



## **Opinion on a notification for Prior Checking received from the Data Protection Officer of the Office for Harmonisation in the Internal Market (OHIM) on the procedure for early retirement without reduction of pension rights**

Brussels, 22 November 2007 (Case 2007-575)

### **1. Proceedings**

1.1. On 24 September 2007, the EDPS received the formal prior checking notification under Article 27 by regular mail from the Data Protection Officer (DPO) of the Office for Harmonisation in the Internal Market (OHIM) on the procedure for early retirement without reduction of pension rights.

1.2. On 15 November 2007, the EDPS sent the draft opinion for comments from the controller. These comments were received on 22 November 2007.

### **2. The Facts**

In accordance with Article 9(2) of Annex VIII of the Staff Regulations and Article 39 of the Conditions of Employment of Other Servants, each year a limited number of officials and temporary agents are allowed to retire before the pensionable age without reduction of pension rights. The OHIM Administrative Decision n° ADM- 07-21 establishes the provisions implementing a scheme for early retirement without reduction of pension rights.

At the request of the Appointing Authority (AA), the Human Resources Department shall invite interested parties to apply for early retirement with effect during the course of the period of the year specified in the call for applications. This call for applications, published in a communication to staff, shall indicate: the number of possibilities; the deadline for applications and the form in which they are to be made; the conditions of eligibility; the period of the year in which the retirement is to be taken; and criteria to be taken into account in the assessment of the applications.

The call for applications will also include a data protection notice. Information is provided in this notice on the purposes of the processing of personal data; the obligation for the Human Resources Department to inform applicants that personal data is being processed in accordance with the objectives and procedure laid down by Decision N° ADM-07-21; the recipients of the data and the fact that these recipients will not process the data for any other purpose nor disclose the data to any other recipient; the period of conservation of the data; the fact that applicants have a right of access, rectification, blocking and erasure and to whom they may submit this request; and the right to consult the DPO or contact the EDPS.

Applicants will fill in a standard application form designed for the purpose of the procedure. Data collected on the form are the personal number; identity of the applicant (name, birth

date, email); affectation (department, service...); administrative position; career within OHIM and EU institutions; other rights already granted; motivation; information as concerns the transfer of pension rights; date and signature.

To be eligible, the official or temporary agent must fulfil, on the date specified in the call for applications, certain criteria set out in the Administrative decision. The Human Resources Department shall verify the compliance with the eligibility criteria and draw up a list of eligible candidates and forward it to the Management Committee composed of the Directors of Department of the Office, the President of the Boards of Appeal of the Office and the Vice-President of the Office. It is chaired by the President of the Office.

Bearing in mind the interests of the service and on the basis of certain specific criteria, the Management Committee shall draw up a preliminary draft list of applicants that it proposes should benefit from the scheme; listing the applicants by order of priority. The criteria to be taken into account by the Management Committee relate notably to reorganisation measures (for example, the applicant holds a sensitive position and would be obliged to change duties in the next twelve months and for which no suitable post has been identified nor is likely to be identified in the next twelve months); and to the applicant's skills (for example, where new job requirements do not correspond to the applicant's aptitudes and skills, and where identifying an appropriate new assignment is likely to prove difficult and cannot be resolved by proportionate training measures). High priority is also attributed to applicants not being able to take a retirement without a reduction of pension rights within the following two years and to applicants having fifteen years or more of service within the European Institutions. The performance of the applicant, having regard to the services rendered to the Office and over the course of his/her career is also taken into account. Furthermore, the Management Committee may wish to take into consideration a particular situation put forward by the applicant requiring his/her presence at home or at a place other than the place of assignment.

Upon proposal of the Management Committee and on the basis of criteria established above, the Appointing Authority (AA) shall draw up a list of applicants that it proposes should benefit from the scheme, listing applicants by order of priority. A list will also be drawn up of the reserve candidates also classed in order of priority<sup>1</sup>. Applicants in the reserve list will be informed in writing of any decision concerning them.

An official or temporary agent who has applied to the scheme and who challenges the published list of applicants may lodge an appeal with the Joint Committee within ten working days following the publication. After examination of any appeals, the Joint Committee will examine the draft and give a reasoned opinion within 20 working days of the published list. This opinion will be forwarded to the AA. The AA will then close the list of applicants eligible to benefit from the scheme and the reserve list. Only the first of those lists will be published by the Human Resources Department. The published data are the personal number, the first name and the surname.

Applicants who are not successful are not obliged to retire and may reapply in successive years insofar as the Office has quota established in accordance with the rules of distribution between the institutions.

Data (personal number and name) may be transmitted to the European Commission for the management of retirement financial rights.

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<sup>1</sup> This list of reserve applicants will not be published.

The submission of an application may not be taken into consideration for any other purpose relating to the candidate's career.

The retention period for applications is of three years. Lists published on OHIM's intranet are available for about 15 days. They are then accessible in an archive area of the intranet for a period of 5 years. Further retention periods may be considered in case of an appeal.

[...]

The 2007 exercise was launched in July 2007 with 27 July 2007 as the deadline for submission of application forms.

### **3. Legal aspects**

#### **3.1. Prior checking**

Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of personal data by Community institutions and bodies and on the free movement of such data (hereinafter Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data is defined as any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity. The procedure for early retirement clearly involves the processing of personal data.

The processing of the data is carried out by a Community body (OHIM) and is carried out in the exercise of activities which fall within the scope of Community law.

The Regulation applies notably to the processing of personal data wholly or partly by automatic means, and to the processing of personal data otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system. Applications are submitted either by email or by post mail. The evaluation processes are manual. Lists are published on OHIM's intranet. The processing is therefore both manual and automated.

Regulation 45/2001 therefore applies.

Article 27(1) of the Regulation 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) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) notably qualifies as subject to prior checking by the EDPS "processing operations intended to evaluate personal aspects relating to the data subject including his or her ability, efficiency and conduct". The procedure under examination is intended to select officials who may be eligible for an immediate pension without reduction. The criteria established in the Administrative decision notably includes "current reorganisation or redeployment measures affecting the applicant which make it difficult to find him/her a new assignment due to the nature of his/her skills", "criteria relating to the applicant's skills: where new job requirements do not correspond to the applicant's aptitudes and skills, and where identifying an appropriate new assignment is likely

to prove difficult" (Article 5). Therefore there is an appraisal of the ability and skills of the applicants which justifies submitting the procedure to prior checking by the EDPS.

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 processing of personal data. In this case however the procedure has already been established in an Administrative decision of 12 July 2007 and processing of personal data has is being carried out since the deadline for submission of applications for 2007 exercise was 27 July 2007. Although the EDPS regrets not having been able to prior check the processing operation resulting from the procedure during the adoption of the Administrative decision, since the procedure is recurrent any recommendations made by the EDPS may still be adopted accordingly in future exercises.

The Notification was received on 24 September 2007. According to Article 27(4) of the Regulation this Opinion must be delivered within a period of two months. The deadline for rendering the opinion was suspended during a period of 7 days for comments by the controller. Thus, the Opinion must be rendered no later than 3 December 2007, the 2 December being a Sunday.

### **3.2. Lawfulness of the processing**

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 other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution"*.

In the case in point, the procedure is established in accordance with Article 9(2) of Annex VIII of the Staff Regulations and of Article 39 of the Conditions of Employment of Other Servants, which allows each year a limited number of officials and temporary agents to retire before the pensionable age without reduction of pension rights. The OHIM Administrative Decision n° ADM- 07-21 establishes the provisions implementing a scheme for early retirement without reduction of pension rights.

The EDPS is satisfied that the processing described is necessary for the procedure established by the Staff Regulations and OHIM's Administrative decision and is therefore lawful under Article 5(a) of Regulation 45/2001.

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

Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning health or sex life is prohibited unless grounds can be found in Article 10§2 and Article 10§3 for data relating to health.

Applicants are asked to provide the reasons for their application in an empty box in their application form. One cannot exclude therefore that data relating to the health of the person concerned or of a third party such as a family member be included. This is all the more so, since the Administrative decision provides that the Management Committee may also take into consideration a particular situation put forward by the applicant requiring his/her presence at home or at a place other than the place of assignment. This is not however an

issue as Article 10§2 a) permits the processing of such data when the "the data subject has given his or her express consent to the processing of such data" which is the case here.

Article 10 of Regulation (EC) No 45/2001, concerning special categories of data, is therefore fully observed.

### **3.4. Data Quality**

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

The data needed for evaluating the application are collected by means of a specific application form. The EDPS considers that the data collected are adequate in the light of the purpose of the processing. The results of the selection procedure are published in a list containing the personal number, the first name and the surname of the persons concerned. The lists of reserve applicants are not made public. The EDPS is satisfied that these data are adequate and not excessive in the light of Article 4 of the Regulation.

Data must also be "processed fairly and lawfully" (Article 4§1(a) of the Regulation). Lawfulness has already been discussed in paragraph 3.2 above. Concerning fairness, this relates to the information which is to be communicated to the data subject (see below, paragraph 3.9).

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 fact that the applicant fills in the forms him/herself and that a new form must be completed each year for any new application, contributes to keeping the data accurate and up to date. Furthermore, as will be seen below, the data subject has access and rectification rights, in order to ensure that the file is as complete as possible.

### **3.5. Conservation of data**

Article 4§1(e) of the Regulation states that 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 (...)".

The retention period for applications is three years from the expiry of the periods applicable to appeals provided for in Section VII of the Staff Regulations. Although the EDPS finds it justifiable to keep data until the expiry of the periods applicable to appeals, he does not see the necessity of the conservation of the data for a further three years after this period has expired. He therefore requests that OHIM reassesses the conservation period for applications. In the event of an appeal the data relevant to that case may of course be kept for a further retention period.

Lists published on OHIM's intranet of selected candidates are available for about 15 days. They are then accessible in an archive area of the intranet for a period of 5 years. Data concerning reserve applicants are not kept. The EDPS questions the necessity of keeping data relating to selected candidates available via the intranet for a period of 5 years.

The conservation of data relating to selected candidates for five years can be justified by Article 38(6) of the OHIM Financial Regulation (No CB-2-03) which states that "*The authorising officer shall conserve the supporting documents relating to operations carried out for a period of five years from the date of the decision granting discharge in respect of implementation of the budget*". As such, there is therefore an obligation to retain data relating to operations with budget implications for at least five years. The EDPS therefore considers this conservation period as in conformity with Regulation (EC) 45/2001.

### **3.6. Transfer of data**

The processing operation should also be scrutinised in the light of Article 7§1 of the Regulation which covers the transfer of personal data within or between Community institutions or bodies. These transfers may only take place "if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient".

The data are transferred to OHIM's Management Committee, to OHIM's Joint Committee and to the European Commission for the management of the granted rights. The purpose of such transfers is to enable a decision to be taken on the dossier submitted and in the light of the Staff Regulations. Article 7§1 is therefore complied with. The Administrative Decision provides in Article 3.3 that "the submission of an application may not be taken into consideration for any other purposes relating to the candidate's career". The EDPS is therefore satisfied that Article 7§3 of the Regulation which specifies that the recipient shall only process the data for the purposes for which they were transmitted, is also complied with.

### **3.7. Processing of personal number or unique identifier**

In the various forms filled in by the applicants, the staff number is requested. Likewise, the lists of selected candidates also mention the staff number. In itself, the use of an identifier is simply a means – in this case, a legitimate means – of assisting the work of the controller, although it can have important consequences. This is why the European legislator regulated the use of identifying numbers in Article 10§6, which provides for the intervention of the EDPS.

In the present case, OHIM's use of an identifying number is reasonable because it is done for the purposes of identifying the person and following up the dossier, thereby simplifying processing. The EDPS considers therefore that this number can be used in the procedure for early retirement.

### **3.8. Right of access and rectification**

Article 13 of Regulation (EC) No 45/2001 establishes a right of access upon request by the data subject. Article 14 of Regulation (EC) No 45/2001 provides the data subject with a right of rectification.

According to the call for applications, applicants have full access, rectification and blocking rights to their data upon request to the Human Resources Department. The Administrative Decision N° ADM-07-21 provides in Article 6 (footnote 4) that applicants may request access to the personal data concerning them contained in the opinion of the Joint Committee. There is however no mention in the Decision of the right for data subjects to request access to the decisions of the Management Committee. The EDPS considers that access to these decisions should be granted to data subjects regarding data relating to them, subject to certain

limitations based on Article 20§1(c). The right of access may notably be denied to comparative data included in the decisions of the Management Committee or to the individual opinions of the members of the Committee.

### **3.9. Information 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 therefore Article 11 of the Regulation applies.

Since data are also collected from other persons involved in the procedure, Article 12 of the Regulation also applies.

The call for applications includes a data protection notice. Information is provided on the purposes of the processing of personal data; the legal basis; the obligation for the Human Resources Department to inform applicants that personal data is being processed in accordance with the objectives and procedure laid down by Decision N° ADM-07-21; the recipients of the data and the fact that these recipients will not process the data for any other purpose nor disclosed to any other recipient; the period of conservation of the data; the fact that applicants have a right of access, rectification, blocking and erasure and to whom they may submit this request; and the right to consult the DPO or contact the EDPS.

The EDPS is therefore satisfied that Articles 11 and 12 of Regulation (EC) 45/2001 are complied with.

### **3.10. Security measures**

Under Article 22 of Regulation (EC) No 45/2001, concerning 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 EDPS considers the measures adequate in terms of Article 22 of the Regulation.

**Conclusion:**

There is no reason to believe that the processing of personal data in the procedure for early retirement at OHIM presents a breach of the provisions of Regulation 45/2001 provided the following recommendations are taken into account:

- that OHIM reassesses the conservation period for applications;
- that OHIM justifies the necessity of keeping data relating to selected candidates available via the intranet for a period of 5 years;
- that access to the decisions of the Management Committee should be granted to data subjects regarding data relating to them subject to certain limitations based on Article 20§1(c).

Done at Brussels, 22 November 2007

Peter HUSTINX  
European Data Protection Supervisor