



Opinion on a notification for prior checking received from the Data Protection Officer of the European Economic and Social Committee regarding the "certification procedure" case

Brussels, 26 November 2008 (Case 2008-475)

1. Procedure

On 30 July 2008 the European Data Protection Supervisor (EDPS) received a notification for prior checking under Article 27(3) of Regulation (EC) No 45/2001 from the Data Protection Officer (DPO) of the European Economic and Social Committee, concerning data processing in the "certification procedure" case.

In connection with this notification, questions were put to the DPO by e-mail on 8 September 2008. The replies were provided on 2 October 2008. Additional questions were put on 3 October and replies were provided on 15 October 2008. On 12 November 2008 the draft opinion was sent to the DPO of the European Economic and Social Committee for comments. Those comments were received on 21 November 2008.

2. The facts

The European Economic and Social Committee organises a procedure to select officials to be authorised to participate in training in the framework of the certification procedure, under Article 45a of the Staff Regulations of Officials of the European Communities.

The processing operation consists of the receipt, processing and analysis of applications received in the framework of the certification procedure which enables staff at grade AST 5 and above to be appointed as administrators. It is important to note that the certification procedure has two phases:

1. determining the persons to be admitted on the basis of stated criteria, who are therefore considered to be eligible for certification; and
2. certification in an AD level post. This second phase ends the procedure.

The application form contains the following data: surname, first name, grade, academic qualifications, professional experience, assessments received in certain reporting exercises, assessment of potential to perform the duties of an administrator.

It is stated that the processing operation is entirely manual. Data are stored electronically (Excel table) and the paper versions are filed in a locked cupboard.

Procedure

First phase:

The certification procedure has been conducted annually since 2005. There are six stages in the first phase:

Stage 1: determining the number of officials authorised to follow the training programme, and call for applications

Every year, after consultation of the joint committee provided for in Article 10, the Appointing Authority determines the number of officials to be authorised to take part in the training programme referred to in Article 45a(1) of the Staff Regulations. In doing so it takes account of the deadline laid down in Article 10(4).

Following this decision, the Appointing Authority publishes a call for applications.

Applications for certification may be submitted by officials in function group AST, grade 5 and above, who have been appointed to a permanent post at the European Economic and Social Committee, in accordance with Article 1a of the Staff Regulations and who, on the date of publication of the call for applications:

- have been assigned one of the following administrative statuses, as referred to in Article 35 of the Staff Regulations: active employment, parental leave or family leave,
- or have been seconded in the interests of the service.

However, applications may not be submitted by officials:

- who are to be retired automatically, pursuant to Article 52 of the Staff Regulations, during the year in question or the following year;
- in respect of whom the Appointing Authority has adopted a decision resulting in termination of service, within the meaning of Article 47 of the Staff Regulations;
- to whom the Appointing Authority has granted an invalidity allowance, pursuant to Article 78 of the Staff Regulations.

Stage 2: admissibility of applications

Applications from officials referred to in Article 3(2) are deemed admissible if the officials concerned meet each of the following two requirements:

- Three¹ of the last five annual staff reports referred to in Article 1 of the general implementing provisions for Article 43 of the Staff Regulations must certify that the official concerned has the potential required to carry out the duties of administrator.
- The official concerned must have at least four years' seniority in the AST function group and be in grade 5 or above. The minimum seniority required in accordance with this subparagraph must have been acquired by 31 December of the year in which the certification procedure is initiated. Seniority acquired as a temporary staff member at

¹ The 2006-2007 promotion exercise was unusual in this respect. To make the period covered by a staff report correspond to one calendar year, a double exercise was organised in 2007 to cover the reporting periods from 1 September 2005 to 31 August 2006 and from 1 September 2006 to 31 December 2006 (for information, the latter reporting exercise covered the period from 1 January 2007 to 31 December 2007 for the 2008 promotions). As the vast majority of reporting officers copied over the assessment for the report covering the period from 1 September 2005 to 31 August 2006 for the report covering the end of 2006, those two reports have been counted as one, so four reports are taken into account instead of three. This will happen again for subsequent certification exercises until three staff reports cover three calendar years. The underlying idea is to take into account the performances of the persons concerned for a sufficiently long period, which should be three years.

grade 5 or above is taken into account, provided that there has been no interruption between the periods worked as a temporary staff member and as an official.

Stage 3: drawing up of the list of officials selected to follow the training programme

The Appointing Authority establishes a ranking of those officials whose applications have been deemed admissible, on the basis of a list of priorities drawn up using the following criteria:

- the level of education and professional experience gained within the institutions and in areas in which the European Economic and Social Committee has identified particular needs;
- the assessments included in the most recent staff reports.

The Appointing Authority determines the precise content, value and weighting of the above criteria before publication of the call for applications referred to in Article 3 and after obtaining the opinion of the committee referred to in Article 10. This information is brought to the attention of staff.

The Appointing Authority establishes a draft list of the officials selected to take part in the training programme. This draft list contains the officials at the top of the ranking referred to in paragraph 1; the number of officials on the list shall match the number admitted to the training programme in accordance with Article 3(1). The draft list is published by the Appointing Authority.

Within ten working days of publication, those officials who submitted applications in accordance with Article 3(2) and are contesting the draft list referred to in the previous paragraph may submit an appeal setting out their reasons for doing so to the joint committee for the certification procedure. All relevant supporting documents and information must be submitted together with the appeal.

The committee examines the appeals and issues a reasoned opinion on the draft list proposed by the Appointing Authority within 20 working days of its publication. It may hear any officials who have lodged appeals, and representatives of the Appointing Authority.

The Appointing Authority adopts and publishes the list of officials authorised to take part in the training programme, after consulting the committee.

Stage 4: participation in the training programme

Pursuant to Article 2(2) of the Staff Regulations, the European Economic and Social Committee entrusts the task of devising and organising the training programme to the European Administrative School ("the School"), in accordance with the decision of the Secretaries-General of the European Parliament, the Council, the Commission, the Registrar of the Court of Justice, the Secretaries-General of the Court of Auditors, the European Economic and Social Committee, the Committee of the Regions and the Representative of the European Ombudsman on the organisation and running of the School².

Those officials placed on the list referred to in Article 5(6) who take parental leave as provided for in Article 42a of the Staff Regulations, family leave as provided for in Article 42b of the Staff Regulations or maternity leave as provided for in Article 58 of the Staff Regulations prior to or during the period in which the training programme takes place may be authorised to follow the training the following year without the need to submit a fresh application.

² OJ L 37, 10.2.2005, p. 17. Decision 2005/119/EC of 26 January 2005.

The European Economic and Social Committee ensures that the School organises the training programme so as to allow the participation of officials authorised to work part time in accordance with Article 55(2) of the Staff Regulations.

Stage 5: organising written and oral examinations and drawing up the list of officials who have passed the examinations, thereby demonstrating that they have successfully taken part in the training programme;

The European Personnel Selection Office (EPSO) determines the content of the written and oral examinations. Pursuant to Article 2(2) of the Staff Regulations, the European Economic and Social Committee entrusts the task of organising the written and oral examinations and drawing up the list of officials who have passed those examinations to EPSO and to the School.

Only officials certified by the School as having completed the training programme are authorised to sit the examinations.

Those officials declared by the School as having taken part in the training programme but not placed on the list referred to in paragraph 1 are allowed to sit the examinations no more than twice in subsequent years.

Stage 6: publication of the list of officials who have passed the examinations, thereby demonstrating that they have successfully taken part in the training programme

The Appointing Authority publishes the list of officials of the European Economic and Social Committee who have passed the written and oral examinations, as drawn up by EPSO.

Second phase:

Applications for vacancies in function group AD

Officials whose names appear on the list referred to in Article 7(1) may apply for vacant posts in function group AD that correspond to their grades subject to the conditions laid down in Articles 29(1)(a)(ii) and (b) of the Staff Regulations.

The Appointing Authority ensures that the number of officials who have been successful in the certification procedure and who are appointed to posts in the AD function group does not exceed 20 % of the total number of appointments made each year in that function group.

Other information provided in the notification

Joint committee for the certification procedure

The joint committee competent for the certification procedure is the promotion committee in the configuration responsible for officials in the AD function group.

At the beginning of every year, the committee adopts an opinion on the outcome of the certification procedure organised during the previous year. That opinion may be accompanied by recommendations. The opinion is forwarded to the Appointing Authority.

Recipients

The recipients of the data are: the staff of the Directorate for Human and Financial Resources who administer the procedure, the members of the promotion committee concerned, the verifier, the Appointing Authority.

Rights of access and rectification

There is no procedure in place at this stage but if anyone asks to know how their data have been processed they will be informed. The data which are forwarded are attested as correct by the applicant. Modifications are envisaged only if there is an error or if information has to be added, only at the beginning of the procedure.

Right to information

Data subjects are informed of the outcome of their application. They are sent an acknowledgement of receipt. All staff are informed of the list of successful officials.

Data storage

This procedure is recent and was organised for the first time in 2005. The data for the exercise are always kept both on paper and electronically. This is justified by the fact that the certification procedure has two phases, and that none of the successful officials have yet been certified (i.e. they are not yet occupying posts at administrator level). As there is no time-limit for the validity of the first phase, namely admissibility, these data have to be kept until the data subjects are no longer able to benefit from the procedure, i.e. when they retire.

Storage and security measures

[...]

3. Legal aspects

3.1. Prior checking

The notification received on 30 July 2008 constitutes processing of personal data ("any information relating to an identified or identifiable natural person" – Article 2(a)). The processing operation is carried out by an institution in the context of activities which fall within the scope of Community law (Article 3(1)).

The processing for the certification procedure is entirely manual, but the results of the procedure are kept electronically. The data therefore undergo manual processing intended to form part of a filing system. Article 3(2) therefore applies.

Accordingly, the processing falls within the scope of Regulation (EC) No 45/2001.

Under Article 27 of Regulation (EC) No 45/2001, processing operations likely to present specific risks to the rights and freedoms of data subjects are subject to prior checking by the EDPS. Article 27(2) contains a list of processing operations that are likely to present such risks. Article 27(2)(b) describes as processing operations likely to present such risks "*processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct*". The certification procedure for officials of the European Economic and Social Committee is a personal data processing operation to evaluate the skills of certain assistants with a view to selecting them for appointment in another function group, i.e. the administrators' group. This evaluation of their potential skills is based not only on existing staff reports, but also on other criteria, namely the level of education and training as well as

needs in certain areas of the service and professional experience and training in those areas. Consequently, this processing operation falls within the scope of Article 27(2)(b) and is accordingly subject to prior checking by the EDPS.

In principle, checks by the EDPS should be performed before the processing operation is implemented. Failing that, the check necessarily becomes *ex post*. This does not alter the fact that the recommendations issued by the EDPS should be implemented. The European Economic and Social Committee has also informed the EDPS that it was waiting for his opinion before reviewing the procedure so that it could implement any of the recommendations made.

The official notification was received on 30 July 2008. An e-mail requesting additional information was sent on 8 September 2008. In accordance with Article 27(4) of the Regulation, the two-month time limit within which the EDPS must deliver an opinion was suspended. Accordingly, the EDPS will deliver his opinion by 15 December 2008. (31 September + 45 days' suspension + August).

3.2. Lawfulness of the processing

The lawfulness of the processing operation must be examined in the light of Article 5(a) of Regulation (EC) No 45/2001, which provides that processing must be "*necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities (...) or in the legitimate exercise of official authority vested in the Community institution*".

The certification procedure for staff of the Committee, which involves the collection and processing of personal data concerning officials, comes within the legitimate exercise of official authority vested in the Committee. The data processing as presented is necessary for carrying out the certification procedure. The processing operation proposed is therefore lawful.

The legal basis for the data processing operation in question is to be found in Article 45a of the Staff Regulations and in Decision No 458/05 A of 18 July 2005 concerning the general implementing provisions for Article 45a of the Staff Regulations.

The legal basis is therefore in compliance and supports the lawfulness of the processing operation.

3.3. Data quality

Data must be "*adequate, relevant and not excessive*" (Article 4(1)(c) of Regulation (EC) No 45/2001). The processed data described at the start of this opinion should be regarded as satisfying these conditions as regards processing. The data required are administrative in nature and necessary to evaluate the work of the data subjects. The EDPS acknowledges that the relevance and proportionality of data assessing the data subject are more difficult to establish. In this context, the EDPS welcomes the fact that, in the presentation of the call for applications, the Committee has established precise priority criteria and weightings for drawing up the list of selected officials. Article 4(1)(c) of Regulation (EC) No 45/2001 thus seems to be duly complied with in this respect.

The data must be processed "*fairly and lawfully*", according to Article 4(1)(a) of Regulation (EC) No 45/2001. The lawfulness of the processing has already been discussed (see point 3.2 above). The issue of fairness relates to the information given to the data subject (see point 3.8 below).

Finally, the data must be "*accurate and, where necessary, kept up-to-date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified*" (Article 4(1)(d) of the Regulation). The procedure itself must ensure that data are accurate. Here, applicants are invited to forward their applications to the relevant department. However, there is no procedure for example for applicants to be able to consult their file and, where appropriate, to ask for corrections to be made before the closure of the relevant certification exercise (see point 3.7 below).

In the certification procedure established by the European Economic and Social Committee, officials who have applied and who contest the draft list may appeal to the joint committee for the certification procedure within ten working days of publication of the list. The EDPS requests that reasoned appeals by applicants challenging the draft list of officials and/or the final list of successful certification applicants be added to their file, so as to ensure that the file is complete in accordance with Article 4(1) of Regulation (EC) No 45/2001.

The EDPS further recommends that where the data subject lodges an appeal with the joint committee for the certification procedure, the conclusions and reasons for those conclusions stated in the joint committee's opinion which are relevant only to the data subject should also be added to the data subject's personal file. It should be noted that by "*conclusions*" the EDPS does not mean conclusions of the committee relating to other data subjects who have lodged an appeal with it, proceedings of the committee (including members' views or voting record) or comparative data concerning other certification applicants.

3.4. Data storage

Article 4(1)(e) of Regulation (EC) No 45/2001 establishes the principle 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*".

It should be recalled that since this procedure is recent and was organised for the first time in 2005, data on the exercise are still kept on paper as well as electronically. This is justified by the fact that the certification procedure has two phases, and that currently none of the successful officials have yet been certified (i.e. they are not yet occupying posts at administrator level). As there is no time-limit for the validity of the first phase, namely admissibility, these data have to be kept until the data subjects are no longer able to benefit from the procedure, i.e. when they retire.

The EDPS is unable to accept such a storage measure for all data concerning the certification procedure. A distinction must be made between the data to be kept on the data subject's personal file and the data which may be destroyed earlier. As regards the certification file (application, participation in the training, passing of tests and communication of successful applicant's name) which must be added to the data subject's personal file, Article 26 of the Staff Regulations applies, in particular: "*an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file and to take copies of them*". This is therefore long-term storage which is necessary from the date on which the member of staff or his legal successors are entitled to claim pension rights or from the date of the last pension payment. However, the EDPS emphasises the need to set a precise period during which data may be stored. In similar cases, the EDPS has found it reasonable to set the data storage period at 10 years, starting from the time when the staff member leaves or the last pension payment³.

³ Opinion of 25 October 2007 regarding the "*Ombudsman's certification procedure*", case 2007-414, EDPS
Opinion of 6 June 2007 regarding the "*European Parliament's certification procedure*", case 2007-168,

On the other hand, as regards the supporting documents attached to applications, in a similar case⁴ the EDPS welcomed the fact that they were destroyed one month following publication of the list of successful applicants for certification.

The EDPS also considers that data of a purely informative nature no longer necessary for administrative reasons could be disposed of after a minimum period of 5 years.

Since this data storage in the data subject's personal file is long-term storage, it will have to be accompanied by appropriate guarantees. The data kept are personal. The fact that they are archived for long-term storage does not divest them of their personal nature. For that reason, even data kept over a long period must be covered by appropriate storage measures, like any other personal data.

Regarding non-selected applicants, the EDPS considers that provision should be made for a period that is proportional to the fulfilment of the purposes of the processing operation. The EDPS recommends that the European Economic and Social Committee keep all the documents necessary for the certification files until the official has exhausted all means of contesting the decision, including the time-limits for bringing an appeal before the Court of Justice.

Regarding administrative data kept by the EAS, see case 2006-0396 (*Activities of the EAS and EPSO in the context of the certification procedure*).

The EDPS therefore recommends a complete reassessment of the storage periods for the various types of data.

3.5. Change of purpose/Compatible use

Data are retrieved from or entered into the staff databases. The processing operation under review involves no general change to the stated purpose of staff databases, of which the certification procedure is only one aspect. Accordingly, Article 6(1) of Regulation (EC) No 45/2001 is not applicable to the case in point, and Article 4(1)(b) of the Regulation is complied with, given that the purposes are compatible.

3.6. Transfer of data

The processing operation should also be scrutinised in the light of Article 7(1) of Regulation (EC) No 45/2001. The processing covered by Article 7(1) is the transfer of personal data between or within 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, the data are for circulation among various departments within the European Economic and Social Committee. Personal data may be transferred within an institution only if they are necessary for the legitimate performance of tasks covered by the competence of the recipient. Transfer to the staff of the Directorate for Human and Financial Resources who administer the procedure, the members of the promotion committee concerned, the verifier, and the Appointing Authority is in accordance with the legitimate performance of the tasks of those involved.

EDPS Opinion of 29 May 2006 regarding the "*Court of Auditors certification procedure*", case 2006-109, EDPS Opinion of 23 March 2006 regarding the "*Council certification procedure*", case 2006-45.

⁴ Opinion of 29 November 2007 concerning the certification procedure of the Committee of the Regions, Case 2007-353.

Moreover, data relating to officials authorised to follow training are forwarded to the EAS, which is attached to EPSO. At the end of the training course, EPSO forwards to the Appointing Authority data concerning officials who have successfully completed the training programme. Finally, the European Union Civil Service Tribunal may receive these files in the context of a legal action. In this case such transfers are legitimate, since they are necessary for the legitimate performance of the tasks covered by the competence of the recipient.

The EDPS would point out that he himself may be considered a data recipient under Regulation (EC) No 45/2001. For instance, pursuant to Article 33 (Complaints by Community staff) or Article 47(2)(a), he is entitled to be granted access by the controller or Community institution or body to all the personal data and information he needs for his inquiries. The Ombudsman is also a potential recipient.

Article 7(1) of Regulation (EC) No 45/2001 has been complied with in this case.

Finally, Article 7(3) of Regulation (EC) No 45/2001 provides that "*the recipient shall process the personal data only for the purposes for which they were transmitted*". The EDPS therefore recommends that anyone receiving and processing data in the context of the certification procedure be informed that they cannot use them for other purposes.

3.7. Rights of access and rectification

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

The European Economic and Social Committee has indicated that there is no procedure in place at this stage but that if anyone wants to know how their data have been processed they will of course be informed. The data which are forwarded are attested as correct by the applicant. Modifications are envisaged only if there is an error or if information has to be added, only at the beginning of the procedure.

The EDPS recommends that a formal procedure on rights of access and rectification should be put in place so as to comply with Articles 13 and 14 of Regulation (EC) No 45/2001. The procedure should also indicate that rights of access and rectification also imply right of access to the conclusions in the opinion of the joint committee for the certification procedure and the reasons for them, where an applicant contesting the draft list appeals to that committee.

3.8. Information to be given to the data subject

Articles 11 and 12 of Regulation (EC) No 45/2001 relate to the information to be given to data subjects in order to ensure transparency in the processing of personal data. These articles list a series of compulsory and optional items. The optional items are applicable insofar as, having regard to the specific circumstances of the processing operation, they are required to guarantee fair processing in respect of the data subject.

Article 11 (*Information to be supplied where the data have been obtained from the data subject*) on information to be given to the data subject applies in this case. Insofar as the official personally fills in the data required in the application, the data subject himself provides the data.

Article 12 (*Information to be supplied where the data have not been obtained from the data subject*) on information to be given to the data subject also applies in this case since such information is obtained from the various participants in the process (Appointing Authority, certification committee).

It should be recalled that data subjects are informed of the outcome of their application. An acknowledgement of receipt is sent to them. All staff are informed of the list of successful officials.

This is very insufficient as regards the conditions set out in Articles 11 and 12 of the Regulation. The EDPS recommends that a confidentiality statement should be drafted containing all the necessary information, in order for Articles 11 and 12 to be complied with.

3.9. Security

Under Article 22 of Regulation (EC) No 45/2001 on the security of processing "*the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected*".

Organisational and technical measures are taken to ensure the security of the processing operation.

Having examined all of these measures, the EDPS considers that they are appropriate for the purposes of Article 22 of Regulation (EC) No 45/2001.

Conclusion

The proposed processing operation would not appear to involve any breach of the provisions of Regulation (EC) No 45/2001, provided that account is taken of the observations made above. This means in particular that the European Economic and Social Committee should:

- draw up a procedure enabling applicants to consult their file and, where appropriate, ask for corrections to be made before the closure of the relevant certification exercise, so as to provide a full guarantee that the data are accurate and up to date,
- add the reasoned appeal by an applicant challenging the draft list of officials and/or the final list of successful certification applicants to the data subject's file, so as to ensure that the file is complete in accordance with Article 4(1) of Regulation (EC) No 45/2001,
- where the data subject lodges an appeal with the joint committee for the certification procedure, add the conclusions and reasons stated in the joint committee's opinion which are relevant only to the data subject to the personal file,
- completely reassess the storage period for the various types of data as laid down in point 3 above,
- inform anyone receiving and processing data in the context of the certification procedure that they may not be used for other purposes;

- put in place a formal procedure on rights of access and rectification so as to comply with Articles 13 and 14 of Regulation (EC) No 45/2001, also stating that the rights of access and rectification also imply right of access to the conclusions in the opinion of the joint committee for the certification procedure and the reasons for them where an applicant contesting the draft list appeals to that committee,
- draft a confidentiality statement containing all the necessary information so that Articles 11 and 12 of Regulation (EC) No 45/2001 are complied with.

Done at Brussels, 26 November 2008

(Signed)

Joaquín BAYO DELGADO
Assistant European Data Protection Supervisor