



Opinion on a notification for prior checking received from the Data Protection Officer of the Office for Harmonization in the Internal market (OHIM) on 20 April 2005 on periodical staff appraisal

Brussels, 28 July 2005 (Case 2004-293)

1. Proceedings

On 20 July 2004, the European Data Protection Supervisor (EDPS) sent a letter to all DPOs asking them to make an inventory of the cases likely to be subject to prior checking by the EDPS as provided for by Article 27 of Regulation (EC) 45/2001. The EDPS requested notification of all processing operations subject to prior checking, even those that started before the appointment of the EDPS and for which the Article 27 check could never be prior, but which had to be dealt with on an "ex-post" basis.

After receipt and analysis of the inventories, the EDPS identified certain priority themes and chose a number of processing operations subject to ex-post prior checking to be addressed. Staff evaluation is one of these priority themes.

On 20 April 2005, the EDPS received a notification for prior checking by the Data Protection Officer of the Office for Harmonization in the Internal Market (OHIM), concerning staff appraisal. The notification included several documents: the notification to the DPO as provided for in Article 25 of Regulation 45/2001, a blanc OHIM appraisal report, Decision n° ADM-04-19 establishing the composition, procedure and powers of the Joint Evaluation and Promotion Committee and Decision N° ADM-04-18 establishing provisions for implementing Article 43 of the Staff Regulations as regard the periodical appraisal report.

Additional information was requested by e-mail on Tuesday 14 June 2005. The answer followed by e-mail on 21 July 2005. The 21 July is an official holiday in Belgium and the EDPS office was closed. The answer by e-mail was therefore received on 22 July 2005.

2. Examination of the matter

2.1. The facts

2.1.1. The appraisal exercise

Article 43 of the Staff Regulations¹ states:

"The ability, efficiency and conduct in the service of each official shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110. Each institution shall lay down provisions conferring the right to

¹ Regulations and Rules applicable to officials and other servants of the European Communities

lodge an appeal within the reporting procedure, which has to be exercised before lodging a complaint as referred to in Article 90(2).[...]

The OHIM has established provisions for implementing Article 43 of the Staff Regulations as regards the periodical appraisal report¹.

A periodical report regarding abilities, efficiency and conduct in the service, hereinafter referred to as the appraisal report, shall be drawn up each year for all officials, temporary agents and contract staff ("jobholders") of the Office, except for grades A*16 and A*15 and for the chairpersons and members of the Boards of Appeal.

The purpose of the report is to assess the work which had been carried out and the results obtained over the period in question and, on the basis of that appraisal, to encourage the jobholder to develop his potential and consider his career prospects.

At the beginning of the yearly appraisal exercise, the jobholders are informed about the procedure. Each department organizes an information meeting for all staff at the beginning of an appraisal exercise. The Human Resources Department publishes a timetable showing the stages of the appraisal procedure.

OHIM-decision N° ADM-04-18 establishing a procedure for the periodical appraisal report is accessible for all jobholders via the Office's intranet (Human Resources' webpage dedicated to appraisals: http://oaminet/oaminet/drvisapi.dll?MIval=cw_usr_index&ID=14117&LANG=en.) It explains in detail the following procedure:

The jobholders are asked to draw up self-assessment and send it to his or her reporting officer. The self-assessment shall be appended to the appraisal report.

The appraisal report is drafted by the responsible officer. He or she is also responsible for conducting the appraisal and organising an interview with the jobholder. A countersigning officer is appointed to ensure the consistent application of the appraisal standards in the appraisal report.

If the appraisal report includes an exceptionally positive or negative assessment, the director of department shall submit it to the Management Committee for an opinion.

After validation by the countersigning officer, the reporting officer forwards the appraisal report to the jobholder, who shall upon receipt of the report, complete the sections reserved for any comments he or she may have.

If he or she agrees with the content of the report, the jobholder shall sign the report and send it back to his reporting officer. The reporting officer shall sign it immediately and forward it to the Human Resources Department to be filed in the personal file.

If he or she does not agree, the countersigning officer shall organize a dialogue between the jobholder and the reporting officer. In case no agreement is reached, an appeal can be sent to the (secretariat of the) Joint Evaluation and Promotion Committee. In all cases, the reporting officer shall ask the jobholder to return the report and send it to the Human Resources Department.

¹ OHIM Decision N° ADM-04-18

2.1.2. The processing operation

First, a blank appraisal report is produced in Word format. Then, the administrative data of the jobholder are inserted and data obtained in the SAP-HR system are integrated. The document is then sent by e-mail to the responsible reporting officer. A list of training sessions undergone by the jobholder is sent as well.

The reporting officer introduces his/her comments on the report in electronic format. He/she prints the report out and circulates it through the workflow described in point 2.1.1. Reports are completed and signed in paper format. Once the report is final, the data from it are collected and introduced in the SAP-system. This includes the reference period of the report, the general assessment comments and a scanned copy of the report.

The physical paper reports are temporarily stored in locked cupboards. The keys hereto are themselves under lock. Two members of the Career and Development Sector are aware of its functioning. When the appraisal exercise is over, the final reports are stored definitively in the personal file of the jobholder. No limits are considered for these documents. They become part of the personal file existing in the Office until transfer to another institution, permanent leave or retirement.

2.1.3. The electronic storage of data

On SAP HR, general data used in other HR processes are stored. Those used for appraisals include: full name, grade, administrative address, staff number, status, seniority in grade, starting date in job, department and budgetary post number, job title and overall purpose, data of previous job assignments (department, service, sector, period concerned) and the names and job titles of the current and the past reporting officer, if any, overall assessment comment dealing with appraisal of efficiency, ability and conduct in the service at the end of the appraisal period. In the future, a scanned copy of the appraisal report might be integrated.

As the SAP tool is not flexible for working with data, these data are extracted for practical purposes in order to merge them into the report form for each member of staff. The work is done within the exclusive framework of the directory X:\personnel\sgcc\OHIM APPRAISAL SYSTEM. Apart from these personal data, the X:\drive contains the lists of training carried out by member of staff during the appraisal period and the list of reporting officers and countersigning officers.

The data on SAP HR and on the directory X:\personnel\sgcc\OHIM APPRAISAL SYSTEM are of the same nature (except for the training lists which are not available on SAP) but the format is different. Moreover, on SAP, the data stored are always permanent data linked to an official date, whereas, while the appraisal exercise is not closed, the data stored on the X:\drive is provisional and may still change (harmonization of appraisal standards, appeals, etc.). These data being exclusively used for facilitating working processes during the appraisal exercise, they are deleted once the integration into SAP has been completed.

Data which have become final (e.g. overall assessment) is updated on the SAP HR system at the end of the appraisal exercise.

The information contained on the shared folder on the directory X:\personnel\sgcc\OHIM APPRAISAL SYSTEM is for restricted access for the members of the Career and Development Sector in HRD dealing with appraisals and the IT business support in charge of the IT-

developments and extraction of data within the HRD. The directory X:\personnel\sgcc\OHIM APPRAISAL SYSTEM functions with access permissions. Access to these data is given and controlled by the IT business support in charge of the IT-developments and extraction of data in co-ordination with the Head of Career and Development Sector. Four members of staff have access to this electronic folder.

2.2. Legal aspects

2.2.1. Prior checking

Staff appraisals can clearly be considered as within the scope of Regulation (EC) 45/2001 since they involve the processing of personal data whether or not by automatic means. Processing of personal data otherwise than by automatic means, will be covered by the scope of the Regulation, providing that the personal data form part of a filing system. In this case the staff appraisal forms are kept in paper version, but are kept in a structured system according to the name of the staff member. The processing therefore falls within the scope of the Regulation.

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as "processing operations intended to evaluate certain aspects relating to the data subject, including his or her ability, efficiency and conduct" (Article 27(2)(b)). Staff appraisal procedures typically qualify as processing of personal data intending to evaluate personal aspects relating to the data subject and are therefore subject to prior checking.

The fact that links are made between the SAP HR system and the APPRAISAL SYSTEM also qualifies the case for prior checking on the basis of Article 27(2)(c).

Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should be given prior to the start of the processing operation. In this case the Staff appraisal procedure has already been established. This is not a serious problem as far as any recommendations made by the EDPS may still be adopted accordingly.

It has to be noted that the subject of this prior checking is the processing of data in the light of the annual exercise of staff appraisal. The SAP HR system, from which general data for this exercise are extracted, is not *as such* subject of this opinion, but may be subject to a prior check in the future.

The notification of the DPO was received on 20 April 2005. Further requests for information suspended the deadline for 27 days. According to Article 27(4) the present opinion must be delivered within a period of two months following receipt of the notification. However, the request for further information extended the deadline to 29 July 2005.

2.2.2. Legal basis and lawfulness of processing

The legal basis of the processing can be found in Article 43 of the Staff Regulations (and Article 15(2) of the Conditions of Employment of Other Servants). As mentioned above, Article 43 states that "*the ability, efficiency and conduct in the service of each official shall be the subject of a periodical report made at least once every two years as provided for by each institution in accordance with Article 110.*" Decision N°ADM-04-18 established the provisions for

implementing this Article in the Office for Harmonization in the Internal Market in accordance with Article 110 of the Staff Regulations.

The lawfulness of the processing is covered by the performance of a task carried out in the public interest on the basis of legal instruments adopted on the basis of the Treaties establishing the European Communities or in the legitimate exercise of an official authority vested in the Community institution on the basis of Article 5(a) of Regulation 45/2001. Report procedures involving the collection and processing of personal data concerning members of staff are part of the legitimate exercise of the official authority vested in the Institution. The legal basis provided by the Staff Regulations confirms that the processing is lawful.

2.2.3. Data Quality

The categories of data processed in the OHIM appraisal exercise are the following:

- administrative data (full name, grade, administrative address, staff number, status, seniority in grade, starting date in the job, names and job titles of the current and past reporting officer, previous job assignments and persons to be consulted about those assignments)
- data relating to the job (job title, administrative post)
- data relating to the appraisal (an overall assessment comment dealing with appraisal of efficiency, ability and conduct in the service).

After careful examination, the EDPS is of the opinion that these data are in accordance with Article 4(1)(c) of Regulation (EC) 45/2001.

Since the exercise is annually repeated, the processing is also in compliance with Article 4(1)(d) that is to say is accurate and kept up to date.

2.2.4. Transfer of data

Processing must also be examined in the light of Article 7, point 1 of Regulation (EC) 45/2001, since the data circulate among a number of different people in the Office for Harmonization in the Internal Market. Personal data may be transferred within an institution only if it is necessary for the legitimate performance of tasks covered by the competence of the recipient.

In this instance, transfer to the different assessors (reporting officer and countersigning officer), the members of the Human Resources Department in charge of the appraisal system, the directors of departments, the future line managers of the staff appraised and, possibly, the Management Committee, the Joint Evaluation and Promotion Committee and internal selection committees, is consistent with the legitimate performance of the tasks of the various parties.

In addition, Article 7(3) of Regulation (EC) 45/2001 stipulates that the recipient must process the personal data only for the purpose for which they were transmitted. Explicit guarantees must be obtained that anyone receiving and processing data as part of the annual OHIM assessment exercise may not use them for other purposes.

2.2.5. Processing of personal number or unique identifier

Article 10(6) of Regulation (EC) 45/2001 states that *"the European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body."*

The OHIM appraisal report mentions the staff number of the person being assessed. The number is part of the administrative data about the jobholder. The number is used to identify the person. The Supervisor considers that the number may be used in the context of staff reports¹.

2.2.6. Information to be supplied to the data subjects

The Regulation states that a data subject must be informed on the processing of data relating to himself/herself and lists a range of compulsory items of information which must be provided. In this instance, some data are collected directly from the data subject and some from other people. Articles 11 and 12 of the Regulation therefore apply.

Information for the data subject on the existence of data collection during an appraisal exercise comes from various sources. Article 43 of the Staff Regulations, the legal basis for the processing, presupposes the collection and recording of data. The OHIM decision establishing provisions for implementing Article 43, contains in its Chapter II all information about the appraisal procedure. An appraisal report form, showing the indicative format, graphical lay-out and general appearances, is annexed to the decision. Standards of use of the assessment procedure, laid down in writing, are sent to all reporting officers in order to ensure harmonisation in the assessments of members of staff. Each department organises an information meeting for staff at the beginning of each appraisal exercise to ensure that staff members receive as much information as possible. For the drafting of the appraisal reports, all officials, temporary members of staff, reporting officers and countersigning officers shall rely on the training and information they are given for this purpose². The Office also provides via its intranet all information regarding appraisal (Human Resources webpage: http://oaminet/oaminet/drvisapi.dll?MIval=cw_usr_index&ID=14117&LANG=en)

The information from these various sources covers at least the compulsory items provided for in Articles 11 and 12.

2.2.7. Right of access and rectification

Under Article 13 of Regulation (EC) 45/2001, the data subject has the right to obtain from the controller, at any time and without restraint, communication in an intelligible form of the data undergoing processing. In addition, Article 43 of the Staff Regulations states on the subject of staff reports that: *"The report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant."*

The right of the data subject to see the information contained in his/her report is ensured several times in the course of the assessment procedure. The European Data Protection Supervisor has no comments to make on this point.

¹ See Opinion on the notification for prior checking from the DPO of the European Parliament relating to the reports procedure and the RAPNOT system (case 2004-206).

² See Article 9 of OHIM-decision N°ADM-04-18.

2.2.8. Conservation of data

Regulation (EC) 45/2001 states that data may not be kept in a form which permits identification of the data subject any longer than is necessary for the intended purpose (Article 4(1)(e)).

In the case of the OHIM staff appraisal exercise, the final physical paper reports are filed temporarily, that is until the end of the exercise, in a locked cupboard, at which moment they are stored definitively in the personal files of the jobholders. No precise time limits are considered for these documents. They are part of the personal file existing in the Office until transfer to another institution, permanent leave or retirement. As regards this physical paper procedure, the EDPS considers that the documents should be stored in personal files beyond transfer, permanent leave or retirement, only if the Office can justify that they must be kept for a specific and legitimate purpose (appraisal form pertinent in the frame of a dismissal case, for example).

With regards to the electronic procedure, the following remarks are made:

- with regard to the directory X:\personnel\sgcc\OHIM APPRAISAL SYSTEM :
The EDPS understands that the data on this directory are exclusively used for facilitating the working process during the appraisal exercise and welcomes the fact that they are deleted at the end of the exercise.
- with regard to the e-mail sent to the reporting officer at the beginning of an appraisal exercise:
It is stated in the procedure that the reporting officer introduces his/her comments in the report in electronic format. This implies that the reporting officer, or perhaps his/her secretary, also saves an electronic copy on his personal computer. The EDPS is of the opinion that the electronic copy of the reporting officer should not be kept any longer than is necessary for the report procedure.
- with regard to the SAP HR system :
It has to be noted that the SAP HR system stores general data, used in different HR processes. The SAP HR system *as such* is not the subject of this prior checking. With regards to the fact that the final assessment results are integrated in the SAP HR system at the end of an appraisal exercise, the EDPS questions the need for this operation, since appraisal reports are also put into the personal file of the jobholders. The EDPS is of the opinion that the use of the SAP HR system should be subject of a separate prior checking exercise.

2.2.9. Security measures

After careful examination, the EDPS is of the opinion that security measures -both for the physical paper processing and the electronic processing- have been complied with.

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the following considerations are fully taken into account:

- with regard to the transfer of data (Article 7(3) of Regulation (EC) 45/2001), the EDPS is of the opinion that explicit guarantees must be obtained so that anyone receiving and

processing data as part of the annual OHIM assessment exercise may not use them for other purposes.

- with regard to the storing of the data in personal files beyond transfer, permanent leave or retirement, the EDPS considers that the documents should only be stored if the Office can justify that they must be kept for a specific and legitimate purpose.
- with regard to the e-mail sent to the reporting officer at the beginning of an appraisal exercise:

It is stated in the procedure that the reporting officer introduces his/her comments in the report in electronic format. This implies that the reporting officer, or perhaps his/her secretary, also saves an electronic copy on his personal computer. The EDPS is of the opinion that the electronic copy of the reporting officer should not be kept any longer than is necessary for the report procedure.

- with regard to the fact that the final assessment results are integrated in the SAP HR system at the end of the appraisal exercise, the EDPS questions the need for this operation, since appraisal reports are also put into the personal file of the jobholders.
- with regard to the SAP HR system :
The EDPS is of the opinion that the use of the SAP HR system should be subject of a separate prior checking exercise.

Done at Brussels, 28 July 2005

Peter HUSTINX
European Data Protection Supervisor