



Opinion on a notification for prior checking received from the Data Protection Officer of the Office for Harmonization in the Internal Market

Brussels, 6 January 2004 (Case 2004-174)

Proceedings

On 25 October 2004, the EDPS received a notification for prior checking by the Data Protection Officer of the Office for Harmonization in the Internal Market (OHIM) concerning an internal selection procedure for temporary agents. The notification included several documents: the notification to the DPO as provided for in article 25 of Regulation 45/2001, a service level agreement between the OHIM and the European Personnel Selection Office (EPSO), specification of services for technical support in organising the selection procedure, official selection notices and information notes issued by the Management Committee.

On 17 November 2004, the EDPS made a first request for information to the OHIM's DPO to which he answered on 22 November 2004.

A second request for information was sent on 3rd December 2004 to Mr Ramón Rubio Head of the Human Resources Department at OHIM. On 10 December 2004 a reply was received from Mr Ramón Rubio.

Facts

The OHIM is organising a selection procedure for temporary staff with a fixed contract at OHIM. Candidates must submit their applications containing the information required in the selection notices by e-mail to the mailboxes indicated in the selection notices processed by OHIM. Such information includes: name, birth date, address, administrative status, category, seniority date as temporary staff, date of end of contract as temporary staff, mother tongue, and second language. An acknowledgment of receipt is sent to each candidate.

Approximately three weeks after the deadline for the submission of applications, the EPSO contacts each admissible candidate individually by e-mail and provides him with a link to the EPSO homepage, together with a personal ID number, log-in and password, which allows the candidate to fill in the full application form in the EPSO data base and the European CV. From this moment all information concerning the selection procedure is only available to candidates via the EPSO web page. The candidates must access the EPSO web page and introduce all the information requested.

The selection procedure is handled both by the OHIM (Human Resources Department, members of an internal team and a selection committee (at least one member on the selection committee will be external)), and by EPSO. The selection procedure will include written tests and oral examinations (these tests contribute to one third of the

points each). The ability, efficiency and conduct in the service of the candidate as contained in his/her appraisal report(s) are scored and taken into account in the selection procedure (one third of the total score). The notification of the processing operation to the DPO mentions that it must still be determined whether scores are to be mentioned in the publication of the final lists.

As concerns the storage of the information gathered during this selection procedure, as concerns OHIM, according to the information received from the Head of Human resources, the data concerning the selection procedure is stored for 5 years in the offices and indefinitely in central archives in case of reclamations.

Electronic applications as contained in the e-mail boxes created will be deleted 12 months after the activation of the e-mail boxes and no later than 15/10/05.

As for EPSO the data is stored for 12 months after publication of the reserve list.

Legal Aspects

a) Prior checking

Article 27 (1) of Regulation (EC) 45/2001 subjects to prior checking by the EDPS all "processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes". Article 27 (2) of the Regulation contains a list of processing operations that are likely to present such risks such as "processing operations intended to evaluate certain aspects relating to the data subject, including his or her ability, efficiency and conduct" (article 27.2.b). Since we are in the presence of processing of personal data intending to evaluate the data subject for the purpose of the selection procedure, the case falls within the scope of the prior checking procedure.

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 selection procedure is already under way. Indeed, the deadline for the submission of applications was the 15 November 2004 and written tests are about to start end of January/beginning of February 2005. This is not a serious problem however as far as any recommendations made by the EDPS may still be adopted accordingly.

The notification of the DPO was received on 25 October 2004. According to Article 27 (4), the present opinion has to be delivered within a period of two months that is before 25 December 2004. Requests for further information suspended the procedure for 5 days and 7 days, extending the deadline to 6 January 2005.

This opinion does not intend to address the issue of selection procedures in the European Institutions in general, but relates to the specific case notified to the European Data Protection Supervisor under the article 27 procedure.

Article 41 (2) of Regulation 45/2001 provides that the European Data Protection Supervisor "shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, and for advising Community

institutions and bodies and data subjects on all matters concerning the protection of personal data". The role of the European Data Protection Supervisor in this case shall be to examine the selection procedure notified according to the data protection principles provided for in Regulation 45/2001. This opinion does not aim at addressing any other legal issue.

b) Controller and processor

According to Article 2.d of the Regulation, the controller is the "Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and the means of the processing of personal data". The controller is responsible for ensuring that the obligations laid down in the Regulation are complied with (information to be given to data subject, ensuring rights of the data subject, choice of data processor, notification to the data protection officer...). A processor is a "natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller" (article 2.e.).

In the present case, OHIM is to be qualified as the controller and EPSO should be qualified as a processor in the terms of the Regulation 45/2001, processing the personal data on behalf of the OHIM¹.

This is supported by the fact that the processing operation is notably based on articles 123 and 185 of the Staff Regulation (conditions of employment of other servants), which provide that the European Personnel Selection Office shall at the request of the institutions, provide "assistance" to the different institutions with a view of the selection of temporary staff or contract staff, in particular by defining the contents of the tests and organising the selection procedure.

Accordingly, the role of EPSO is defined in the service level agreement between the OHIM and EPSO (article 2) as assisting OHIM in organising internal selection for temporary agents and contract agents to select suitably qualified individuals.

c) Lawfulness of processing

The selection procedure involves the collection and processing of a number of personal data concerning the candidates and therefore clearly falls within the scope of Regulation 45/2001.

The 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 (article 5.a. of the Regulation). Article 112 of the Council Regulation on Community Trade Mark² provides that the Staff Regulations of the European Communities, the Conditions of Employment of other servants of the European Communities, and the rules adopted by agreement between the institutions of the European Communities giving effect to those Staff Regulations and Conditions of Employment shall apply to the staff of the Office.

¹ This does not mean that EPSO cannot be qualified as the controller in other cases.

² Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark

The Staff Regulations provide that the Appointing Authority shall decide whether to hold a competition internal to the institution, which shall be open only to officials and temporary staff as defined in Article 2 of the Conditions of Employment of other servants of the European Communities; and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests.

d) Information to be given to the data subject

According to article 4.1.a of the Regulation, personal data must be processed "fairly and lawfully". The principle of fairness refers to the obligation to provide information to the data subject (article 11 of the Regulation). If the processing of the data is to be fair, the data subject must be in a position to learn of the existence of a processing operation and, when personal data are collected from him or her, must be given accurate and full information, except where he or she already has it, according to the provision of the Regulation. This information covers at least: the identity of the controller, the purposes of the processing operation for which the data are intended, the recipients or categories of recipients of the data, whether replies to questions are obligatory or voluntary as well as the possible consequences of failure to reply, the existence of a right of access to and right to rectify the data concerning him/her. According to the Regulation, further information should also be provided if necessary to guarantee "fair processing in respect of the data subject". Such information covers aspects such as the legal basis for the processing of the data, the time-limits for storing data, the right to have recourse to the European Data Protection Supervisor.

Data concerning applicants are collected in two phases. In the first instance an application is sent by e-mail to a mailbox specified in the selection notice. This e-mail also includes an up-dated European Curriculum Vitae. After the deadline for the submission of applications, EPSO provides each admissible applicant with an access to a personal portal to enable the candidate to fill in a full application in the EPSO data base. From this time on, all the information concerning the selection procedure will be made available to the candidates by EPSO via a special page on their web site, created specifically for this selection procedure.

According to the notification of the processing operation to the DPO, information to the data subject is provided in information notes of 1/10/04 and 8/10/04 and in the selection notice of 15/10/04. However, neither the information notes nor the selection notices provide specific information concerning the processing of personal data by the OHIM in the selection procedure. For example, information lacks as concerns the period of retention of the data by OHIM or the data subject's right of access and rectification.

Since EPSO is processing the personal data on behalf of the OHIM, there is no specific obligation according to the Regulation for EPSO to provide the information to the data subject. Having said this, information on the processing of the data by EPSO in this selection procedure is in fact provided by the EPSO web site on a pop up screen. The information provided refers to the processing of the data by EPSO and concerns: the identity of the controller, the purpose of the processing, the data subjects concerned, the categories of data concerned, the legal basis of the processing, the recipients of the data, the retention period, the date when the processing starts and the existence of a right of access and rectification. The data subject must click on an "OK" button thereby agreeing to the processing of the personal data by EPSO.

Seeing that EPSO is the contact point for the data subjects in the second phase of the selection procedure, the information provided by EPSO should be adapted so as to also provide information about the processing of the data by OHIM. For example information should be provided as concerns period of retention of data or recipients of data or as concerns the fact that OHIM is the controller of the processing operation.

As possible candidates are informed in the information note of the Management Committee, that the final lists will be published (with or without the scores, yet to be decided), this publication must be considered, in principle, as fair in the terms of the Regulation, although it would be far preferable if the decision on publishing scores would have been taken before the selection procedure started and potential candidates would have been informed of it. As to the means of publication, no information has been provided on where the results will be published. Should the final lists be published in the Official Journal, being the highest level tool of official publication in the EU, this information should have been given to potential candidates before they submitted their application.

More generally, for the processing of personal data to be considered as "fair", potential candidates must be provided with all essential information concerning the processing of their personal data in the selection procedure before they submit their application and, in any case, with all relevant details before collection of data.

e) Quality of the data

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.c of the Regulation). It seems that the information requested by OHIM and EPSO satisfy the quality requirements of the Regulation.

f) Retention of data

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 are collected or for which they are further processed" (article 4.1.e).

As concerns OHIM, according to the information received, the data concerning the selection procedure is stored for 5 years in the offices and indefinitely in central archives in case of reclamations. Electronic applications as contained in the e-mail boxes created will be deleted 12 months after the activation of the e-mail boxes. As for EPSO the data is stored for 12 months after publication of the reserve list.

It is questionable whether the data need to be retained in central archives indefinitely in case of reclamations. Reclamations cannot be introduced indefinitely, but only within a certain time frame. The conservation period must therefore be adapted accordingly.

g) Processing on behalf of controllers

Where a processing operation is carried out on behalf of a controller, article 23 of the Regulation provides that the controller shall choose a processor providing sufficient

guarantees in respect of the technical and organisational security measures required by the Regulation. The carrying out of a processing operation by way of a processor must be governed by a contract or legal act binding the processor and the controller and stipulating in particular that the processor shall only act on instructions from the controller and that the obligations of confidentiality and security of processing of personal data are also incumbent on the processor.

The service level agreement between the OHIM and EPSO defines the role of EPSO and the scope of the service, but does not mention the obligations provided for in article 23 of Regulation 45/2001 as concerns the security and confidentiality of the processing of personal data. These aspects should be provided for in an addendum to the agreement. OHIM should also make sure that EPSO's standards as concerns security measures are sufficient to guarantee adequate security in the present case.

h) Security

According to articles 22 and 23 of the Regulation 45/2001, the controller and the processor shall implement the 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. These security measures must in particular prevent any unauthorized disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other forms of unlawful processing.

The notification to the DPO mentions various organisational and technical security measures within OHIM which seem appropriate to the risks presented and the nature of the data. As for security measures within EPSO we assume that these are standard EPSO security measures for selection procedures.

Conclusion

The proposed processing operation does not seem in breach of Regulation (EC) 45/2001 provided that the aforementioned considerations are taken into account. This means in particular that:

- Further information must be provided to the data subjects on the selection procedure, notably the period of retention of the data by OHIM and the data subjects right of access and rectification;
- the information could be provided on the EPSO pop up message as concerns data protection which will need to be adapted accordingly;
- the final lists of results should not be published in the Official Journal as this information was not given to potential candidates before they submitted their application;
- more generally, for the processing of personal data to be considered as "fair", potential candidates must be provided with all essential information concerning the processing of their personal data in the selection procedure before they submit their application and, in any case, with all relevant details before collection of data;

- the conservation period of the data in the central archives of OHIM must be adapted accordingly;
- OHIM must ensure that the EPSO standard security measures are adequate to the risks raised in the present case.

Done at Brussels, 6 January 2005

The European Data Protection Supervisor

Peter HUSTINX

Follow-up Note 27 January 2005

OHIM has followed the comments provided in the conclusion of this opinion.

The European Data Protection Supervisor