

Opinion on a notification for Prior Checking received from the Data Protection Officer of the Office for Harmonization in the Internal Market concerning "Probationary Period Reports"

Brussels, 25 November 2008 (Case 2008-432)

1. Proceedings

On 10 July 2008, the European Data Protection Supervisor (**EDPS**) received from the Data Protection Officer of the **Office for Harmonization in the Internal Market (OHIM)** a Notification for prior checking concerning OHIM's evaluation of officials and temporary agents during their probation period (**Notification**).

The Notification was accompanied by various templates, including "OHIM Probationary Period Report" and "OHIM Management Capacities Assessment".

On 2 October 2008 the EDPS requested additional information from OHIM. The responses were received on 5 November 2008. On the same day, the EDPS sent the draft opinion to the Data Protection Officer for comments which were received on 20 November 2008.

2. Facts

The present case deals with evaluation of officials, temporary and contract agents during the initial period of their employment at OHIM as foreseen in Article 34 of the Staff Regulations and Articles 14 and 84 of the Conditions of Employment of Other Servants of the European Communities (**CEOS**). It also deals with evaluation of the competencies of officials newly appointed in management positions ex Articles 43 and 44 of the Staff Regulations (altogether **probationers**). These processing operations are carried out by the Career and Development Sector which is part of the OHIM Human Resources Department (**HRD**).

The *purpose* of the data processing is to assess the performance of newly recruited officials and temporary/contractual agents, as well as the management competences of officials appointed in management positions.

In order to fulfil this purpose, the following reports are drafted: the Probationary Period Report which aim to establish the confirmation (or dismissal) of the respective official/agent newly appointed. The primary Management Capacities Assessment which aim to establish the confirmation of the capacities of the manager in probation for the purposes of advancing to the next step in the grade (both reports referred altogether to as **Reports or individually as Report**).

The *data processing* is both automated and manual and can be described as follows:

(i) At the end of the probationary period an appointed reporting officer drafts a Report based on a standard form available in an on-line SAP/Insite portal database. Identification and other relevant information on probationers necessary for the filling of the Report are available in the same database.

- (ii) The reporting officer prints out the Report, signs it and forwards it to the probationer who is asked to read, sign and comment it (if necessary), and give it back to the reporting officer.
- (iii) The reporting officer sends the signed Report to HRD for its filing in the personal file and to be forwarded to the probationer concerned.
- (iv) The reporting officer introduces in the SAP/Insite portal database the dates of completion of the Report and subsequent sending to the HRD, together with the result of the probationary period (confirmed in post, not confirmed, probationary period prolonged). In case the probationary period is prolonged, the reporting officer contacts the HRD Personal Administration in order that a decision on continuation of the probationary period is issued and signed by the Appointing Authority of the Office, whenever suitable.

The *Categories of data processed* include (i) probationer's details: surname, first name(s), personnel number, current position, department/unit, category and grade; (ii) period of appraisal (from - to); (iii) reporting officer's details: surname, first name(s), department / unit; (iv) reporting officer's comments assessing the probationer, as well as his signature and the date; (v) probationer's comments, as well as his signature and the date.

Regarding the *conservation periods*, the Reports are kept in the paper based personal file of the respective employee in line with Articles 11 (1) and 81 CEOS¹. Indeed, these are kept for an undefined period until the transfer to another institution, permanent leave or retirement. As for the word document Report drafted by the reporting officer (and which is stored provisionally on the individual PCs of the reporting officer), the time limit for storage is the moment when the Report is deemed final, i.e. when the Report has been signed by all parties and no conflict has arisen on the basis of that Report. This document is then erased by the reporting officer from his/her computer.

The information regarding the Report stored in the SAP personal file is limited to the result of the probationary period (confirmed in post, not confirmed, probationary period prolonged) which is kept as long as the personal file.

Storage for historical, statistical or scientific purposes is not being envisaged.

According to the Notification, individuals are *informed* through the Report.

Regarding the *rights of the data subjects*, the Notification describes that on written request to the controller, the data subject may ask for a copy of the personal data used during the procedure and to shall have the right to obtain from the data controller the rectification without delay of inaccurate or incomplete personal data used during the procedure.

The data processed within the evaluation of officials and temporary and contract agents on probation can be *disclosed* to the following recipients: (i) the hierarchical superiors of the probationer including the director of department who must decide on the result of the probationary period; (ii) the members of Human Resources Department in charge of the probationary period reports (for inclusion in the personal folders, issuing decisions to be submitted to the Appointing Authority in relation to probationary period reports, and dealing with payroll and individual rights).

[.....].

¹ Article 26 of the Staff Regulations is applicable per analogy.

3. Legal aspects

3.1. Prior checking

Applicability of Regulation (EC) 45/2001: The evaluation of the initial performance of officials, temporary and contract agents constitutes processing of personal data ("*any information relating to an identified or identifiable natural person*" - Article 2 (a) of the Regulation). The data processing is performed by a Community body, in this case, by OHIM, in the exercise of activities which fall within the scope of Community law (Article 3 (1) of the Regulation). The processing of the data contained in the probationary period reports is both electronic and manual; in the later case the data form part of a filing system (Article 3 (2) of the Regulation). Therefore, Regulation (EC) 45/2001 is applicable.

Grounds for prior checking: According to Article 27 (1) of the Regulation, "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purpose shall be subject to prior checking by the European Data Protection Supervisor*". 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 ability, efficiency and conduct*". The evaluation of the initial performance of officials, temporary and contract agents clearly represents such a processing operation and is therefore subject to prior checking by the EDPS.

Ex-post prior checking: Since prior checking is designed to address situations that are likely to present certain risks, the opinion of the EDPS should have been 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.

Deadlines: The notification of the DPO was received on 10 July 2008. According to Article 27 (4) of the Regulation, the EDPS opinion must be delivered within a period of two months. The procedure was suspended for a total of 49 days to require additional information and to allow for comments from the data controller, plus the month of August. Consequently, the present opinion must be delivered no later than on 1st December 2008.

3.2. Lawfulness of the processing

Article 5 of Regulation 45/2001 provides criteria for making processing of personal data lawful. 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 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 evaluation of the initial performance of officials, temporary and contract agents is a part of the legitimate exercise of official authority vested in the OHIM. The legal basis provided in Articles 34, 43 and 44 of the Staff Regulations and Articles 14 and 84 CEOS confirms the lawfulness of the processing.

3.3. Data Quality

Adequacy, relevance and proportionality: According to Article 4 (1) (c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". The information presented to the EDPS on the data

processed during this initial evaluation exercise (as described in point 2) appears to meet those requirements. The processed data are of administrative nature and necessary to evaluate the initial performance of the officials, temporary and contract agents.

Accuracy: Article 4 (1) (d) of the Regulation provides that personal data must be *"accurate and, where necessary, kept up to date"* and that *"every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified"*. As indicated above, an important part of the information processed within the initial evaluation exercise is provided by persons other than the data subject, particularly by the reporting officer. In this respect, it is important that the data subjects can make use of their rights of access and rectification to ensure the accuracy of their personal data processed (cf. point 3.6 in detail).

Fairness and lawfulness: Article 4 (1) (a) of the Regulation also provides that personal data must be *"processed fairly and lawfully"*. Lawfulness has already been discussed (cf. point 3.2) and fairness will be dealt with in relation to information provided to data subjects (cf. point 3.7)

3.4. Data retention

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"*.

Regarding the information (Report) stored in personal files, as indicated above, no exact time-limits for the storage of the personal files have been established so far. OHIM should consider the setting up of storage period consisting of a certain time after the termination of the service. The EDPS recommends the establishment of a reasonable time frame for the storage of documents kept in the personal files. In similar cases, the EDPS has considered a data retention period of ten years as of the termination of employment or as of the last pension payment as reasonable².

The EDPS considers appropriate the practice of reporting officers consisting in erasing the Report when they are final.

3.5. Transfer of data

In line with Article 7 of the Regulation, personal data can be transferred within or to other Community institutions or bodies *"if the data are necessary for the legitimate performance of the tasks covered by the competence of the recipient"* (paragraph 1). The recipient can process the data *"only for the purposes for which they were transmitted"* (paragraph 3).

As mentioned above, the data are transferred to the hierarchical superiors of the respective official or temporary/contractual agent, as well as to certain members of the Human Resources Department.

The EDPS considers that all these transfers are necessary for the legitimate performance of the tasks covered by the given recipient. In fact, the data transmitted are necessary for the human resources management, as well as for the performance of the respective supervisory tasks. Therefore, Article 7 (1) of the Regulation is being complied with.

In order to ensure the full compliance with Article 7 (3) of the Regulation, the EDPS recommends that all OHIM internal recipients are reminded of their obligation not to use the data received for any further purposes than the one for which they were transmitted. This does not need to be done

² cf. the following opinions concerning evaluation of statutory personnel: EDPS **2007-406** of 3 August 2007 (European Ombudsman), EDPS **2006-297** of 19 October 2006 (ECOSOC), EDPS **2005-218** of 15 December 2005 (Commission), EDPS **2004-293** of 28 July 2005 (OHIM), EPDS **2004-281** of 4 July 2005 (ECJ)

for each individual assessment. Instead, it can be done once, for example, through an information letter addressed to relevant superiors and members of the Human Resources Department of their obligation vis-à-vis the data received for evaluation purposes.

3.6. Right of access and rectification

The following provisions are applicable in the present case:

(i) Article 13 of Regulation 45/2001 that provides a right of access to personal data being processed; (ii) Article 14 of Regulation 45/2001 that provides a right to rectification without delay of inaccurate or incomplete data; (iii) Articles 34 and 43 of the Staff Regulations stating that the Report shall be communicated to the person concerned who shall have right to submit his comments in writing. (iv) Article 14 and 84 CEOS stating that the Report shall be communicated to the person concerned who shall have right to submit his comments in writing; (v) Articles 11 (1) and 81 CEOS read together with Article 26 of the Staff Regulation providing for a right of access to all documents contained in the statutory agents' personal files even after leaving the service.

As indicated above, the officials, temporary and/or contract agents are given a copy of the Report *"The reporting officer prints out the draft Probationary Period Report, signs it and forwards it to the probationer who is asked to read, sign and comment (if necessary), and give it back the report to the reporting officer"*, thus giving pro-active access to the information contained in the Report. Access can also be obtained later on by requesting it to the data controller. The EDPS considers the current practice compliant with Article 13 of Regulation 45/2001.

Regarding the right to rectification, probationers are asked to add their comments directly on the Report so that these comments are clearly visible, including to the hierarchical superior of the probationer and/or the director of department who must decide on the result of the probationary period. Probationers can also address an access and rectification request to the delegated data controller seeking the modification of not only evaluation data but any other data contained in the Report.

The EDPS considers the current practice as compliant with Articles 13 and 14 of the Regulation. In particular, he welcomes the fact that probationers concerned are allowed to add comments related to his (by nature subjective) evaluation data provided by his hierarchical superior.

3.7. Information to the person concerned

Article 12 of Regulation 45/2001 provides for certain information to be supplied where the data processed have not been obtained from the person concerned (unless she already is in possession of such information).

According to the Notification, in the present case, probationers are informed through the Report. However, the Report does not contain information, among others, about the identity of the controller, the purpose of the processing, the existence of the rights of access and rectification and the right of recourse to the EDPS. In order to ensure the transparency and fairness of the processing in question and to comply with Article 12 of Regulation 45/2001, the EDPS recommends that the following information is added to the Report:

- (i) identity of the data controller;
- (ii) purposes of the processing;
- (iii) existence of the right of access and the right of recourse to the EDPS. Including information on how these rights can be exercised (at least by indicating a functional mailbox);
- (iv) the recipients in case of possible data transfers;
- (v) the legal basis of the data processing;

(vi) the time limits for the data storage (once established in line with comments provided in point 3.4).

3.8. Security measures

According to Article 22 of Regulation (EC) No 45/2001, *"the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks presented by the processing and the nature of the personal data to be protected"*. These security measures must *"in particular prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing"*.

[.....]

The EDPS has no reason to believe that these and other additional implemented measures are no adequate in light of Article 22 of the Regulation.

4. Conclusion:

There is no reason to believe that there is a breach of the provisions of Regulation 45/2001 provided the above considerations are fully taken into account. In particular, OHIM should:

- set out an appropriate time-limit for the storage of the personal files (Article 4 (1) (e) of the Regulation);
- remind all recipients of their obligation not to use the data received for any further purpose than the one for which they were transmitted (Article 7 (3) of the Regulation);
- insert in the "Probation Period Report" data protection information in light of Article 12 of the Regulation as suggested in this Opinion.

Done at Brussels, 25 November 2008

(Signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor