

Opinion on a notification for Prior Checking received from the Data Protection Officer of the Office for Harmonisation in the Internal Market on the Certification Procedure

Brussels, 6 June 2007 (Case 2007-138)

1. Proceedings

On 9 March 2007, the European Data Protection Supervisor (EDPS) received from the Data Protection Officer at the Office for Harmonisation in the Internal Market (OHIM) a notification for prior checking relating to the OHIM certification procedure, set up for the implementation of Article 45bis of the Staff Regulations. Three other documents were enclosed:

- OHIM Decision No ADM-06-15 establishing the provisions for implementing Article 45a of the Staff Regulations as regards the certification procedure, dated 10 January 2007;
- Commission Decision of 26-XII-2006 on the agreement to certain implementing rules for giving effect to the Staff Regulations and the Conditions of Employment of Other Servants to be adopted by Agencies; and
- the "Call for applications for the certification procedure corresponding to year 2006" including application form and working method used in the selection of candidates.

A copy of OHIM's internal Financial Regulation No CB-2-03 was provided to the EDPS on 17 April 2007.

The EDPS requested further information on the 12 March 2007. This was provided on 21 March 2007. Further information was sought on 10 April 2007 and was provided on 17 April 2007. The draft Opinion was sent to OHIM for comments on 24 April and these were received on 16 May 2007.

2. The facts

Article 45a of the Staff Regulations provides for a procedure known as certification, the purpose of which is to enable officials of function group AST of at least grade 5 to be appointed to posts of function group AD, provided that they have been included on the list drawn up by the Appointing Authority of candidates who have passed an oral and written examination demonstrating that they have successfully completed the training programme.

The Commission decision of 26-XII-2006 gave agreement to the implementing of the OHIM certification procedure, which came into effect on 10 January 2007.

The purpose of the processing operations relating to the certification procedure is the selection of officials authorised to apply for posts at function group AD. The processing will be governed by OHIM's decision ADM-06-15 and the working method used in the selection of candidates.

The certification procedure includes:

- Reception of electronic applications (sent by applicant to *certification (HRD) inbox, which has an access restricted to members of staff in Career and Development Sector dealing with the certification procedure) and applications on paper in sealed envelope handed over by the applicant to the members of staff in Career and Development Sector dealing with the certification procedure. See Annexes 3 (model of call for application) and 4 (application form).
- Electronic storage of the applications on Career and Development Sector systems; physical storage of paper documents in locked cupboard in Career and Development Sector, with access restricted to members of staff in Career and Development Sector dealing with the certification procedure.
- Setting up of a list of applicants in electronic format internal to Career and Development Sector for the formal checking and the admissibility check of applications.
- Setting up of the list of admissible applicants for publication by the Career and Development Sector. The application files of the applicants who have been found admissible will be stored on OHIM systems with restricted access for directors of departments.
- Publication of the list of admissible applicants.
- Files including the admissible applications and a copy of the three last appraisal reports of each candidate are handed over personally to each Director of Department, together with the list of admissible candidates. (Once the works of the Management Committee are over, the files are handed over to the Career and Development Sector, who will be in charge of their destruction).
- Proposals for the selection of officials authorised to take part in the compulsory training programme are discussed in the Management Committee meeting (deliberations are secret however minutes are drafted and the members of the Joint Evaluation and Promotion Committee [JEPC] might have access to these minutes if necessary for the examination of appeals). A draft list of officials authorised to take part in the training programme is published.
- An individual notification indicating the provisional result is sent to each admissible candidate.
- Appeal deadline for contesting the draft list: 10 working days as from the publication of the draft list.
- Regular appeal procedure follows. Every appellant is individually notified with the opinion of the JEPC.
- After hearing the opinion of the Joint Evaluation and Promotion Committee, the Appointing Authority decides on the final list of officials authorised to take part in the compulsory training programme.
- Publication of the final list of officials authorised to take part in the compulsory training programme.
- Sending of the list of names to European Administration School (EAS)¹.

¹ The processing of personal data by EAS and EPSO have been notified separately and shall not be dealt with in this opinion. This processing is dealt with in the Opinion 2006-0396 "Acitivités de l'EAS et d'EPSO en matière de procédure de certification"

OHIM then will delegate authority² for drawing up and organising the training programme to EAS. To this they provide EAS with the personal number, first name and last name, office telephone number, e-mail address, as well as the language of recruitment of the candidates authorized to attend the training program. Once the applicants have completed their training programme they sit an oral and written exam. OHIM delegate authority for organising the written and oral tests to the European Personnel Selection Office (EPSO) and ESA. Once this process is complete, ESA provide personal data on the applicants to OHIM, which is limited to the personal number and name of the candidates, the number of absences each candidate had from the course, whether they passed or failed and for invoicing purposes.

At this stage the Office shall delegate the establishment of the list of officials who have passed the tests referred to above to EPSO and ESA. AA shall publish the list of officials established by EPSO and ESA. Officials included in this list may apply for vacant posts at OHIM in the function group AD, provided they meet the required conditions of grade for the posts in question. This entitlement shall last for five years from the date of publication of this list. Personal data received from ESA about the applicant is used for invoicing purposes.

All applications will be kept for the duration of the certification procedure and for a further year after the procedure has been completed. Each year the Joint Committee shall adopt an opinion based on the results of the previous year's certification procedure.

The only category of data subject is the officials in function group AST of grade 5 and higher who apply for certification.

The data that will be processed include:-

Data of a personal nature allowing the identification of the official:

- full name,
- staff number,
- grade, seniority in grade, seniority in grade AST5 or above.

Information provided by the official allowing the practical organisation of the selection procedure:

- administrative address and telephone number,
- priority area chosen for the certification procedure,
- present organisational assignment: department, service, sector, job title and duties and functions undertaken, seniority in job (eventually), any other details the applicant wishes to insert,
- previous job assignments or employments: employer, place of employment, periods, job title and duties and functions undertaken, any other details the applicant wishes to insert,
- language competencies (capacity to work in FR or EN),
- training undertaken of academic or professional character: title of diploma or training, level when relevant, name of training organisation, training periods, relationship with priority area chosen,
- Preference for Brussels or Luxembourg as a training site,
- Content of the annexes the applicant joins to the application form providing justification for the abovementioned data.

² While the Decision of 26-XII-2006 uses the term "delegates authority" in relation to the processing conducted by EAS and EPSO, the EDPS is satisfied these bodies act in the capacity of controllers rather than processors for the purposes of the certification procedure.

Data included in the three last appraisal reports (copied from the personal file of each applicant, if not provided by applicant), in particular:

- The comments of the reporting officer on performance, competencies and conduct in the service and general comments where relevant.
- The overall assessment awarded.
- The justification of the reporting officer for checking the box F.3 (potential).

Data subjects are informed about how their data will be processed at the launch of the certification procedure each year. This is done through a call for applications and its relevant annexes which include the application form and the selection method. All the relevant documents are published on OHIM's intranet site. The information from these sources includes:

- The identity of the controller (OHIM).
- The purposes of the processing operation for which the data are intended (certification procedure).
- The categories of recipients of the data (each head of department within OHIM).
- The fact that the pertinent data on the application form are obligatory for the purposes of the application.
- Further information on the 7 stages of the certification process, such as the fact that the Human Resources Department (HRD) will provide copies of the last three appraisal reports which will form part of the assessment by the heads of department.

Personal data are provided by the applicant to the HRD. Staff from the HRD will process that data to check admissibility of applications, set up lists of admissible applicants and files, publish the lists and send out notifications to applicants. Data corresponding to admissible candidates will be passed to the members of the Management Committee (heads of department) for selection purposes.

Four lists are published during the certification procedure. Once the HRD have determined the initial admissibility of applications the names of all officials considered admissible to the procedure is drawn up, provided to the Management Committee and published on the OHIM intranet. Once the Management Committee have considered the applications a draft list of admissible candidates is drawn up and published. Following publication of the draft list, applicants who dispute the draft list have 10 working days to lodge an appeal with the Joint Evaluation and Promotion Committee (Joint Committee). Following an examination of any dispute the Joint Committee shall examine the draft list and shall issue an opinion, after which the Appointing Authority will approve and publish the final list of officials authorised to take part in the training programme. After the training programme, EAS and EPSO publish a final list for OHIM of all candidates who have passed the written and oral tests and are entitled to apply for posts in function group AD.

OHIM receive the following information from EAS:

- whether the candidate has passed/not passed the exam (with no further detail);
- the number of absences each candidate has taken from the training programme (but not the reason);
- name of each candidate for invoicing purposes.

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 (hereinafter 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 certification procedure proposed by OHIM processes the data referred to above related to applicants for the certification procedure. The data therefore qualify as personal data according to Article 2(a) of Regulation 45/2001.

The processing of personal data is carried out by OHIM for the purposes of the certification procedures laid down by 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 is carried out both on computer and in a structured paper filing system.

Regulation 45/2001 therefore applies.

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. This list includes Article 27(2)(b) "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency or conduct*". Thus the certification procedure adopted by OHIM falls to be prior checked.

The notification of the DPO was received on 9 March 2007. The case was suspended when further information was sought on 12 March 2007 and a response was received from OHIM on 21 March 2007. The case was suspended a second time when further information was sought on 10 April 2007 and a response was received from OHIM on 17 April. The case was suspended pending comments from the DPO at OHIM on 24 April 2007 and these were received on 16 May 2007. According to Article 27(4) the present opinion must be delivered within a period of two months, that is no later than the 18 June 2007.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data legitimate. One of the criteria provided in Article 5(a) is that the "*processing 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*".

Article 112 of Council Regulation (EC) 40/94 provides that the Staff Regulations and the rules adopted by the Institutions of the European Communities for giving effect to those Staff regulation shall apply to OHIM.

Article 45bis of the Staff Regulations provides the legal basis for the certification procedure, supported by Decision No ADM-06-15 establishing the provisions for implementing Article 45a of the Staff Regulations, which has been implemented in consultation with the OHIM Staff Committee and in agreement with the Commission (Decision of 26/12/2006 C[2006] 7264) in accordance with Article 110 of the Staff Regulations.

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

3.3. Data Quality

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 collected and/or further processed*". After careful examination, the EDPS is of the opinion that the data listed in the notification and collected from the data subject for the purposes of the certification procedure comply with the criteria set out in Article 4(1)(c).

OHIM also receive data from EAS on whether the applicant has passed the examinations or not, the number of absences each applicant has taken from courses (but not the reasons for those absences), and details of candidates who has completed training or sat examinations for invoicing purposes. OHIM require the results for the purposes of establishing the lists of candidates, the number of absences decides whether the candidate is eligible to sit the examination or not and the names of candidates is necessary for financial probity for invoicing purposes. Thus the EDPS is satisfied that the processing of this data from the EAS complies with the criteria set out in Article 4(1)(c).

Article 4(1) provides that personal data must be "*accurate and, where necessary, kept up to date*". As a quality assurance in the process, applicants are informed in the "*Call for applications for the certification procedure*" that the information they supply in applications will be systematically checked against that on the personal files of officials authorised to take part in the training programme given by the EAS. Applicants are encouraged to update their files accordingly in the *Call for Applications* and have the right of access to their personal files to check accuracy and make any updates³(see 2.12 below). EDPS is of the opinion that this ensures that the data are accurate and kept up to date throughout the process.

Article 4(1)(a) also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see point 2.1.4) and fairness will be dealt with in relation to information provided to data subjects (see point 2.1.12)

3.4. Conservation of data/ Data retention

³ By virtue of Article 26 of Regulation No. 31 (EEC), 11 (EAEC) "The Staff Regulations".

Article 4(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 application files will be filed, until the end of the certification procedure (total closure of the exercise), in a locked HRD-Career and Development cupboard and further 1 year. If an appeal about the certification procedure is made during this period, the application may be kept beyond the one year period until the end of the appeal process. Should an applicant request the erasure or the blocking of his personal data needed for the course of the certification procedure, the Controller would immediately inform him/her about any eventual impact such request may have on the admissibility of the application.

The EDPS is satisfied that the retention of personal data kept in the application files is compliant with the provisions of Article 4(e) of Regulation 45/2001.

Since the four lists published during the certification procedure are public, there is no retention period applied to these lists. For the publication of these lists, the controller follows the rules established for publication on the Intranet site within the context of the whole Office. In accordance with these conditions of use, the lists will be published for a period of 15 days and then archived.

Article 38(6) of the OHIM Financial Regulation (No CB-2-03) 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 will be a requirement to retain certain information relating to the certification procedure for five years for the conciliation of accounts.

The EDPS is concerned that these data are archived for an indefinite period. Although these personal data are contained in a public document, they are only published for a period of 15 days and are then removed from the OHIM Intranet. While the EDPS recognises that there will be a requirement to maintain each of the lists for specified periods both during and after the certification procedure, the EDPS does not accept that the lists are archived for an indefinite period. The EDPS considers that data of a purely informative nature which are no longer necessary for administrative reasons can be disposed of after a minimum retention period of 5 years, where this does not involve a disproportionate amount of work.

The EDPS recommends that the list of applicants whose applications are considered admissible, the draft list and list of applicants authorised to take part in the training programme are retained for the certification period and a further period of five years, with provision for retaining it for a longer period if this is necessary for resolving an appeal made during the certification procedure.

The EDPS recommends that the list of applicants who may apply for vacant posts be retained for the period during which those on the list are entitled to apply for vacant posts in the function group AD.

3.5. Compatible use / Change of purpose

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

those purposes". OHIM use the personal data collected in the form for use in the certification procedure.

After the procedure is completed, OHIM retain the data for a further year in order to adopt an opinion on the results of the previous year's certification procedure. The EDPS views this as a purpose which is compatible with the certification procedure.

EDPS is of the view that the later inclusion of the successful candidate's entitlement to apply for vacant posts in the function group AD is compatible with the original purpose. EDPS is also satisfied that the use of data from the applicant's personal file and appraisals is compatible with the original purposes for which they were collected.

EDPS is also satisfied that the use of personal data for checking invoices from EAS is compatible with the purposes of the certification procedure.

3.6. Transfer of data

Article 7(1) of Regulation 45/2001 provides 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"*.

OHIM transfer data to the European Academic School (EAS) and the European Personnel Selection Office (EPSO) in order to organise the training programme and the written and oral tests which follow. As both EAS and EPSO have competence for organising the training programme and setting both written and oral tests, the EDPS is satisfied that the transfers are in accordance with the provisions of Article 7(1) of Regulation 45/2001.

OHIM transfer data to the Joint Evaluation and Promotion Committee for the purposes of examining appeals made during the certification procedure. They also distribute the application to the Management Committee so they can decide the eligibility of applicants to take part in the training programme. EDPS is of the opinion that both transfers are in accordance with the provisions of Article 7(1) of Regulation 45/2001.

3.7. Processing of personal number or unique identifier

OHIM uses personal numbers in the certification procedure. The use of the personal number may have the consequence of allowing interconnection of data processed in different contexts. This is not the place in which to determine the conditions under which OHIM may process a personal number (Article 10(6) of the Regulation), but it is appropriate here to emphasise the attention that must be paid to this aspect of the Regulation. In the case in point, OHIM's use of the personal number is reasonable as it is used for the purposes of identifying the person and keeping track of their progress through the certification procedure. The EDPS considers that this number may be used in the context of the certification procedure.

3.8. Right of access and rectification

Article 13 of Regulation 45/2001 provides a right of access to personal data being processed. The notification states that applicants to the certification exercise may send a written request to the Head of the Career and Development Sector.

Article 14 of Regulation 45/2001 provides a right to rectification without delay of inaccurate or incomplete data. The notification states that applicants to the certification exercise may send a written request to the Head of the Career and Development Sector. In addition, applicants are informed in the *Call for Applications* that all information they provide will be systematically checked against their personal file and are encouraged to ensure the information in the personal file is accurate.

Blocking and erasure of data in accordance with the rights provided in Articles 15 and 16 respectively of Regulation 45/2001 are completed immediately upon a legitimate request. Applicants who make a request for blocking or erasure during the certification procedure are made aware of any eventual impact such a request may have of the admissibility of their application.

The EDPS is of the opinion that the rights of the data subject are respected in the processing that occurs as part of the certification procedure.

3.9. Information to the data subject

Article 11 of Regulation 45/2001 provides for certain information to be supplied where the data have been obtained from the data subject. Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data have not been obtained from the data subject. During the certification procedure personal data is obtained directly from the data subject on the application form and from EAS. Thus Articles 11 and 12 will both apply to the certification procedure.

Data subjects are informed about how their data will be processed at the launch of the certification procedure each year. This is done through a call for applications and its relevant annexes which include the application form and the selection method. All the relevant documents are published on OHIM's intranet site. The information from these sources includes:

- The identity of the controller (OHIM).
- The purposes of the processing operation for which the data are intended (certification procedure).
- The categories of recipients of the data (each head of department within OHIM)
- The fact that the pertinent data on the application form are obligatory for the purposes of the application
- Further information on the 7 stages of the certification process, such as the fact that the Human Resources Department (HRD) will provide copies of the last three appraisal reports which will form part of the assessment by the heads of department.

In addition, OHIM have indicated that the following statement will be added to the end of the application form:

“In accordance with articles 11 of Regulation 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, the Human Resources Department hereby informs that the above data are gathered and processed for the sole purpose of the certification procedure as laid down in decision ADM-06-46. The lists to be published in accordance with decision ADM-06-46 will contain the personal number, the first name, the last name and the department of candidates. Personal number, first name and last name, office telephone number, e-mail address, as well as the

language of recruitment of the candidates authorized to attend the training program will be communicated to the European Administration School.

*All candidates have the right to access, rectify, erase, or block their respective personal data by sending a written request to the Human Resources Department, to the mailbox *Certification (HRD).*

Finally, the candidates are informed that they may at any time consult OHIM's Data Protection Officer (DataProtectionOfficer@oami.europa.eu) or have recourse at the European Data Protection Supervisor (www.edps.europa.eu) should they consider that the above mentioned processing operations of personal data do not comply with Regulation 45/2001.“

Article 12(1)(c) provides that where the personal data have not been obtained from the data subject, information on the categories of data concerned must be supplied to the data subject.

EDPS recommends that this statement is amended to include further details on the categories of data obtained from EAS once the candidates have completed the training programme, that is to say the personal number and name of the candidates, the number of absences each candidate had from the course, whether they passed or failed and that the data is also used for invoicing purposes.

EDPS recommends that the amended statement is added to the end of the application form under the heading "Data Protection" so that the applicant is fully informed in line with Regulation 45/2001 at the point the application form is completed.

3.10. Security measures

(.....)

Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 providing the considerations are fully taken into account:

- The EDPS recommends that the list of applicants whose applications are considered admissible, the draft list and list of applicants authorised to take part in the training programme are retained for the certification period and a further period of five years, with provision for retaining it for a longer period if this is necessary for resolving an appeal made during the certification procedure.
- The EDPS recommends that the list of applicants who may apply for vacant posts be retained for the period during which those on the list are entitled to apply for vacant posts in the function group AD.
- EDPS recommends that the proposed statement in 2.1.12 is amended to include further details on the categories of data obtained from EAS once the candidates have completed the training programme, that is to say the personal number and name of the candidates, the number of absences each candidate had from the course, whether they passed or failed and that the data is also used for invoicing purposes.

- EDPS recommends that the amended statement is added to the end of the application form under the heading "Data Protection" so that the applicant is fully informed in line with Regulation 45/2001 at the point the application form is completed.

Done at Brussels, 6 June 2007

Peter Hustinx
European Data Protection Supervisor