by the Commission, its reliability and its consistency. The analysis of this evidence showed that, in the day-to-day performance of the duties that the successful candidates in the competition would be called upon to perform, a satisfactory knowledge of only one of the two languages (English) could be considered indispensable for a successful candidate to be "immediately operational". The objective of recruiting "immediately operational" officials was to be seen primarily in terms of domain-related rather than general skills. In these circumstances, it did not appear strictly necessary to test general skills in the second language (French) only.

The competition notice was therefore declared unlawful, leading to the annulment of the decision to refuse to place the applicant's name on the reserve list.

After careful analysis, this judgment reframes the possibility for EU institutions to impose language limitations in competitions and recalls that discrimination on the basis of language can only be allowed if it is "strictly necessary" to the objective pursued by the administration.

The right of a minor child to be heard by a judge in matters that concern him/her

In Belgium, when parents separate, whether they were married or not, the family Court has jurisdiction to settle any dispute between them, particularly those relating to the accommodation of their minor children (provided that the latter have their habitual residence in Belgium).

In this case, the judge applies Article 374, §2 of the Civil Code and assesses as a priority, and if at least one of the parents so requests, the possibility of setting up an equal alternating accommodation between the two parental environments.

The judge will only deviate from this model if there are contraindications, which may be: the child's young age, the unavailability of a parent, a serious parental conflict making it impossible to share the child's accommodation, the geographical distance between the two parental homes, etc. In the event of disagreement between the two parents, the judge must decide.

The question we believe is interesting to look at, in the light of Belgian and international law, is whether the child participates in any way in the choice made by the judge. Does he or she have the right to be heard and to give his or her opinion or even to decide with which parent he or she would like to be accommodated?

Under Belgian law, the judge will apply article 1004/1 of the Judicial Code, which provides that from the age of 12, each minor child concerned by the procedure is informed by the Court of the possibility to be heard by the judge.

In practice, a letter is sent to the child at the home of each parent. In this letter, the child is invited to state whether or not he or she wishes to be heard. If the child wishes to be heard, the Court will summon the child, the judge (and his clerk) will hear the child and a report of the hearing will be drawn up. Each parent can read it and ask for a copy.

What is the value of the child's opinion? Should the judge follow what the child over twelve years old asks/wants?

It is not uncommon to hear that from the age of 12, the child can choose which parent he or she wants to live with.

However, this statement is not accurate: at 12, children cannot choose which parent they want to live with. They are simply heard and their statements is taken into account, in the same way as other elements that will form the basis of the judge's decision. The child's opinion is therefore only consultative, his or her wishes are not decisive and judges do not hesitate to depart from them.

It is only when children reach the age of majority, at 18, that they can really decide where to live (either with one of their parents or elsewhere) and the accommodation arrangements set out in a judgment no longer apply.

In the event of an agreement between the parents, the judge does not rule on the matter but may have to approve the agreement reached. In this case, the children are generally not heard. Similarly, if the parents resolve their dispute through mediation, it is rare that the child takes part in the process. Children are therefore only rarely heard when their parents agree. In this case, how can the judge consider that the agreement between the parents is in the best interests of the child?

Apart from the fact that in the case of an agreement or mediation the child over 12 years of age is not heard, his or her voice is only consultative and sometimes has little impact on the solution of the dispute; It is questionable that the child under 12 years of age (and except for other investigative measures such as a social or police investigation) is not recognised as having any rights under Belgian legislation.

Article 12 of the International Convention on the Rights of the Child (ICRC), ratified by Belgium, does not make any age distinction and does not exclude that a child can have the right to speak when his/her parents agree.

The Committee on the Rights of the Child also recalls that, in accordance with paragraph 21 of its general comment No. 12 (2009), Article 12 does not set out any age limit on the right of the child to express his or her views, and discourages States parties from adopting, either in law or in practice, age limits that would restrict the right of children to be heard on all matters affecting them. The Committee recommends that the State party: "*increase the participation of all children, in particular by abolishing in its legislation all such age limits concerning the right of the child to express their views on all matters of concern to them, and ensuring that their opinions are duly taken into account in accordance with their age and maturity (...)*".

As the Court of Cassation has recognised the direct effect of Article 12 of the ICRC in its judgment of 6 October 2017, these principles are directly applicable in Belgium.

Belgium should therefore go further in its domestic legislation when a debate takes place between parents before the civil family courts. Before the Youth Courts, any child (at risk or suspected of having committed an act qualified as an offence), over or under 12 years of age, is assisted and represented by a lawyer specialised in this area. The child's voice is heard much more effectively than before a civil judge.

While waiting for a change, it is up to us to put forward international legislation when, in the event of separation, it seems essential to the solution of the dispute that a minor is heard and his or her views are better considered by our courts.