

## **Opinion on the notification of a prior check received from the Data Protection Officer of the European Commission relating to the EU-China Agreement - Approved Destination Status (ADS)**

Brussels, 30 June 2006 (Case 2006-192)

### **1. Procedure**

- 1.1. On 10 March 2006 the EDPS received an electronic mail from the DPO of the European Commission submitting a consultation under Article 27.3 of Regulation (EC) nr. 45/2001 (hereinafter "the Regulation") in order to ask whether a prior check was needed for the processing operations on personal data concerning the CIRCA website of DG RELEX on the "EU-China Tourism Agreement - Approved Destination Status (ADS)".
- 1.2. After having analyzed the consultation and the facts described therein, the EDPS concluded on 21 April 2006 that the case actually qualified for a prior check. An e-mail was sent to the DPO to inform him about the results of the consultation. The notification attached to the initial email was then considered to have been made on that date.
- 1.4. The EDPS requested the European Commission to provide some complementary information on 10 May and 18 May 2006. The replies were received on 12 May and 24 May 2006, respectively.

### **2. Examination of the case**

#### **2.1. The facts**

The processing activity under analysis is conducted in the framework of the "EU-China Tourism Agreement - Approved Destination Status (ADS)". In this context, a Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China, on visa and related issues concerning tourist groups from the People's Republic of China (ADS)<sup>1</sup>, as well as the Commission Recommendation of 16 September 2004 on the implementation by the consular offices of the Member States of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China, on visa and related issues concerning tourist groups from the People's Republic of China (ADS)<sup>2</sup> were signed.

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<sup>1</sup> OJ, L 83/14, 20.3.2004. Hereinafter "the MoU".

<sup>2</sup> OJ, L 296/23, 21.9.2004. Hereinafter "the Commission Recommendation".

Within this framework, a protected CIRCA website will be used for the purpose of facilitating the real-time exchange of up-to-date information among the European Commission and consular posts of European Union countries, including third countries -Norway, Iceland, and Switzerland- (hereinafter "European ADS countries") that participate in the ADS tourism agreement with China. The objective is to ensure an effective and correct implementation of the ADS Memorandum of Understanding, notably by providing up-to-date lists of travel agencies/couriers which are authorised to deal with ADS visa applications to EU consulates.

The website will contain inter alia lists of couriers, i.e. physical persons who are (in the process of being) authorised to act on behalf of accredited travel agencies. Contact data of the users (name, first name, office address, telephone number, job function, fax number, e-mail) who have access to the CIRCA website will also be stored on the website and made available to all users.

From a more general perspective, the website will contain:

- List of accredited travel agencies including possible sanctions imposed for failure to comply with ADS rules.
- List of couriers that are authorised to act on behalf of accredited travel agencies.
- Sanction proposals submitted by European ADS Partners against particular travel agencies that are presumed to have violated ADS rules.
- Contact data + job function for authorised CIRCA protected website users from European ADS Partner countries.

The following type of information will be stored on the protected CIRCA website and made available via secure electronic access to the registered users of the website:

- Name of travel agency, office address, telephone + fax number, e-mail, and business licence no.
- Name, first name and identification number of authorised couriers, badge application status for couriers, issuing Member State and expiry date.
- Sanctions imposed against certain travel agencies, consular post that has authorised couriers and a travel agency, and/or sanctioned a travel agency

Furthermore, users of the ADS CIRCA protected website are required to provide their contact details and official function when registering as a Member of the ADS CIRCA website/interest group. This information is made available to all Members of the ADS interest group in order to facilitate contacts and cooperation.

Within the process of accreditation as ADS travel agencies, consular officers inform travel agencies and their authorised couriers about their rights and duties according to current EU legislation, inter alia their right to access their data and request for correction, erasure, blocking (Art 11 and 13-19 of Regulation). It is envisaged to organise regular trainings for all accredited travel agencies and couriers. Badges for couriers are valid for a limited duration and can be cancelled at any moment if the agency/courier is found not to respect the ADS rules. The courier/agency is informed about any sanction imposed on it and the respective reasons. More detailed information can be provided on request.

The identification of couriers is done jointly by the travel agencies and respective consular staff of European ADS Partners. Any sanctions or their expiry are communicated immediately to the concerned travel agency.

Current procedure as agreed between European Heads of Mission is the following: when a travel agency applies for the first time for the accreditation certificate in one of the European

ADS countries' Visa Sections, each Chinese Designated Travel Agency shall exhibit its business licence. Upon accreditation of the agency the concerned Member State updates accordingly the travel agency's position in the EU ADS list, in order to inform other European ADS countries that an accreditation certificate has been issued for that business license. Considering the fact that only one Member State should issue accreditation certificates and courier badges to a certain travel agency, the EC Delegation plays a coordinating role. European ADS countries which have been contacted by a Chinese travel agency in order to be issued a certificate and badges, should contact the Delegation of the European Commission in order to confirm whether they were the first to have been contacted. After issuance of the badges for the agency's authorised couriers, European ADS countries should send back information as recorded in the Accreditation Activation Checks Table to the EC Delegation. The accreditation certificates/cards/badges with a general validity of 1 year or less if the validity of the business license expires earlier, issued by the Embassies to the Chinese travel agencies should be identical in format. The certificates contain, inter alia: certificate serial number and the name of the travel agency. Contact persons of the travel agencies ("couriers") will receive a photo identity badge.

A Service Specific Privacy Statement has been uploaded on the CIRCA Website. This document defines the purpose of processing (Point 1), the type of information processed (Point 2), who has access to the information (Point 3), how data is protected (Point 4), how users can verify, modify or delete their information (Point 5), how long data is kept (Point 6), it provides for contact information (Point 7) as well as information about the complaint instance, which is the EDPS (Point 8).

As far as Point 5 is concerned, it says "If you discover any inaccurate information, please inform the EC Delegation in Beijing immediately. The Delegation will verify and carry out the necessary corrections within 10 working days".

Point 1 of the Statement, last paragraph reads: "Improper use / leakage of some of the registered data might lead to legal prosecution under Chinese law and/or undue economic disadvantages for affected travel agencies and their representatives. (...)".

The website is open only to registered users from European ADS Partners for official use. The website will contain inter alia Excel lists of designated travel agencies, couriers and sanctions against travel agencies that have not respected the ADS rules. European ADS countries will be able to upload sanction proposals against travel agencies and thus ask for the approval of partners. Sanctions range from a warning to the definite withdrawal of the accreditation to operate under the ADS MoU. The website will further contain basic reference documents and information on local consular cooperation (minutes of meetings, local implementation arrangements etc.).

The recipients of the data are authorised personnel from European ADS Partners, i.e. consular officers in local embassies, possibly officials from European ministries headquarters who are in charge of ADS, Commission staff in DGs RELEX, JLS (and possibly DGs TRADE, MARKT and ENTR) who are in charge of ADS. Currently the European ADS countries participate in local consular cooperation related to ADS in China.

In order to implement the ADS MoU (correct issuing of ADS tourist visa and limiting migration risk) European consular posts in China need to exchange the information as provided by the ADS CIRCA protected website. Commission officials in charge of the ADS file need to have access as part of their daily work in policy implementation and development. Officials in European national administrations in charge of the ADS file need to have access for the same

reasons as their respective Commission counterparts. Access to the ADS CIRCA protected website is granted *ad personam* (personal login + password) by the CIRCA "leader"/administrator (designated Commission staff).

Concerning the data retention policy, information on travel agencies, couriers and authorised users will be updated in real-time whenever new information becomes available. Information on couriers will be deleted once their personal badges have expired and/or have been returned to the issuing consular post. Expired information on travel agencies, couriers and authorised users may be stored in a separate secure place for up to 5 years in order to enable the tracing back of previously authorised travel agencies, couriers or users for any potential legal claim or other possible problems, e. g. the undue leakage of information by one of the (previously authorised) users, the reappearance of a travel agency that had been definitely excluded from the ADS scheme. In certain cases personal data might be deduced from information on travel agencies, e. g. personal contact details given as a company contact address or one-person companies.

Expired sanctions against travel agencies (not couriers) will be stored for up to 5 years in order to enable a better judgement of any future sanction proposals.

Corrections will be made immediately to ensure that the information is always up-to-date and fulfilling the purpose of the ADS CIRCA website. If travel agencies/couriers no longer wish to participate in ADS group travel, they need to return their accreditation and badges - subsequently, information relating to them will be deleted from the ADS CIRCA website. This will take no longer than 10 working days.

Anonymous statistical data will be stored to ensure monitoring of the overall impact of the ADS MoU.

Security measures have been adopted.

## **2.2. Legal aspects**

### **2.2.1. Prior checking**

The processing activity conducted in the framework of the "EU-China Tourism Agreement - Approved Destination Status (ADS)" constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The data processing in this case is performed by an institution (the European Commission Delegation in Beijing), carried out in the exercise of activities falling within the scope of Community law (Article 3(1)), and is performed wholly by automatic means or must be recorded in a file (Article 3(2)). It accordingly falls within the scope of Regulation (EC) 45/2001.

It has to be noted that, since the purpose of processing is related to the exercise of activities falling within the scope of Community law, Point 1, third paragraph, of the Privacy Statement mentioned in point 2.1 of the present Opinion has no relevance in the present context, mainly considering that it may create confusion concerning the applicable law. It has to be borne in mind that, as far as personal data protection is concerned, Chinese law is not applicable in the present case, and therefore, any reference to it shall be avoided in the Privacy Statement.

Article 27(1) of Regulation (EC) 45/2001 makes *"processing operations likely to present specific risks to the rights and freedom of data subjects by virtue of their nature, their scope or their purposes"* subject to prior checking by the EDPS.

Article 27(2) of the Regulation contains a list of processing operations which might present such risks.

In the present case, it has to be taken into account that CIRCA contains information about (among other) the accredited travel agencies, the couriers that are authorised to act on behalf of accredited travel agencies and sanctions imposed against travel agencies. Article 4.2 of the Memorandum of Understanding stipulates that: *"(a) Each Chinese designated travel agency may appoint up to two persons to act on its behalf and account as couriers in the necessary visa application process for Chinese tourist groups wishing to visit the territory of the Community. The couriers are entitled to submit visa applications for such groups to the embassies or consular offices of Member States in China; (b) they shall be authorised to enter Member States' embassies or consular offices with a badge issued by CNTA and a photo identity badge and certificate issued by Member State's embassies or consular offices, to which the CNTA shall give relevant details of the persons acting as couriers of each travel agency. The certificate will contain at least the name and address of the travel agency and the name of the agent acting as courier; (...)"*.<sup>3</sup> The couriers are then physical persons, whose link to a given travel agency can be easily identified since there are only two couriers *per* travel agency.

Regarding sanctions, Article 4.1 of the Memorandum of Understanding foresees that *"(b) in case of any violation of EU and/or Chinese regulations by a Chinese designated travel agency in operating the outbound travel of the Chinese citizens, appropriate measures against such agency in accordance with the legislation in force will be taken. This includes, where appropriate, the withdrawal of the travel agency's designation by China, or of its accreditation with the Member States' embassies or consular offices in China"*. Furthermore, the Commission Recommendation adds in its point 3 *"(...) In appropriate circumstances, the withdrawal of accreditation can be reviewed, if for instance the accredited travel agency proves that the violation of EU and/or Chinese regulations was limited to one of its employees, who no longer works for the Agency"*.<sup>4</sup>

Thus, in this particular case, the exclusion of travel agencies from certain rights in the framework described will have the consequence of excluding couriers from these rights as representatives of a given travel agency (what falls under Art. 27.2(d) of the Regulation). Apart from this, the data on sanctions to travel agencies can potentially, and considering the particularities of this specific case, be considered also as data on "suspected offences" committed by physical persons - being either the couriers or other persons, for instance, one of the agency's employees, as pointed out in point 3 of the Commission Recommendation - (what would fall under Art. 27.2(a) of the Regulation).

In view of this, the present matter merits prior checking.

The present case was accepted for prior-checking on 21 April 2006. In conformity with Article 27(4), this opinion must be delivered within the next two months. The procedure has

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<sup>3</sup> It has to be noted that "CNTA stands for "Chinese designated travel agency" and *"shall mean any travel agency selected and designated by the National Tourism Administration of the People's Republic of China"* (Article 1(d) of the Memorandum of Understanding). Underline added.

<sup>4</sup> Underline added.

been suspended for 8 days. The Supervisor will therefore deliver his opinion not later than 30 June 2006.

#### **2.2.2. Legal basis and lawfulness of processing**

The processing operation is carried out on the legal basis of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China, on visa and related issues concerning tourist groups from the People's Republic of China (ADS), OJ L83/14 of 20/03/2004 ( hereinafter "the Memorandum of Understanding") which has been approved by Council Decision of 8 March 2004/256/EC; and the Commission Recommendation on the implementation by the consular offices of the European ADS countries of the Memorandum of Understanding between the European Community and the National Tourism Administration of the People's Republic of China on visa and related issues concerning tourist groups from the People's Republic of China (ADS), OJ L296/23 of 21/09/2004 (hereinafter "the Commission Recommendation").

Taking into account this legal basis, the lawfulness of the processing operation must be considered. Article 5(a) stipulates that "Personal data may be processed only if:

*(a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed (...)."*

In the file under consideration, the European Commission is acting in the performance of a task carried out in the public interest on the basis of the instruments mentioned. Indeed, the processing of data is necessary in the light of the mentioned purpose. As far as the necessity to "transfer" data within the European Commission is concerned, account should be taken of what is said in point 2.2.9 of the present Opinion.

#### **2.2.4. Processing of special categories of data**

Among other data, the CIRCA website would process special categories of data as mentioned in Article 10.5: *"[p]rocessing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards".*

As described in point 2.2.2 of the present opinion, the processing activity is carried out on the basis of the legal instruments referred, what complies with Article 10.5 of the Regulation.

#### **2.2.5. Data quality**

*"Personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"* (Article 4(1)(c) of the Regulation).

The data processed in the context of the CIRCA website, as described in paragraph 2.1 of this opinion, complies with this obligation. However, as underlined in point 2.2.3 above, certain processing activities, such as the transfer within the Commission, will have to be analyzed also from a data quality perspective (see point 2.2.9 below).

Data must also be *"processed fairly and lawfully"* (Article 4(1)(a) of the Regulation). Lawfulness has already been discussed in paragraph 2.2.2 above. Concerning fairness, this relates to the information which is to be communicated to the data subject (see below, point 2.2.8).

Finally, 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 CIRCA website is conceived in a way as to guarantee the accuracy and update of the data being processed. Furthermore, the data subject has access and rectification rights, in order to ensure that the file is as complete as possible; on these two rights see point 2.2.7 below.

#### **2.2.6. Data storage**

Personal 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 (...)"* (Article 4(1)(e) of the Regulation).

In the case in question, the period of five years seems reasonable in the light of the purposes mentioned and the facts described in point 2.1 above.

#### **2.2.7. Access and rectification rights**

According to Article 13 of the Regulation, the data subject shall have the right to obtain without constraint from the controller, communication in an intelligible form of the data undergoing the processing and any available information as to their source. Article 14 of the Regulation provides the data subject with a right to rectify inaccurate or incomplete data.

The right of access is the right of the data subject to be informed about any information relating to him or her that is processed by the data controller. As a matter of principle, this right has to be interpreted linked to the concept of personal data. Indeed, the Regulation has adopted a broad concept of personal data, and the Article 29 Working Party has followed an also broad interpretation of this concept.<sup>5</sup> The respect of the rights of access and rectification is directly linked to the data quality principle.

The notification form received from the DPO does not specify which procedures are granted to data subjects for the exercise of their rights of access and rectification. The Privacy Statement for the ADS CIRCA Website makes reference to these rights in point 5. Nevertheless, the website is open only to registered users from European ADS Partners for official use, and as a consequence, other data subjects, such as couriers, are not aware of the process described therein.

When asked specifically about this issue, the controller answered that European ADS countries inform travel agencies and couriers about their rights and obligations, including the right of access to data, rectification, etc.

In any case, the controller, in the exercise of its coordination role, has to make sure that the data subjects, apart from the website users, are aware of the fact that they are entitled to exercise these rights *vis-à-vis* the data processed in the context of the CIRCA website (see point 2.2.8 below), as well as foresee specific procedures to grant the exercise of those rights in practice.

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<sup>5</sup> See Working document on data protection issues related to RFID technology, adopted on 19 January 2005, WP 105, p. 8: "data relates to an individual if it refers to the identity, characteristics or behaviour of an individual or if such information is used to determine or influence the way in which that person is treated or evaluated".

### **2.2.8. Information to be given to the data subject**

The Regulation states that the data subject must be informed where there is processing of his or her personal data and lists a number of obligatory points to be included in the information. In the case at hand, the data are collected directly from the data subject, for instance, the ADS CIRCA website users, and also indirectly, for instance, by processing data on couriers provided by the travel agencies.

The provisions of Article 11 (*Information to be supplied where the data have been obtained from the data subject*) and 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 apply in this case.

As stated in point 2.1, the notification form mentions the fact that the European ADS countries inform the travel agencies and couriers about their rights and duties according to EU legislation. It has to be noted that the controller is obliged to provide for information to the data subject "except where he or she already has it" (point 1 of both Articles 11 and 12). From this perspective, if the European ADS countries provide the information to the couriers (or other data subjects that may be involved), then, the European Commission is not obliged to do so. However, the European Commission has to make sure that all the information mentioned in Articles 11 and 12 is actually given by the European ADS countries to the data subjects: namely: (a) the identity of the controller (in this case the Delegation in Beijing); (b) the purposes of the processing operation; (c) the 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; (e) the existence of the right of access to, and the right to rectify, the data concerning him or her, must be supplied to data subjects. This also applies to paragraph (f), which lists the following: *the legal basis of the processing operation, the time-limits for storing the data, the right to have recourse at any time to the European Data Protection Supervisor* – ensuring that processing fully complies with the lawfulness requirement.

### **2.2.9. Transfer of data**

The processing operation must also be considered in the light of Article 7(1) of the Regulation. Processing as contemplated by that Article concerns personal data transfers between Community institutions or bodies, or within them "if necessary for the legitimate performance of tasks covered by the competence of the recipient".

In the case in hand, transfers within the Commission will take place, namely DGs RELEX, JLS, and possibly DGs TRADE, MARKT and ENTR. When asked about the purpose of such transfers, the controller answered that it is necessary to give certain DGs in Commission Headquarters (read only) access to the CIRCA website, which will act as a reference tool for information on ADS implementation and wider policy issues.

The EDPS further asked if access to those DGs would be given in a routine fashion (pull system), to the whole website or only to a restricted part of it (restricted pull system) -for instance not giving access to files containing personal data-, or if the information would be sent upon specific request (push system). The answer received is the following: "Access to CIRCA is given on a personal basis with a personal password and login. We intend to give read-only access to the whole website (pull system), both for practical reasons and to make sure that colleagues have the full picture as a basis for their decisions/work - for instance, it would be difficult to contribute to a CIRCA newsgroup discussion among CIRCA members



about certain features of the website, if part of this website were not visible for some Members. The CIRCA Leader (ADS website administrator) decides to whom to give access upon application on a need-to-know basis that is arbitrated by intervention of the Commission hierarchy in case of problems/conflicts. Access should not be granted beyond staff who directly follow the ADS file in involved Commission DGs (RELEX, JLS, TRADE, MARKT, ENTR) and the Commission Delegation."

The EDPS would like to underline that the transfer can only take place "if necessary" for the legitimate performance of the tasks covered by the competence of the recipient. This being so, only if the tasks of the DGs in question would necessarily require the access to the personal data involved in CIRCA could the transfer be operated. It may happen that they need to have access to the name of the CIRCA users, but not the list of couriers. In this case, the access to this last list will not be justified. The necessity of the transfer can only be evaluated on a case-by-case basis, and considering the specific purpose of each DG to have access to CIRCA. The EDPS recommends that such evaluation be conducted before the transfer is operated.

### **2.2.10. Security**

In conformity with Article 22 of the Regulation on the security of processing, *"the controller shall implement 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 security measures of the ADS CIRCA protected website, as mentioned in the notification, seem to be adequate in terms of Article 22 of the Regulation [...].

## **Conclusion**

The proposed processing operation does not appear to involve any infringements of Regulation (EC) 45/2001, if account is taken of the above comments. This means in particular that:

- any reference to Chinese law shall be avoided in the Privacy Statement;
- specific procedures must be foreseen to grant the exercise of the rights of access and rectification *vis-à-vis* the processing conducted in the context of the CIRCA website;
- the Commission has to make sure that all the information mentioned in Articles 11 and 12 of the Regulation is actually given to the data subjects;
- the necessity of the transfer has to be evaluated on a case-by-case basis, and considering the specific purpose of each DG to have access to CIRCA;
- [...]

Done at Brussels, 30 June 2006.

Peter HUSTINX  
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