

Opinion on the notification for prior checking received from the Data Protection Officer (DPO) of the Court of Auditors of the European Communities regarding the "certification procedure" dossier

Brussels, 29 May 2006 (Case 2006-109)

1. Procedure

By e-mail dated 20 December 2005, the DPO of the European Court of Auditors consulted the EDPS on the need for prior checking (Article 27(3) of Regulation (EC) No 45/2001) the "certification procedure" processing. By e-mail dated 21 January 2006, the EDPS replied in the affirmative and asked the DPO to submit a notification for prior checking of the processing. By e-mail dated 2 March 2006, the DPO sent the notification for prior checking for the "certification procedure" dossier.

Decision 57/2005 on the certification procedure was dated 6 October 2005 and entered into force the day following its adoption. The present prior check is therefore subsequent to the date when the processing was instituted. It is an ex post prior check.

The EDPS has identified priority themes for ex post prior checks, including data processing operations relating to staff assessment. The certification procedure dossier, inasmuch as it contains data on the evaluation of personal aspects relating to the data subject, including his or her ability, efficiency and conduct (Article 27(2)(b)), is one of those priorities.

The European Data Protection Supervisor made a request for information on Friday 7 April 2006. The Court of Auditors responded on 3 May 2006.

2. Examination of the case

2.1. Procedure

The Court of Auditors organises a selection procedure for officials authorised to participate in training in the certification procedure framework, under Article 45a of the Staff Regulations of Officials of the European Communities (Staff Regulations). The certification procedure has in fact been organised every year since 2005. The aim of the processing is to select officials from the AST function group who have been at grade 5 for at least five years, to be authorised to participate in training in the certification procedure framework, which will give them the right to be appointed to a post in the same grade in the AD function group. The selection procedure for officials authorised to follow this programme is governed by Court of Auditors Decision 57/2005.

The stages of the procedure are:

1. establishment of the number of officials authorised to take part in the training programme and publication of a call for applications;
2. assessing the admissibility of the applications;
3. drawing up by the Appointing Authority of the list of officials authorised to take part in the training programme each year;
4. participation in the training programme provided by the European Administrative School;
5. organisation of written and oral tests and the drawing up of the list of officials who have passed the tests which certify that they have successfully completed the training programme;
6. publication by the Appointing Authority of the list of officials who have passed the tests.

Applications

Each year, after having consulted the joint committee referred to in Article 9(1)(a), second indent of the Staff Regulations, the Appointing Authority establishes the number of officials authorised to take part in the training programme mentioned in Article 45a(1) of the Staff Regulations. In doing so it takes account of the restriction laid down in Article 45a(4). Following this decision, the Appointing Authority publishes a call for applications. Officials who are retired ex-officio and those receiving an invalidity allowance with effect from the year concerned or the following year may not apply.

Admissibility of applications

Applications by officials are deemed eligible if the officials concerned meet both of the following criteria: the periodic assessment reports mentioned in Article 43 of the Staff Regulations for the previous three years should certify that the official has the potential to carry out an administrator's duties; the official concerned must have at least five years' seniority in the AST function group and hold a post at grade 5 or above. The minimum seniority required by this indent must have been acquired by 31 December of the year when the certification procedure commenced. Account is taken of seniority acquired as a temporary agent at grade 5 or above provided that there has been no interruption between the periods of active service as a temporary member of staff and as an official.

The Appointing Authority draws up and publishes the list of officials whose applications have been deemed admissible on the basis of the two aforementioned criteria.

Drawing up of the list of officials selected to take part in the training programme

The Appointing Authority draws up a list in order of priority of the officials whose applications have been considered eligible on the basis of the following criteria: the periodic assessment reports mentioned in Article 43 of the Staff Regulations, the officials' level of education and training, the requirements of the service and professional experience acquired in the institutions.

The Appointing Authority draws up a draft list of the officials selected to take part in the training programme.

Within 15 working days of the list being published, officials who have submitted an application and who object to the draft list may lodge a reasoned appeal with the Joint Committee for the certification procedure (set up by Article 11 of Decision 57/2005 of the Court of Auditors). All relevant supporting documents and information must be submitted together with the appeal.

The Committee examines the draft list and any appeals lodged by the officials and issues a reasoned opinion within 20 working days of the draft list being published. It may interview the officials who have applied to take part in the programme, as well as representatives of the Appointing Authority.

On the basis of the Committee's opinion, the Appointing Authority adopts and publishes the list of officials selected to take part in the training programme.

Participation in the training programme

In accordance with Article 2(2) of the Staff Regulations, the Court delegates to the European Administrative School ("the School") responsibility for devising and organising the training programme¹.

Tests

The content of the written and oral tests is established by the European Personnel Selection Office ("EPSO"). Only officials whom the School certifies as having completed the training programme are authorised to sit the tests. Officials whom the School certifies as having completed the training programme but who have not passed EPSO's tests are authorised to resit the tests no more than twice in subsequent years.

Drawing up and publication of the list of officials selected

The Court delegates to EPSO and to the School responsibility for drawing up the list of officials who have passed the tests. The Appointing Authority publishes the list of Court officials who have passed the written and oral tests, as drawn up by EPSO and the School.

Other provisions

Officials on the list mentioned of officials who have passed the tests may apply for vacant posts in the AD function group corresponding to their grade, in accordance with the terms of Article 29(1)(a)(ii) and (b) of the Staff Regulations.

The Appointing Authority ensures, in accordance with Article 45a of the Staff Regulations, that the number of officials who have been successful in the certification procedure and who are appointed to posts in the AD function group does not exceed 20 % of the total number of appointments made each year in that function group.

2.2. Other information from the notification

The stages of the procedure have been harmonised across the institutions. Given the possibilities for interinstitutional transfer of the officials who have received certification, all the institutions have adopted similar general implementing provisions.

¹ Decision 2005/119/EC, 26 January 2005, OJ L 37, 10.2.2005, p. 17.

The processing procedure is partly manual (physical storage of the data in dossiers during the procedure) and partly automated (automated storage of data on individual files for the certification procedure).

Data subjects: officials in the AST function group from grade 5 up, in service, on family leave, parental leave or seconded in the interests of the service, with at least five years' seniority and meeting the criteria set out in Articles 3 and 4 of Court Decision 57/2005.

Categories of data: the data necessary for selecting officials are: the staff reports for the past three years and the data on individual files: name, date of birth, grade, education, training, relevant professional experience. The staff number is also processed.

Information: the Court Decision dated 6 October 2005 (Staff Notice 57/05) and Court of Auditors Staff Notice 67/2005 of 27 October 2005 ("certification procedure for transfer between function groups: call for expressions of interest") inform applicants of the procedure. The call for applications gives information on eligibility criteria and priority criteria and mentions the procedure for contesting the list of officials selected to follow the training programme. The Decision stipulates that the Human Resources, IT and Telecommunications Directorate will organise an information programme for Court staff potentially interested in the certification procedure.

Recipients: the members and the secretary of the Joint Certification Committee for certification and the Appointing Authority and the Legal Service for an appeal under Article 90 of the Staff Regulations. The Directors are consulted for their opinions by the Appointing Authority before the draft list is drawn up. The draft list and the list of names of persons authorised to take the training are sent to all Court staff. The list of names of the persons selected and their office addresses are communicated to the Director of the School and to the professional training service of the Court of Auditors.

Data retention: during the procedure, the data are kept in a special file locked in a secure cupboard. At the end of the exercise, the documents are transferred to the relevant personal files. As for the individual files, they remain permanently stored in an electronic file (in the possession of the Appointing Authority) in a restricted drive.

Historical purposes: the data may be used in the following year to enable the appointing authority to ensure equal treatment of candidates over time. The files are not anonymised.

Right of access and rectification: the data subject is entitled to check and correct his individual file for the certification procedure on the basis of which the Appointing Authority adopted its draft list. Officials who contest the draft list may submit an appeal setting out their reasons for doing so to the Joint Certification Committee before the final list is adopted.

Safety measures: only staff directly concerned with the processing have access to the data. Documents are locked in a secure cupboard. Access to electronic data is also restricted. A logging system makes it possible to trace operations carried out on files if necessary.

3. Legal aspects

3.1. Prior checking

The notification received on 2 March 2006 relates to processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a) of Regulation (EC) No 45/2001). The data processing in question is carried out by an institution

in the exercise of activities which fall within the scope of Community law (Article 3(1) of the Regulation). The certification procedure processing is partly automated, in that the applicant files are established electronically in a folder. The data are also kept on paper, they are held in a file initially and then kept in the individual dossier of the data subject. Article 3(2) is therefore applicable in this case. This processing therefore falls within the scope of Regulation (EC) No 45/2001.

The European Data Protection Supervisor does not carry out the prior check of the stage at which the European Administrative School is involved, since the latter is responsible for that stage of the processing that concerns it. That will have to be the subject of a separate notification for prior checking.

Article 27 of Regulation (EC) No 45/2001 makes subject to prior checking by the European Data Protection Supervisor processing operations likely to present specific risks to the rights and freedoms of data subjects. Article 27(2) contains a list of processing operations likely to present such risks including, in Article 27(2)(b), "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The procedure for certification of officials of the Court of Auditors is an operation for the processing of personal data for the purpose of assessment and is therefore covered by Article 27(2)(b), and as such is subject to prior checking by the European Data Protection Supervisor. The selection – the evaluation of competence to change to another function group – even if based on an existing report (COMPASS), is an evaluation in its own right. Furthermore, the selection is based on other criteria: officials' training and education and the needs of the service and professional experience acquired in service.

In principle, checks by the European Data Protection Supervisor should be performed before the processing operation is implemented. In this specific case, the processing was set up before consultation of the European Data Protection Supervisor, so the check necessarily has to be performed ex-post. However, this does not alter the fact that it would be desirable for the recommendations issued by the European Data Protection Supervisor to be implemented.

The formal notification was received by e-mail on 2 March 2006. Under Article 27(4) of the Regulation, the European Data Protection Supervisor has to deliver his opinion within two months following receipt of the notification. This two-month time limit was suspended by a request for information from the Supervisor made by e-mail on 7 April 2006. The Court of Auditors responded on 3 May 2006. The European Data Protection Supervisor will therefore give his opinion no later than 29 April 2006.

3.2. Legal basis and lawfulness of the processing operation

The legal basis for the data processing concerned lies in Article 45a of the Staff Regulations (certification procedure) and in the Court of Auditors Decision of 6 October 2005 on general rules for implementing Article 45a of the Staff Regulations. The legal basis, which is clear enough, raises no particular issues.

Alongside the legal basis, the lawfulness of the processing operation must also be considered. 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 in the legitimate exercise of official authority vested in the Community institution*". The certification procedure, which involves collecting and processing personal data relating to officials or other servants, falls within the legitimate

exercise of official authority vested in the institution. The legal basis provided by the Staff Regulations supports the lawfulness of the processing.

3.3. Data quality

Data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the beginning of this opinion should be regarded as fulfilling these conditions in relation to the processing operation. The data required are administrative in nature and necessary to assess officials' work. Furthermore, the EDPS acknowledges that the relevance and proportionality of the data that help to assess the data subject are more difficult to establish. In this context, the EDPS welcomes the fact that the Court of Auditors has established priority criteria and their weightings precisely in its Staff Notice 67/2005. Article 4(1)(c) of Regulation (EC) No 45/2001 thus seems to be duly complied with in this respect.

Furthermore, the data must be processed "*fairly and lawfully*", according to Article 4(1)(a) of Regulation (EC) No 45/2001. The lawfulness of the processing has already been discussed (see point 3.2 above). The issue of fairness is linked to the information which must be transmitted to the data subject (see point 3.9 below).

Lastly, the 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 procedure itself must ensure that data are accurate. In this instance, the system provides for access and rectification and therefore seems to guarantee data accuracy. For the data to be complete, the EDPS requests that reasoned appeals from applicants contesting the provisional list and the Joint Committee's opinions on them should be attached to applicants' files (see point 3.8 below on the right of access and rectification).

3.4. Data retention

Article 4(1)(e) of Regulation (EC) No 45/2001 posits the principle that data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*".

It will be recalled that during the procedure all the necessary documents are kept in a specific file. At the end of the exercise, the documents are transferred to the personal files of the data subjects. In this context, Article 26 of the Staff Regulations is applicable, in particular: "*an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them*". Data are thus stored long-term. In the case at hand, the files on both successful and unsuccessful applicants are retained without distinction (for the same length of time, in individuals' files).

On this point, the EDPS would like the Court to distinguish between successful and unsuccessful candidates in the certification procedure. No purpose is served by keeping the files on unsuccessful applicants for more than a few years unless it be in anonymised form as a compendium of practice. Besides the routine data (name, forename, etc.), the data relevant for evaluation will have changed. The EDPS would therefore like to see established a retention period proportional to the fulfilment of the purposes of the processing for data on failed applicants.

The European Data Protection Supervisor emphasises the need to set a period for which the data on applicants successful in the procedure can be kept. In a similar case², the EDPS considered that it was reasonable to set the storage period at 10 years, starting from the moment when the staff member leaves or after the last pension payment. The EDPS also believes that data of a purely informative nature, if they are no longer necessary for administrative reasons, could be disposed of after a minimum period of five years.

Furthermore, long-term retention of data must be accompanied by appropriate safeguards. The data stored are personal. The fact that they are archived for long-term storage does not divest them of their personal nature. For that reason, even data stored over a long period must be covered by adequate measures for transmission and storage, like any other personal data.

Finally, the notion of the data being kept for historical reasons does apply (Article 4(1)(e) of the Regulation), in that the Court wishes to ensure equal treatment of applicants over time by retaining the data indefinitely. The EDPS requests that data kept for historical reasons be anonymised, or if that is impossible that the subjects' identities be encrypted.

3.5. Change of purpose/Compatible use

Data are retrieved from or entered into the staff databases. The processing being reviewed involves no general change to the specified purpose of staff databases, the certification procedure being merely a part of that purpose. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 does not apply in this instance and the conditions of Article 4(1)(b) of the Regulation are fulfilled.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) 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*".

In this case, the data are for circulation among various services in the Court of Auditors. Personal data may not be transferred within an institution unless they are necessary for the legitimate performance of tasks covered by the competence of the recipient. Transfer to the Court of Auditors' professional training service, to the Appointing Authority, to the Joint Certification Committee and to the Directors of the Court of Auditors is consistent with the legitimate performance of the tasks of the various parties.

In addition, the data on officials authorised to follow training courses are transferred to the European Administrative School, which is attached to EPSO. After the training courses, EPSO forwards the data concerning the officials who have successfully completed the training programme to the Appointing Authority. Finally, the European Union Civil Service Tribunal may receive these files in the context of a legal action. These transfers are legitimate in this instance since they are necessary for the legitimate performance of tasks covered by the competence of the recipient.

In this instance, Article 7(1) of Regulation (EC) No 45/2001 is duly complied with.

² Prior check 2006-45, *Certification procedure*, Council of the European Union.

3.7. Processing including the personnel or identifying number

The Court of Auditors uses the personnel number for processing operations relating to the certification procedure. Use of the personnel number may allow the linkage of data processed in different contexts. The point here is not to establish the conditions under which the Court of Auditors may process the personnel number (Article 10(6) of the Regulation), but rather to emphasise the attention that must be paid to that provision of the Regulation. In the case in point, the use of the staff number by the Court of Auditors is reasonable as it is used for the purposes of identifying the person and keeping track of the file. The EDPS considers that this number may be used in the context of the promotion procedure.

3.8. Right of access and rectification

Article 13 of Regulation (EC) No 45/2001 lays down provisions concerning a right of access upon request by the data subject, and details concerning that right. Article 14 of Regulation (EC) No 45/2001 allows the data subject the right of rectification. In the case in point, the data subject has access to his personal file so that he/she can point out any errors or omissions which can then be rectified before the Appointing Authority's draft list is drawn up. It must therefore be concluded that Articles 13 and 14 of the Regulation are complied with in this case; the data subject's identification data may be consulted and rectified if incorrect or incomplete.

As to the draft list transmitted to all Court staff, dissatisfied officials may submit a reasoned appeal to the Joint Certification Committee within 15 working days of publication of the final list. The EDPS requests that the reasoned appeal and the Committee's opinion on that reasoned appeal be attached to the file on the data subject, to ensure that the file is complete, in accordance with Article 14 of Regulation (EC) No 45/2001.

3.9. Information to be given to the data subject

Regulation (EC) No 45/2001 provides that the data subject must be informed where his or her personal data are processed and lists a series of specific items of information that must be provided. In the present case, some of the data are collected directly from the data subject and others from other persons.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject apply in this case. Insofar as the official provides the data required on his/her own behalf, the data subject himself or herself provides the data.

The provisions of Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also apply in this case because information are obtained from the various parties involved in the process (Appointing Authority, Directors and Joint Committee).

It will be recalled that provision of information to the data subject is guaranteed in this case through Court of Auditors Decision 57/2005 and by the Staff Notice entitled "Certification procedure for transferring from one function group to another: call for expressions of interest".

The data subject must be notified of the information specified in Article 11(1)(a) (identity of the controller), (b) (purposes of the processing operation), (c) (recipients or categories of recipients of the data), (d) (whether replies to the questions are obligatory or voluntary, as well

as the possible consequences of failure to reply) and (e) (existence of the right of access to, and the right to rectify, the data concerning him or her). For the processing to be fully compliant, Article 11(1)(f) should also be mentioned. It refers to the following points: *legal basis of the processing operation, time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor*.

The data subject must be notified of the information specified in Article 12(1)(a) (identity of the controller), (b) (purposes of the processing operation), (c) (categories of data concerned), (d) (recipients or categories of recipients), (e) (existence of a right of access to, and the right to rectify, the data concerning him or her) and (f) (*legal basis of the processing operation, time-limits for storing the data, right to have recourse at any time to the European Data Protection Supervisor*).

Only the information on data retention periods, the right to have recourse at any time to the European Data Protection Supervisor and the right of access to and rectification of the individual file is not given to the data subject. This is important to guarantee that data subjects are duly informed of all the means open to them. Court Staff Notice 67/2005 mentions that an information programme will be organised by the Human Resources, IT and Telecommunications Directorate for Court staff potentially interested in the certification procedure. The EDPS sees this as a suitable way to inform data subjects in accordance with Articles 11 and 12 of Regulation No 45/2001. The European Data Protection Supervisor also recommends that this information be included in the various documents available to the data subject regarding the certification procedure.

3.10. Security

In accordance with Article 22 of Regulation (EC) No 45/2001 on the security of processing, the controller implements "*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*".

The organisational and technical measures are taken to ensure an optimum level of security for the processing operation.

Having examined all of these measures, the EDPS considers that they are appropriate for the purposes of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The processing proposed does not appear to involve any infringement of the provisions of Regulation (EC) No 45/2001 provided that the comments made above are taken into account. This means, in particular, that:

- a retention period should be established for the data about failed applicants, and it should be proportional to the purposes of the processing;
- a retention period should also be established for data about successful applicants, and it should also be proportional to the purposes of the processing;
- data kept for historical reasons should be anonymised, or, if that is impossible, the subjects' identities should be encrypted;

- the reasoned appeals made by the applicants dissatisfied with the final list, as well as the Certification Committee's opinion on such reasoned appeal should be attached to the file of the data subject, to ensure that the file is complete, in accordance with Article 14 of Regulation (EC) No 45/2001;
- persons concerned should be informed of the data retention periods, of their right to have recourse at any time to the EDPS and of their right of access to and rectification of their individual files. This is necessary to guarantee that data subjects are duly informed of all the means open to them.

Done at Brussels, 29 May 2006

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