

Opinion on the notification for prior checking from the Data Protection Officer of the Office for Harmonisation in the Internal Market regarding the "Internal Promotion of Official and Regrading of Temporary Agents"

Brussels, 7 November 2008 (case 2008-0095)

1. Proceedings

On 19 February 2008, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer (**DPO**) of the Office for Harmonisation in the Internal Market (**OHIM**) a notification for prior checking relating to the processing of personal data for the purpose of internal promotions of officials, as well as assignments of temporary agents to posts carrying higher grades than that at which they were engaged ("regrading").

The notification was accompanied by the following documents:

- OHIM Administrative Decision ADM-05-09 on the career and promotions of officials dated 12 April 2006,
- OHIM Administrative Decision ADM-05-59 on the career of temporary members of staff and assignment to a post carrying a higher grade than that at which they were engaged dated 12 April 2006,
- OHIM Administrative Decision ADM-04-19-Rev establishing the composition, procedure and powers of the Joint Evaluation and Promotion Committee,
- Data Protection Statement (OHIM Memorandum DPN-2005-033 "Promotion and Re-grading" Information to Data Subjects),
- Frequently Asked Questions on Promotions/Regradings (as updated in 2007),
- Model of lists published on Intranet (officials eligible for promotion, promoted officials).

Questions were raised on 14 April 2008. These were answered on 11 June 2008. The draft opinion was sent to the DPO for comments on 30 September 2008. The EDPS received a reply on 5 November 2008.

2. Facts

The purpose of the processing is to conduct the yearly internal promotion/regrading exercise for members of staff in compliance with Article 45 of the Staff Regulations, Articles 10 and 15 of the Conditions of Employment of Other Servants (**CEOS**), as well as OHIM Administrative Decisions ADM-05-09 and ADM-05-59 (adopted on a basis of Article 110 of the Staff Regulations).

The controller is the Head of the Career and Development Sector of the OHIM Human Resources Department (**HRD**).

The promotion/regrading scheme: The current OHIM promotion/regrading scheme was established in 2003. It is based on the attribution and accumulation of points for merits and relies on an appraisal report covering the period from 1 April of the previous year to 31 March of the reference year¹.

The points are awarded to all staff members concerned according to their merits during the period concerned, irrespective whether they are actually eligible for promotion/regrading in that particular year. Certain minimum numbers of points have to be awarded in relation to the overall assessment in the respective appraisal report².

To be eligible for promotion/regrading, staff members need to have completed a minimum seniority of two years in their grade by 31 December of the respective calendar year. This period is counted from the end of the respective probationary period.

The processing operations can be summarised as follows:

- At the beginning of each yearly exercise, the lists of the staff members eligible for promotion and regrading are published on the OHIM's Intranet.
- A **MS-Access database** of staff members to whom promotion/regrading points may be awarded is set up containing administrative data synchronised from the SAP-HR module.
- The database is made accessible for the respective Directors for a limited period of time so that they can attribute the promotion/regrading points.
- The points introduced by the Directors to the database are compiled by HRD - Career Development Sector into two lists (officials and temporary agents) to be discussed in the Management Committee³ meeting held on the comparative examination of merits. The lists (paper format) are handed over personally to each Director before the beginning of this meeting. The members of the Management Committee have to agree on a proposal of points to be awarded.
- An individual notification of the proposed points is sent to the staff members concerned who may lodge an appeal against the notification within ten working days to the Joint Evaluation and Promotion Committee (JEPC)⁴ in accordance with OHIM's administrative decision ADM-04-19 Rev (see appeal procedure below).

¹ Staff appraisal at OHIM was analysed in the EDPS opinion 2004-293 dated 28 July 2005

² 3 points for "sustained outstanding performance", 2,25 points for "significantly above the levels required", 2 points for "above the levels required", 1,5 for "correspond to the level required", 1,25 "acceptable despite some weak points", 0,5 for "do not correspond to the level required"

³ The management committee shall comprise the directors of the department of the Office, the President of the Boards of Appeal of the Office and the Vice President of the Office. It shall be chaired by the President of the Office.

⁴ The JEPC is composed of a chairperson appointed by the Appointing Authority on a proposal by the Staff Committee which shall make its choice from a list drawn up by the HR department of five persons who are at least of grade A11 and four members of the administrator's function group (category A*): two members designated by Appointing Authority and two by Staff Committee. It shall be established for a period of one year from the launching date of the appraisal exercise.

- Before the Appointing Authority takes a formal decision concerning promotions, the JEPC shall examine and issue an opinion on the list of candidates for promotion. It shall also issue an opinion on the overall awarding of promotion points. Wherever relevant, it shall formulate recommendations to the Appointing Authority.
- The final promotion/regrading points are awarded by the Appointing Authority.
- An individual notification of the definitive points attributed is sent to each staff member concerned and the promoted/regraded staff members are addressed a formal decision by HRD's Personnel Administration Sector.
- The lists of promoted/regraded staff members are published on OHIM's Intranet.
- The SAP-HR module is synchronised back in accordance with the promotion/regrading exercise (change of grade and date of seniority in grade in event of promotion/regrading).
- The accumulated number of promotion/regrading points is kept on a confidential list in the HRD Career Development Sector as necessary basic working document for its use in the following promotion/regrading exercises as promotion/regrading points are cumulative over the years.
- At the end of each promotions exercise, the JEPC shall be responsible for evaluating the conduct of the promotions exercise in the departments and for issuing its observations and recommendations to the Appointing Authority in a short report. This report shall also be sent to the Staff Committee. Staff shall also be notified of this report by the HRD.

Appeals procedure

The JEPC shall examine and issue its opinion on the appeals lodged against proposals to award promotion points, as provided for in decision ADM-03-35-Rev. It may carry out any consultations/hearing that it deems useful, and may request any document or information that is likely to assist it in its work. In its opinion, the JEPC shall formulate a recommendation for the awarding of promotion points to the Appointing Authority. The JEPC opinion shall be notified to the jobholder and to the Director of the department concerned. Where it has been adopted following a vote, the opinion of the JEPC shall state the majority and minority positions that were expressed, while preserving the anonymity of those positions⁵.

Data subjects

The data subjects concerned are officials and temporary agents who may be awarded promotion/regrading points (i.e. excluding grades A* 16, A* 15 and A* 14).

Categories of data processed

The following data are contained in the MS-Access database established for each promotion/regrading exercise:

- full name,

⁵ Article 3 of decision n° ADM-04-19-Rev.

- gender,
- staff number,
- category and grade,
- seniority in grade,
- overall assessment comment in the last appraisal exercise ("sustained outstanding performance"- "significantly above the levels required" - "above the levels required" - "correspond to the level required" - "acceptable despite some weak points" - "do not correspond to the level required" - "unacceptable"),
- the accumulated capital of points since the last promotion/regrading, if any,
- the promotion/regrading threshold (in order to have a promotion/regrading, members of staff must have a total number of points equal or greater than a reference threshold),
- the number of promotion/regrading points proposed/awarded in the current exercise,
- total number of promotion/regrading points in past promotions/regrading exercise,
- information about third language (to check compliance with Article 45(2) of the Staff Regulations in case of promotion).

The lists of officials/temporary agents eligible for promotion/regrading published on the Intranet contain the full name, category and (former and new) grade of the respective staff member.

The lists of promoted/regraded officials/temporary agents published on the Intranet contain the full name of the promoted/regraded staff member, his category and (former and new) grade, his department, the points obtained, as well as the promotion/regrading threshold.

The confidential list of accumulated promotions/regrading points is a list signed by the President of the Office at the end of the promotions/regrading exercise and which represents the final official decision on the procedure. The confidential list of accumulated promotion/regrading points contains the full name of all officials and temporary agents to whom the points have been awarded, their category and grade, as well as the number of the points awarded.

Information given to data subjects

A data protection statement is attached to the notice published on OHIM's Intranet informing about the launching of a promotion/regrading exercise together with the list of candidates for promotion/regrading. It contains information about the purpose of the processing, certain data recipients, the existence of rights of access and rectification, the time limits for storing of the data, as well as the right to have recourse to the EDPS.

Information about the right of rectification and the right to have recourse to the EDPS are also provided in the Frequently Asked Questions posted on OHIM's Intranet.

Rights of access and rectification

Data subjects have to submit a written request to the Career and Development Sector of the HRD.

Data transfers

The data may be disclosed to the following recipients:

- to Directors of Department in charge of members of staff to whom promotion/regrading points are to be awarded. The data of each individual included in

the data base are only disclosed to the Director of the department to which the individual belongs.

- to members of the Management Committee, in a meeting on the global awarding of promotion points and the comparative examination of merits are discussed. This will be done on the basis of a list including the staff members for whom points must be proposed.
- to members of the HRD's Personnel Administration Sector in charge of personal files, for the filing of definitive notification of points and preparation of decisions on promotion/regrading.
- to members of the Joint Evaluation and Promotions Committee (in case of an appeal).

Data retention

The respective storage periods vary according to the categories of data. In fact,

- Data contained in the **MS-Access database** established for the purpose of the yearly promotion/regrading exercise, as well as in the **confidential list of the accumulated promotion/regrading points** (working document of the HRD Career and Development Sector) are kept for a period fixed provisionally to ten years from the end of the respective exercise.
- Data included in the **lists published on OHIM's Intranet** (for a period of about 15 days) are further archived for a period not longer than five years.
- Copies of the **letter confirming the final awarding of points**, as well as the **decisions on promotion/regrading** are kept in each individual's personal file until the end of the career of the person concerned.

The 10 year retention period has been considered as necessary for the purpose of appeals related to promotions/regrading. Indeed, in case of such an appeal, OHIM claims that it must be in a position to reconstitute with precision the situation and "environment" of past exercises. Since the current promotion scheme is in force since 2003, it is considered that a sufficient and reasonable experience is necessary to fix a definitive time limit for the storage of these data. The retention period has therefore been fixed provisionally for 10 years.

No personal data are kept for historical, statistical or scientific purposes in this context.

Security measures

[...]

3. Legal aspects

3.1. Prior checking

Regulation (EC) 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 (Regulation 45/2001) applies to the processing of personal data by Community institutions and bodies.

Personal data are 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 data processed in the promotion of officials and regrading of temporary agents therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by the OHIM, a Community body whose activities fall within the scope of Community law.

Regulation 45/2001 shall apply to the processing of personal data wholly or partly by automatic means and to the processing 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. In this case, the processing of the personal data is at least partly by automatic means and, when done manually, the data are intended to form part of a filing system.

Regulation 45/2001 therefore applies.

Article 27(1) of Regulation 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 Regulation 45/2001 contains a list of processing operations that are likely to present such risks. This list includes *"processing operations intended to evaluate personal aspects relating to the data subjects"* (Article 27 (2)(b) of Regulation 45/2001).

The processing in question consists of evaluation of the ability, efficiency and conduct of officials and temporary agents with the view of their promotion or regrading. Consequently, it has to be subjected to prior checking on a basis of Article 27(2)(b) of Regulation 45/2001.

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, however, the processing operation has already been established. In any case, this is not a serious problem in that any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 19 February 2008. According to Article 27(4) of Regulation 45/2001, the EDPS opinion must be delivered within a period of two months. For special reasons the delay was extended for one month on 16 September 2008. The procedure was suspended for a total of 58 days for further information from the controller and 36 days for comments. Consequently, taking into account the August suspension, the present opinion must be delivered no later than on 16 November 2008.

3.2. Lawfulness of the processing

The lawfulness of the processing operations has to be examined in light of Article 5 of Regulation 45/2001.

Pursuant to Article 5(a) of Regulation 45/2001, the processing is lawful if it is *"necessary for 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 institutions or body"*. The processing of personal data for performance of tasks carried out in the public interest includes *"the processing necessary for the management and functioning of those institutions and bodies"* (recital 27).

The promotion and regrading procedures involving collection and processing of personal data are part of the legitimate exercise of the official authority vested in OHIM.

The legal basis confirming the lawfulness of the processing can be found in the following provisions:

- Article 45 of the Staff Regulations as implemented in OHIM Administrative Decision ADM-05-09 on the career and promotions of officials dated 12 April 2006,
- Articles 10 and 15 of the CEOS as implemented in OHIM Administrative Decision ADM05-59 on the career of temporary members of staff and assignment to a post carrying a higher grade than that at which they were engaged dated 12 April 2006.

The EDPS therefore considers that the processing of personal data in the frame of the procedure of promotions of officials and regrading of temporary staff is a processing operation necessary in order to comply with a legal obligation of the controller in accordance with Article 5(a) of Regulation (EC) 45/2001.

3.3. Data Quality

Article 4(1)(a) of Regulation 45/2001 provides that personal data must be '*processed fairly and lawfully*'. Lawfulness has already been discussed (see point 3.2.) and fairness will be dealt with in relation to information provided to data subjects (see point 3.8.).

According to Article 4(1)(c) of Regulation 45/2001, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The processing of administrative and evaluation data is necessary for the examination of merits and the subsequent attribution of promotion/regrading points. It is therefore in full compliance with Article 4 (1)(c) of Regulation 45/2001.

Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and when necessary, kept up to date*". In addition, "*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.*" The EDPS considers that the OHIM promotion/regrading procedure helps to ensure the accuracy of the personal data processed and, by using recent appraisal reports, is up to date and complete. Furthermore, the invitation to make use of the rights of access and rectification helps to ensure the quality of data (see point 3.7.).

3.5. Conservation of data

Article 4 (1)(e) of Regulation 45/2001 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 EDPS notes that the letters confirming the final awarding of points, as well as the decisions on promotion/regrading are kept in the respective personal files until the end of the career of the person concerned. In similar cases, the EDPS considered the storage period of ten years after the termination of employment and/or the last pension payment as reasonable⁶.

⁶ EDPS opinion 2007-192 dated 9 October 2007 concerning Sysper2: promotion at the Commission and EDPS opinion 2007-354 dated 7 January 2008 on promotion of officials at the Committee of Regions

Furthermore, the EDPS notes that a ten year storage period is applicable to the data contained in the MS-Access database, as well as to data contained in the confidential lists of the accumulated promotion/regrading points. This retention period is considered necessary for the promotion/regrading related appeals since in case of an appeal, OHIM must be in a position to reconstitute with precision the situation and "environment" of past promotion/regrading exercises. This ten year period has been fixed provisionally. The EDPS therefore invites the OHIM to reassess this conservation period after the first ten years based on practical experience.

Data included in the lists published on OHIM's Intranet (for a period of about 15 days) are further archived for a period not longer than five years (five years being the general storage period applicable to data published on OHIM's Intranet). The EDPS has already considered this conservation period as acceptable⁷.

3.5. Compatible use / Change of purpose

Article 4(1)(b) of Regulation 45/2001 states that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*".

The data processed during the promotion of officials and regrading of temporary agents come from and later on are stored on the staff member's personal file. The EDPS is satisfied that this is compatible with the promotion/regrading of staff. Data are also fed from the SAP HR module into the MS Access data base created for the purpose of the promotion/regrading procedure. This is also considered as a compatible purpose in the general framework of management of staff careers.

3.6. Transfer of data

Article 7(1) of Regulation 45/2001 states that "*Personal data shall only be transferred 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, personal data are communicated to Directors of Department in charge of members of staff to whom promotion/regrading points are to be awarded, to members of the Management Committee, to members of the HRD's Personnel Administration Sector in charge of personal files, for the filing of definitive notification of points and preparation of decisions on promotion/regrading and to members of the Joint Evaluation and Promotions Committee. In each of these cases the transfer is necessary for the tasks each of these recipients is required to perform and only the necessary task for the performance of the task is communicated.

As such, the EDPS is satisfied that, in each case, the transfer of personal data within OHIM is in accordance with Article 7(1) of Regulation 45/2001. However, the EDPS recommends that, in accordance with Article 7(3), each of the recipients is made aware that they shall process the personal data they receive in the course of the promotions procedure only for that purpose.

⁷ See EDPS opinion on certification procedure at OHIM (2007-0138)

3.7. Right of access and rectification

Article 13 of Regulation 45/2001 grants a data subject the right of access to personal data held about him. Article 14 provides a right of rectification of personal data.

According to the notification received, and to the information provided to staff members, they have a right to request access to the personal data by sending a written request to the HRD's Career and Development Sector. Rectification is possible in the context of the specific procedure.

3.8. Information to the data subject

Articles 11 and 12 of the Regulation provide a list of information that should be supplied to the person concerned and specify the moment of providing that information.

The EDPS considers that it is Article 12 on information to be supplied to the data subject where the *data have not been obtained from the data subject directly* that applies mainly in this case, because the information is obtained from the various parties involved in the process.

As it has been described in the facts part above, a data protection statement is attached to the notice published on OHIM's Intranet. It contains most of the information required by Article 12 of the Regulation. However, information is lacking on the on categories of data processed notably in the MS-Access data base and the recipients of the data other than the Management Committee and the HRD's Personnel Administration Sector. This information should therefore be provided.

3.9 Security Measures

After careful analysis of the security measures adopted, the EDPS is considers that these measures are adequate in the light of Article 22 of the Regulation.

Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation (EC) 45/2001 provided that the following considerations are taken into account. In particular OHIM should ensure that

- The conservation period should be reassessed after the first ten years based on practical experience;
- The recipients should be made aware that they shall process the personal data they receive in the course of the promotions procedure only for that purpose;
- Information should be provided on categories of data processed, notably in the MS-Access data base, and the recipients of the data other than the Management Committee and the HRD's Personnel Administration Sector.

Done at Brussels, 7 November 2008

(signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor